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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-2315

PEGUY DELVA

Petitioner/Plaintiff,

vs.

THE CONTINENTAL GROUP, INC.

Respondent/Defendant.

On Appeal from the District Court of Appeal of The State of Florida
Third District
DCA CASE NO.: 3D11-2964

INITIAL BRIEF OF PETITIONER-PLAINTIFF PEGUY DELVA

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STATEMENT OF ISSUE ON APPEAL

Whether the Florida Civil Rights Act of 1992 at Fla. Stat. § 760.01, *et seq.*, ("FCRA") prohibits pregnancy discrimination as a form of sex discrimination.

STATEMENT OF THE CASE

This case arises out of a pregnancy discrimination lawsuit filed on August 30, 2011 by Peguy Delva ("Petitioner") against her former employer The Continental Group, Inc. ("Respondent") in Miami-Dade Circuit Court. (R-1). Petitioner, a front desk manager who worked at a residential property managed by Respondent, alleged that Respondent, after being told by Petitioner that she was pregnant, negatively impacted the terms and conditions of her employment. The Respondent's actions included engaging in heightened critical scrutiny of Petitioner's work and refusing to allow her to change shifts based on her pregnancy-related medical needs. Respondent also violated its own company policy by refusing to allow her to cover other worker's shifts to earn extra money. Finally, Respondent refused to schedule Petitioner for work after she returned from a maternity leave period while similarly situated male employees were treated more favorably by being permitted to return to work from non-pregnancy related medical leave. Petitioner alleged that these adverse employment actions were taken by Respondent due to her pregnancy in violation of the prohibition against sex discrimination in the Florida Civil Rights Act of 1992 at Fla. Stat. § 760.01, *et seq.*, ("FCRA").

On September 21, 2011, Respondent moved to dismiss Petitioner's Complaint arguing that pregnancy discrimination is not prohibited by the FCRA. The Miami-Dade Circuit Court conducted a hearing on the issue on November 9, 2011 and granted the motion to dismiss with prejudice.

Petitioner filed a timely notice of appeal to the Third District Court of Appeal. The Third DCA rendered its opinion in Delva v. The Continental Group, Inc. on July 25, 2012 affirming the trial court's decision, adopting the holding and decision of O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991), and certifying conflict with Carsillo v. City of Lake Worth, 995 So.2d 1118 (Fla. 4th DCA 2008) *rev. denied* City of Lake Worth v. Carsillo, 20 So.3d 848 (Fla. 2009). The Third DCA ruled that the FCRA does not prohibit pregnancy discrimination.

Petitioner submitted a Motion for Rehearing on August 6, 2012 which was denied by the Third DCA on September 18, 2012.

Petitioner filed her Notice to Invoke Discretionary Jurisdiction in this Court on October 15, 2012. This Court accepted jurisdiction on May 2, 2013.

STANDARD OF REVIEW

This case presents a pure question of law concerning whether the FCRA prohibits pregnancy discrimination as a form of sex discrimination. The standard of review for pure questions of law is *de novo* and no deference is given to the

judgment of the lower courts. Bionetics Corp. v. Kenniasty, 69 So.3d 943, 947 (Fla. 2011).

SUMMARY OF THE ARGUMENT

The Florida Supreme Court should construe pregnancy discrimination as a form of sex discrimination under the Florida Civil Rights Act ("FCRA"). The First District Court of Appeal in O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991), upheld a lower tribunal's finding of liability against an employer for pregnancy discrimination under state law and correctly determined (albeit using partially faulty reasoning) that a state law like the FCRA's predecessor statute that was modeled after the federal Title VII statute in the area of employment discrimination must be construed in the same manner as federal courts interpret that federal law.

The Fourth District Court of Appeal in Carsillo v. City of Lake Worth, 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, City of Lake Worth v. Carsillo, 20 So.3d 848 (Fla. 2009), adopted the holding in O'Loughlin but not its partially faulty reasoning and instead correctly determined that because

(i) Florida's civil rights statute was modeled after Title VII which has always prohibited pregnancy discrimination as a form of sex discrimination,

(ii) statutory construction principles as per State v. Jackson, 650 So.2d 24, 27 (Fla. 1995), require that state statutes modeled on federal statutes covering essentially the same subject matter should be given the same construction federal courts

give the federal statute, and

(iii) the FCRA must be liberally construed to preserve and promote access to the remedy intended by the Legislature,

then an aggrieved employee in Florida may advance a claim and sue for the remedies available under the FCRA for pregnancy discrimination. There was, therefore, no need for the Florida Legislature to amend the FCRA to add with word "pregnancy." The few cases to the contrary, including the Third DCA's opinion in this case Delva v. The Continental Group, Inc., 96 So.3d 956 (Fla. 3rd DCA 2012), either misconstrued the actual holding in O'Loughlin or relied on that opinion's misinterpretation of the U.S. Supreme Court case General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), and O'Loughlin's unusual preemption analysis without taking into consideration the correct statutory construction principles set forth in that case.

The Petitioner here requests that the Florida Supreme Court reverse the holding in the Third DCA's Delva opinion, adopt the holdings in the First DCA's O'Loughlin (but not its faulty "preemption" reasoning and misinterpretation of Gilbert) and the Fourth DCA's Carsillo opinions, and remand this matter for further proceedings below.

ARGUMENT

I. THE FCRA PROHIBITS PREGNANCY DISCRIMINATION AS A FORM OF SEX DISCRIMINATION.

The issue in this case is whether the Florida Civil Rights Act of 1992 at Fla. Stat. § 760.01, *et seq.*, ("FCRA") prohibits pregnancy discrimination as a form of

sex discrimination. Petitioner argues that the FCRA does prohibit pregnancy discrimination for the reasons set forth below.

The FCRA states in pertinent part:

> "(2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.
>
> (3) The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved."[1]

Furthermore, the FCRA states:

> "(1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> (b) To 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."[2]

It is undisputed that the FCRA prohibits discrimination on the basis of "sex." The FCRA, however, does not mention the word "pregnancy." It is the

[1] Fla. Stat. 760.01 (2012).
[2] Fla. Stat. 760.10 (2012).

lack of the word "pregnancy" in the statute that underlies the dispute in this case.

Three Florida District Courts of Appeal have considered this issue. O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991); Carsillo v. City of Lake Worth, 995 So.2d 1118 (Fla. 4th DCA 2008) *rev. denied* City of Lake Worth v. Carsillo, 20 So.3d 848 (Fla. 2009); and Delva v. The Continental Group, Inc., 96 So.3d 956 (Fla. 3rd DCA 2012).

The First DCA in O'Loughlin reached the correct conclusion that FCRA's predecessor statute (the Human Rights Act of 1977) permitted a claim and remedy for pregnancy discrimination under state law but reached its conclusion using a partially flawed interpretation of federal law. The Fourth DCA in Carsillo recognized and correctly adopted O'Loughlin's holding that Florida law must be construed to recognize pregnancy discrimination as a form of sex discrimination but *not* O'Loughlin's partially faulty reasoning. The Third DCA in Delva misinterpreted O'Loughlin's holding apparently not recognizing that the employee prevailed in that case and instead actually adopted O'Loughlin's flawed reasoning as its own.

It is the confusion about the actual holding of O'Loughlin along with its peculiar reasoning that has misled many courts addressing the issue that is before this Court. In sum, O'Loughlin's holding was correct though its reasoning was partially flawed, Carsillo correctly adopted O'Loughlin's ultimate holding but not its reasoning, and Delva misconstrued the entire issue.

A. Rules of Statutory Construction.

"[T]he purpose of all rules relating to the construction of statutes is to discover the true intention of the law." State v. Egan, 287 So.2d 1, 4 (Fla. 1973). Where a statute (such as the FCRA) is remedial in nature, it should be liberally construed to "preserve and promote access to the remedy intended by the Legislature." Joshua v. City of Gainesville, 768 So.2d 432, 435 (Fla. 2000) (construing FCRA); Golf Channel v. Jenkins, 752 So.2d 561, 566 (Fla. 2000) (construing Florida's Whistleblower Act).

It is well-established that if a Florida statute is patterned after a federal law, the Florida statute will be given at least the same construction as the federal courts give the federal act to the extent such construction is harmonious with the spirit of the Florida legislation. State v. Jackson, 650 So.2d 24, 27 (Fla. 1995).

Furthermore, clarifying legislative amendments to a statute may be considered when interpreting a statute because the Court has "the right and duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation." Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788 (Fla. 1952).

It has also been long recognized that the FCRA was, in fact, patterned after Title VII of the federal Civil Rights Act of 1964 ("Title VII"). Woodham v. Blue Cross Blue Shield of Florida, 829 So.2d 891, 894 (Fla. 2002).

At the time of enactment of the FCRA in 1992, Title VII prohibited discrimination on the basis of, among other characteristics, sex which included pregnancy. Title VII states in pertinent part:

> "Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; …"[3]

Title VII also has a definitions section which states in pertinent part:

> **"**For the purposes of this subchapter--
>
> **(k)** The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work … "[4]

From the date of Title VII's enactment in 1964 and before the passage of the federal Pregnancy Discrimination Act ("PDA") in 1978 which amended Title VII to add subsection (k) above, Title VII did not mention the words "pregnancy, childbirth, or related medical conditions." The reason Congress added this clarifying amendment is important to understand for purposes of deciding the issue

[3] 42 U.S.C. § 2000e-2 (originally enacted 1964).
[4] 42 U.S.C. § 2000e(k) (originally enacted 1978).

before this Court because so many subsequent courts, including the Third DCA in this case, have misinterpreted federal Title VII case law and legislative history. Petitioner endeavors to clarify the interpretive confusion in the following sections of this brief.

It is also important to consider the development of Florida's civil rights statute and how it has compared with Title VII at various points in their respective histories.

B. Historical overview of federal and Florida statutory protection against sex and pregnancy discrimination.

As noted, Title VII prohibited sex discrimination without a specific reference to pregnancy from 1964 to 1978. Florida first enacted its own civil rights statute in 1969 which was then known as the Florida Human Relations Act ("FHRA"). Laws 1969, ch. 69-287 §§ 1-5, 7. The original FHRA indicated that the purpose of the statute was to secure for all individuals within Florida freedom from discrimination because of race, color, creed, or ancestry. Id. at § 1. Notably, the list of protected characteristics did not initially include sex.

Since 1969, the title or name of the state civil rights statute has changed twice. From 1969-1977, the statute was named the FHRA. In 1977 the statute was re-named as the Human Rights Act of 1977 ("HRA77") which remained the title until 1992. Laws 1977, ch. 77-341. In 1992 the statute was re-named as the FCRA and has been continuously known by that title up to the present. Laws

1992, ch. 92-177; Fla. Stat. § 760.01.

Also since 1969, various parts of the Florida's civil rights statute were substantively amended by the Florida legislature. The relevant amendments for purposes of this discussion occurred in 1972. Specifically, in 1972, the Florida legislature amended the FHRA in three separate places. Laws 1972, ch. 72-48 at §§ 1-3. The legislature expressly added "freedom from discrimination because of sex" to § 1, amended the definition of "discriminatory practice" to include discrimination based on sex in § 2, and modified subsection (6) of § 3 by inserting "discrimination on the grounds of sex." This 1972 FHRA amendment modeled Title VII's then-existing prohibition against sex discrimination which had remained unchanged in the federal statute since its original enactment in 1964.

When the Florida legislature amended the FHRA and re-named it The Human Rights Act of 1977 ("HRA77"), it did not change its 1972 amendments regarding the prohibition against sex discrimination. Laws 1977, ch. 77-341. In 1992, when the Florida legislature amended HRA77 and renamed it the Florida Civil Rights Act of 1992 ("FCRA"), it again did not change its 1972 amendments. Laws 1992, ch. 92-177; Fla. Stat. § 760.01. As such, sex discrimination has been continuously prohibited by Florida law since 1972. However, the word "pregnancy" has not been in any of the three versions of Florida's civil rights statute.

C. A review of Title VII opinions including the Gilbert decision.

Because the FHRA (effective in Florida during 1969-1977) was modeled on Title VII, an examination of the treatment of pregnancy discrimination as a form of sex discrimination under federal law during that time is both necessary and illuminating.

By 1976, the issue of whether pregnancy discrimination was a form of sex discrimination prohibited by Title VII had been litigated in several federal appellate courts. The factual context of this appellate litigation was primarily rooted in whether employer-sponsored health care plans that excluded pregnancy-related disabilities from their otherwise comprehensive plans constituted *per se* sex discrimination under Title VII. The six federal circuit courts which considered whether pregnancy exclusions from employer-sponsored health plans violated Title VII prior to 1976 concluded that such policies constituted unlawful *per se* sex discrimination.[5]

In 1976, the U.S. Supreme Court issued its controversial 5-4 opinion in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) ("Gilbert"), that effectively

[5] Communication Workers v. American Tel. & Tel. Co., Long Lines Dep't, 513 F.2d 1024 (2nd Cir. 1975) *vacated* 429 U.S. 1033 (1977); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975) *vacated* 424 U.S. 737 (1976); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975) *reversed* 429 U.S. 125 (1976); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) *cert. denied* 426 U.S. 940 (1976); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975) *vacated in part* 434 U.S. 136 (1977); and Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975), *vacated*, 429 U.S. 1033 (1977).

overturned the six federal circuit courts' decisions. It is the holding and scope of Gilbert that has perplexed many courts since 1976.

Some Florida courts (both federal and state) have misunderstood Gilbert as holding that *all types* of pregnancy discrimination were not and never could be deemed sex discrimination under Title VII *under any circumstances*. This is a fundamentally incorrect interpretation of Gilbert that mirrors the same analytical error made by the First DCA in O'Loughlin when construing Florida's then-current civil rights statute in 1991. O'Loughlin v. Pinchback, 579 So.2d 788, 791 (Fla. 1st DCA 1991) (incorrectly describing the holding of Gilbert by stating: "the Supreme Court held that discrimination on the basis of pregnancy was not sex discrimination under Title VII."). That analytical error was compounded when it was adopted by the Third DCA in this case. Delva v. The Continental Group, Inc., 96 So.3d 956, 958 (Fla. 3rd DCA 2012).

Gilbert stood for the much narrower proposition that *a certain* pregnancy-related exclusion in a health care plan was not pregnancy or sex discrimination *in that particular case* because the plaintiff had failed to present sufficient evidence to prove that the specific policy at issue masked the employer's intent to discriminate or had a discriminatory effect or impact upon female employees. General Elec. Co. v. Gilbert, 429 U.S. 125, 137-138 (1976). The employees in Gilbert instead sought a ruling that the exclusion of pregnancy from an otherwise

comprehensive employer-sponsored health plan constituted sex discrimination *per se*. Id.

The Gilbert majority rejected the *per se* discrimination theory pressed by the employees in that case but unquestionably left the door open for courts to decide that other employers' actions or policies -- including but not limited to exclusions based on pregnancy in employer-sponsored health care plans -- constituted sex discrimination under Title VII *if* supported by competent evidence of discriminatory intent or impact upon the protected class (females). Id. at n. 14 *citing* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

The foregoing interpretation of the narrow holding of Gilbert is supported by the plain language found in the U.S. Supreme Court's opinion of Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983). In Newport News, both the majority and dissent agreed that in Gilbert the U.S. Supreme Court had expressly left open the concept that policies that exclude health coverage based on pregnancy would be considered as impermissible sex discrimination under Title VII where there is a sufficient evidentiary showing "that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other" or if there is sufficient proof of discriminatory effect or impact on a protected class. Newport News *supra* at 677 n. 12 (Stevens,

J. for majority) and 686 n. 1 (Rehnquist, J. for dissent) *citing* Gilbert *supra* at 135 *quoting* Geduldig v. Aiello, 417 U.S. 484, 496-497 n. 20 (1974).

As such, the oft-stated view that Gilbert held that pregnancy discrimination cannot ever constitute sex discrimination under any circumstances is simply erroneous. All that Gilbert did was reject the notion that pregnancy-based exclusions in employers' otherwise comprehensive health plans constituted *per se* sex discrimination (which would have relieved employees from having to submit proof of discriminatory intent or impact).

It must be emphasized that in both 1976's Gilbert (a case brought under Title VII) and the related case of 1974's Geduldig v. Aiello, 417 U.S. 484 (1974) (a case brought under the Equal Protection Clause), the U.S. Supreme Court was narrowly focused on whether comprehensive employee disability coverage plans that covered virtually all types of disabilities for both genders but expressly excluded benefits for pregnancy-related disabilities should be considered *per se* sex discrimination in violation of Title VII (Gilbert in a private employment setting) or the Equal Protection Clause as set forth in Section 1 of the 14th Amendment to the U.S. Constitution (Geduldig in a governmental employment setting).

Both cases construed such disability plans as being instances of employers electing, in supposedly gender-neutral fashion, to not cover pregnancy-related conditions or illnesses within the scope of their insurance plans. The U.S. Supreme Court found that this type of "under-inclusive" pregnancy-based decision

was not *per se* sex discrimination based upon its reasoning that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[6] The Court in *neither* case ruled that *every possible form* of pregnancy discrimination could never constitute sex discrimination either under Title VII or the Equal Protection Clause.

To the contrary, another U.S. Supreme Court case made clear that "unequal burden" pregnancy discrimination could and did, in fact, constitute unlawful sex discrimination under the Equal Protection Clause. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). In LaFleur, the U.S. Supreme Court reviewed constitutional challenges (through 42 U.S.C. § 1983) brought by pregnant school teachers against two school boards that had implemented mandatory unpaid maternity leave rules. The Supreme Court held that both school boards' rules violated the 14th Amendment because they amounted to unconstitutional and unequal burdens upon a woman's right to decide to bear a child. LaFleur at 640, 651.

[6] Of course, as shown below, this holding and reasoning was legislatively overturned by the 1978 enactment of the PDA which was a clarifying amendment to Title VII to make it clear that it was the Legislature's original intent that *all forms* of pregnancy discrimination were always intended to be considered as impermissible sex discrimination under Title VII. Newport News *supra* at 679 ("Proponents of the [PDA] repeatedly emphasized that the Supreme Court [in Gilbert] had erroneously interpreted Congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the Gilbert decision. Many of [the legislators] expressly agreed with the views of the dissenting Justices.").

While Gilbert and Gelduldig style "under-inclusive" pregnancy discrimination in employer-sponsored disability policies was not considered to be *per se* sex discrimination in federal court between the issuance of Gilbert in 1976 and the Congressional enactment of the PDA in 1978 *unless* a plaintiff employee proffered adequate proof of intentional discrimination or a discriminatory impact upon women, LaFleur-style "unequal burden" pregnancy discrimination was absolutely considered to be actionable sex discrimination before, during, and after Gilbert even without the 1978 clarifying enactment of the PDA.

D. Post-Gilbert and pre-PDA jurisprudence between 1976-1978 clarifies holding of Gilbert.

The confluence of LaFleur, Geduldig, and Gilbert was carefully analyzed by the Southern District of Florida in 1977 between the date that Gilbert was issued and the date that Congress overruled Gilbert by amending Title VII with the PDA. In re: National Airlines, Inc., 434 F.Supp. 249 (S.D. Fla. 1977).

At issue in National Airlines was a Title VII challenge brought by female workers against an employer's mandatory pregnancy leave policy which, among other things, required women to commence leave at various stages of their pregnancies the dates of which, in turn, depended upon whether the female was a flying or ground employee. Id. at 254-255.

After a bench trial, the National Airlines court entered judgment in favor of the plaintiffs on the portion of the Title VII claims that challenged the mandatory pregnancy leave policy. Id. at 259.

The issues the court had to decide were whether, as a matter of law and based upon the factual evidence presented, the employer's mandatory maternity leave policy constituted pregnancy discrimination and, if so, whether that amounted to impermissible sex discrimination under Title VII. In answering that 2-part question in the affirmative, the court relied upon the U.S. Supreme Court rulings in LaFleur, Geduldig, and Gilbert.

The National Airlines court accurately noted that in Gilbert, the U.S. Supreme Court did not hold that *all* types pregnancy discrimination can *never* constitute sex discrimination; rather, the Gilbert majority ruled only that every distinction based on pregnancy is "not in itself discrimination based on sex" and therefore not *per se* discrimination. National *supra* at 256 quoting Gilbert *supra* at 133-139. Accordingly, the National court correctly determined that the U.S. Supreme Court left open the idea that pregnancy discrimination can constitute sex discrimination under Title VII where competent proof of discriminatory intent or impact is offered.

The National Airlines court found that the holding and impact of the U.S. Supreme Court's LaFleur decision also provided guidance to its inquiry. The court relied on LaFleur to support the notion that mandatory maternity leave policies can

constitute impermissible pregnancy and sex discrimination under Title VII even after Gilbert.

In further support of this notion, the National Airlines court noted that the U.S. Supreme Court had at that time recently granted *certiorari* in two cases that dealt with mandatory maternity leave policies and related issues which were then-pending on appeal after the Gilbert opinion had been issued in 1976 (the two cases are identified and discussed below). The court stated that if the U.S. Supreme Court believed that Gilbert had completely foreclosed the notion that plaintiffs could ever challenge any policies or practices that amounted to pregnancy discrimination as a form of sex discrimination under Title VII, then the U.S. Supreme Court would not have granted *certiorari* to resolve the issues in the two cases and would have instead simply vacated and remanded them. Id. at 257.

The National Airlines court then examined the evidence that had been presented at trial and determined that the employer's mandatory maternity leave policies discriminated against the pregnant employees in violation of Title VII. Id. at 259.

As it turned out, the National Airlines court's reasoning that mandatory maternity leave policies and similar practices could amount to impermissible pregnancy and sex discrimination because the U.S. Supreme Court had not denied *certiorari* in two then-pending cases was prescient. This is because later in 1977 (before the PDA was enacted in 1978) the Supreme Court issued same-day

opinions squarely addressing the issues in Nashville Gas Company v. Satty, 434 U.S. 136 (1977), and Richmond Unified School District v. Berg, 434 U.S. 158 (1977). Because Berg was ultimately vacated and remanded in light of Gilbert and Satty without further comment, this discussion moves to and focuses on the Satty opinion which clarified the Supreme Court's view of the law in federal court regarding pregnancy and sex discrimination under Title VII after Gilbert but before enactment of the PDA in 1978.

E. The Satty decision.

The Satty decision of 1977 is often overlooked when considering the U.S. Supreme Court's view of pregnancy discrimination as a form of sex discrimination under Title VII even before the clarifying enactment of the PDA in 1978. Many courts do not even reference Satty when analyzing how the U.S. Supreme Court viewed pre-PDA pregnancy discrimination apparently believing that Gilbert was the end-all, be-all on the subject. It was not.

In Satty, an employee brought a Title VII claim alleging sex discrimination in employment with respect to her pregnancy. The U.S. Supreme Court, in an opinion authored by Justice Rehnquist (the same Justice who authored Gilbert), held that: (1) the employer's policy of denying accumulated seniority to female employees returning from pregnancy leave **did constitute an unlawful employment practice under Title VII** but (2) the case would have to be remanded to determine whether the employee had preserved her right to proceed

on a theory that the employer's separate policy of not awarding sick leave pay to pregnant employees was a mere pretext designed to effect invidious discrimination against members of one sex. As such, the intermediate appellate court's ruling was affirmed in part, vacated in part, and remanded. Satty *supra* at 136.

In framing the issues, the Supreme Court noted that the employer maintained a mandatory maternity leave policy which required an employee who was about to give birth to take a pregnancy leave of indeterminate length. Moreover, the pregnant employee did not accumulate seniority while absent and instead actually lost any job seniority accrued before the leave commenced. Id. at 139.

The pregnant employee (who did not challenge the legality of the mandatory maternity leave policy) took the mandatory leave and then seven weeks after giving birth sought re-employment with the employer. Temporary employment was found for her at a lower salary than she had earned prior to taking leave. While holding this temporary employment, the employee unsuccessfully applied for three permanent positions with the employer. Each position was awarded to another employee who had begun work for the employer before the employee had returned from leave. It was undisputed that if the employee had been credited with the seniority that she had accumulated prior to her maternity leave, she would have been awarded any of the three positions for which she applied. Thereafter, she specifically challenged the employer's policy regarding the loss of and failure to reinstate her seniority. Id. She prevailed.

The Supreme Court stated:

> "We conclude that petitioner's policy of denying accumulated seniority to female employees returning from ***pregnancy*** leave ***violates § 703(a)(2) of Title VII***, 42 U.S.C. § 2000e-2(a)(2) 1970 ed., Supp. V). That section declares it to be an unlawful employment practice for an employer to 'limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee ***because of such individual's . . . sex*** . . .." [Emphasis added]. Id. at 140.

According to the majority, the employer's decision not to treat pregnancy as a disease or disability for purposes of seniority retention was not on its face (i.e.; *per se*) a discriminatory policy, however, the Supreme Court nevertheless stated:

> "We have recognized, however, that ***both*** intentional discrimination ***and*** policies neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2). *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). It is beyond dispute that petitioner's policy of depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as an employee.'" [Emphasis added]. Id. at 141.

The Supreme Court clearly indicated in the quoted passage above (just as it had in Gilbert) that there were *always* two ways a pregnant employee could prove that an employer engaged in unlawful pregnancy-related sex discrimination under Title VII. One was by proving that the employer engaged in "intentional discrimination." The other was by proving that a facially neutral policy had a "discriminatory effect."

The Supreme Court then contrasted the Satty seniority loss policy with the

insurance exclusion for pregnancy disability policy at issue in Gilbert. The Court noted that in Gilbert there was *no showing* that the employer's policy of compensating employees for all non-job-related disabilities except pregnancy favored men over women and *no evidence* was produced to suggest that men received more benefits from the employer's disability insurance fund than did women. Since both men and women were subject generally to the disabilities covered and presumably drew similar amounts from the insurance fund, the Supreme Court (in a 5-4 vote later overturned in 1978 by the passage of the PDA) upheld the plan under Title VII. Id.

Therefore, the Satty Court clarified that the insurance policy exclusion for pregnancy at issue in Gilbert was not violative of Title VII because the plaintiff had simply failed to meet her burden of proof and not because such a policy could never be considered impermissible pregnancy and sex discrimination.

This is an important clarification. In other words the Supreme Court was saying that the policy at issue in Gilbert (and, for that matter, any other supposedly facially neutral policy) *could* have been found to violate Title VII if the employee had presented sufficient competent evidence to show that the policy, in practice or effect, discriminated against women. As the Court plainly stated later in the Satty opinion:

> "We of course recognized both in *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974), and in *Gilbert,* that the facial neutrality of an employee benefit plan would not end analysis if it

> could be shown that 'distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other . . . .' *Gilbert*, 429 U.S., at 135, 97 S.Ct., at 407." Id. at 146.

The Court then noted that, unlike the policy in Gilbert where the employer had refused to extend to women a benefit that men cannot and do not receive (i.e., "underinclusiveness"), the policy in Satty imposed a substantial burden on women that men would not suffer (i.e., "unequal burden"). The Court stated:

> "The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other because of their differing roles in 'the scheme of human existence,' 429 U.S., at 139, 97 S.Ct., at 410 n. 17. But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." Id. at 142.

The U.S. Supreme Court, therefore, held in Satty that the unequal burden placed on *pregnant* women by the employer's seniority policy *did violate* Title VII's prohibition against sex discrimination.

The Court remanded the case for the district court to decide whether the employee had preserved the issue of whether the employer's separate sick pay policy had a discriminatory effect upon women. Id. at 146. Notably, the majority stated in response to a concern raised in a concurring opinion that the remand be broader so as to permit the articulation of the "discriminatory effect" theory as to the sick pay issue in the event it had not been raised in the trial court:

> "Our opinion in *Gilbert* on this and other issues, of course, speaks for itself; we do not think it can rightly be characterized as so drastic a change in the law as it was understood to exist in 1974 as to enable respondent to raise or reopen issues on remand that she would not under settled principles be otherwise able to do." Id. at n. 6.

In other words, the majority was saying that the Gilbert articulation of the law in 1976 was not so different as the state of the law in 1974 set forth in Geduldig or LaFleur to justify giving the plaintiff a chance on remand to present an argument or evidence that she may not have presented when she initially litigated the Title VII claim in district court. This again clarifies the Supreme Court's view that Gilbert did not in any meaningful way alter the principles of Geduldig and LaFleur which, although brought under the Equal Protection Clause and not Title VII, permitted plaintiffs to bring claims for pregnancy discrimination as a form of sex discrimination under either a theory of "intentional discrimination" (a/k/a disparate treatment) or "policies neutral on their face but having a discriminatory effect" (a/k/a disparate impact).

This recitation of the history of the development of pregnancy discrimination as a form of sex discrimination under the federal Title VII statute shows that the state of the law before the 1978 enactment of the PDA did, without question, recognize that pregnancy based distinctions could constitute sex discrimination so long as adequate proof was presented. It was only the *per se* discrimination theory that was rejected in Gilbert.

Further, based on the principles of statutory construction set forth earlier in

this brief, because Florida's then-current civil rights statute FHRA prohibited sex discrimination since 1972, its protections modeled those inherent in Title VII at that same time. That is, pregnancy discrimination could absolutely constitute sex discrimination so long as the plaintiff met her burden of proof to show discriminatory intent or effect. The only "hitch" from Gilbert was that, between the years 1976-1978 only, pregnancy-based benefit exclusions in otherwise comprehensive employer-sponsored health care plans did not constitute *per se* discrimination.

F. The PDA.

The primary reason for the enactment of the PDA as a *clarifying* amendment to Title VII was *not* to correct any holding in Gilbert that all pregnancy discrimination is not gender discrimination. Instead, the PDA was enacted to directly overturn the narrow holding in Gilbert that employer sponsored insurance plans that excluded pregnancy from the scope of coverage were not *per se* sex discrimination. This common view has been best expressed by the Eighth Circuit Court of Appeals. Carney v. Martin Luther Home, Inc., 824 F.2d 643, 646 (8th Cir. 1987). The Eighth Circuit in Carney wrote:

> "The [PDA's] language and legislative history indicate the amendment was designed specifically to overrule the Gilbert decision, and to require employers who provided disability benefits to their employees to extend such benefits to women who are unable to work due to pregnancy-related conditions … [T]he amendment was intended only to prevent the exclusion of pregnancy coverage, not to require that employers who had no disability or medical benefits at all

> provide them to pregnant women." (Internal footnotes and cites omitted). Id.

The Eighth Circuit noted that the PDA was also enacted for a second and broader *clarifying purpose*; namely, to ensure the prevention of differential treatment of women in all aspects of employment (not just in fringe benefits as in Gilbert) based on the condition of pregnancy. Id.

Again, this is not to say that pregnancy discrimination was not gender discrimination before or after Gilbert and before enactment of the PDA; instead, Congress, in overruling Gilbert's narrow holding, took the opportunity to statutorily clarify what both pre- and post-Gilbert jurisprudence had already established which was that differential treatment in the workplace based on pregnancy constitutes sex discrimination.

This second clarifying purpose behind the enactment of the PDA was not meant to substantively change the law. It only clarified in Title VII what the Supreme Court had *already* held in LaFleur, Geduldig, Gilbert, and Satty based upon the principle first articulated in Griggs v. Duke Power Co., 401 U.S. 424 (1971); that is, intentional discrimination based on pregnancy or policies that use pregnancy as a basis for unequal treatment or have a discriminatory impact upon employees in the workplace constitutes unlawful sex discrimination. Armstrong v. Flowers Hospital, 33 F.3d 1308, 1312 (11th Cir. 1994) ("rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA

brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination").

All to say, the position adopted by both the First DCA in O'Loughlin v. Pinchback and the Third DCA in this case that Gilbert stands for the proposition that all pregnancy discrimination is not sex discrimination is simply incorrect. It is indisputable in light of the foregoing discussion that Gilbert should *not* be construed as having foreclosed a claim that pregnancy discrimination could amount to impermissible sex discrimination under Title VII even during the 1976-1978 period that Gilbert was binding on federal courts.

There is no U.S. Supreme Court case, including Gilbert, that has ever held that no type of pregnancy discrimination can ever be construed to be sex discrimination in violation of Title VII. To the contrary, Gilbert and Satty clearly held that the pre-PDA Title VII did permit claims for pregnancy discrimination as a form of sex discrimination, whether framed as an under-inclusiveness claim or an unequal burden claim, under either a theory of "intentional discrimination" or "policies neutral on their face but having a discriminatory effect", so long as the plaintiff met her burden of proof and produced sufficient evidence in support of the claims. Satty *supra* at 141 citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also* AT&T Corp. v. Hulteen, 129 S.Ct. 1962, 1970 at n. 4 (2009) (noting that both Gilbert and Satty permit such an interpretation).

Because Title VII unquestionably has always prohibited pregnancy discrimination as a form of gender discrimination where the plaintiff can meet her burden of proof to support either an "intentional discrimination" or "policies neutral on their face but having a discriminatory effect" claim (as discussed in Gilbert) or can show that an employer's pregnancy-based distinction burdens a woman's employment opportunities (as discussed in Satty), including the period between Gilbert and the PDA, then Florida's law must be construed to have provided at least the same level of protection from 1972 when "sex" was added as a protected characteristic to the FCRA's statutory predecessor (the FHRA) up to the present day.

G. Extrajurisdictional jurisprudence.

Florida is by no means the first state to address the issue before this Court. The most succinct summary of the development of pregnancy discrimination constituting sex discrimination in extrajurisdictional jurisprudence was set forth by the Massachusetts Supreme Court in 1978 before the enactment of the PDA.[7]

The Massachusetts high court addressed the question of whether a state law that was patterned after Title VII included pregnancy as a subset of sex discrimination. The court held that the exclusion of temporary disabilities related to pregnancy from a comprehensive disability plan constituted unlawful *per se* sex

[7] Massachusetts Electric Company v. Massachusetts Commission Against Discrimination, 375 N.E.2d 1192 (Mass. 1978).

discrimination in employment in violation of G.L. c. 151B, s 4 which was the Massachusetts state anti-discrimination law being examined.

The state statute prohibited sex discrimination and, just as in the originally enacted Title VII, Florida's FHRA, and later the FCRA, this statute did not expressly include the word "pregnancy." The court addressed the then less-than-two-year-old *Gilbert* holding thusly:

> "Because of the similarities between G.L. c. 151B, s 4, and Title VII the company contends that Gilbert should dictate the result of this decision. We disagree … [t]he major purpose of Title VII was to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin. An interpretation of G.L. c. 151B, s 4, requiring the inclusion of pregnancy-related disabilities in a comprehensive disability plan would impose a higher duty than that existing under present Federal law; such a construction, however, is certainly not inconsistent with the expressed purpose of Title VII of eliminating all practices which lead to inequality in employment opportunity." (Internal quotes and cites omitted). Id. at 1198.

The Massachusetts Supreme Court noted that the "initial inquiry necessarily involves determining whether distinctions based on pregnancy are sex-linked classifications. Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex." Id.

The court also stated that "[p]regnancy exclusions in disability programs both financially burden women workers and act to break down the continuity of the

employment relationship, thereby exacerbating women's comparatively transient role in the labor force. Moreover, pregnancy exclusions reflect and perpetuate the stereotype that women belong at home raising a family rather than at a job as permanent members of the work force. Any argument that the exclusion of pregnancy-related disabilities is not discriminatory because pregnancy, unlike other disabilities, is voluntary is not persuasive." Id. at 1199 (internal cites and quotation marks omitted).

This state Supreme Court clearly rejected Gilbert and reached its own conclusion that the state law (patterned after Title VII and substantially similar to Florida's FCRA) included pregnancy discrimination as a subset of sex discrimination (including the *per se* discrimination theory) even *before* the U.S. Congress enacted the PDA later in the same calendar year (1978) as the opinion.

The Massachusetts Supreme Court was not constrained to follow what it viewed as an analytically erroneous U.S. Supreme Court opinion and instead substituted its own judgment as to its own state's statute. This opinion shows that although a state statute that is modeled after a federal statue must be construed to provide at least the same level of protection that the federal statute does, there is certainly nothing to prevent a state court, where appropriate and justifiable under principles of logic and rigorous legal analysis, from interpreting that a particular state statute actually provides more protection than what the federal courts interpret a federal statute to provide even though the language of the two statutes are

substantially similar. This is especially true with respect to a state statute like Florida's FCRA which requires liberal construction of its statutory protections.

Dual sovereignty and dual regulation in the area of employment discrimination does not mean that Florida courts must always slavishly follow the exact federal court interpretations of Title VII when construing the protections of the FCRA.[8] Instead, the FCRA should always be construed to provide at least the same level of protection (never less) as Title VII and, in certain circumstance like the present, state courts are justified in disagreeing with federal decisions such as Gilbert's errant view on *per se* discrimination theory.

Notably, the vast majority of state Supreme Courts that have addressed this issue have concluded that pregnancy discrimination is a form of sex discrimination under state or local laws. Before Gilbert in 1976, the state Supreme Courts of Pennsylvania, Iowa, and Wisconsin all ruled that discrimination based on pregnancy constitutes prohibited sex discrimination under their respective state or local laws.[9]

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[8] Andujar v. National Property and Casualty Underwriters, 659 So.2d 1214, 1216-1217 (Fla. 4th DCA 1995) ("[We] conclude that [Title VII and FCRA] are different … Whatever may be the similarities and differences between the two statutes, it is clear that a claim made under the one statute is not the same cause of action as a claim made under the other. They arise from separate rights recognized and protected by different sovereigns … [A] Florida citizen who claims to have suffered from invidious discrimination in employment has at one and the same time a remedy under the federal laws protecting against illegal discrimination in employment and a remedy under Florida law protecting against illegal discrimination in employment.").

[9] Cerra v. East Stroudsburg School District, 299 A.2d 277, 280 (Pa. 1973); Parr v. Cedar Rapids Community School District, 227 N.W.2d 486, 492-497 (Iowa 1975); and Ray-O-Vac v. Wisconsin Department of Industry, 236 N.W.2d 209, 215-217 (Wis. 1975).

The same is true with respect to courts examining state and local laws *after* Gilbert and/or the enactment of the PDA. In addition to the Massachusetts Supreme Court (discussed above), the state Supreme Courts of Colorado, Missouri, Minnesota, Montana, Vermont, and (again) Iowa all determined that pregnancy discrimination is a form of sex discrimination prohibited by their respective state or local laws.[10]

Numerous extrajurisdictional intermediate state appellate courts and federal district courts have reached the same conclusion; that is, pregnancy discrimination is a form of prohibited sex discrimination under state law.[11]

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[10] Colorado Civil Rights Commission v. Travelers Insurance Co., 759 P.2d 1358, 1361-1365, 1369 (Colo. 1988) ("To the extent that the provisions of [the Colorado statute] may have been intended to parallel those of Title VII, it is reasonable to conclude that no post–*Gilbert* amendment to [the Colorado statute] was necessary because according to Congress the 1978 amendments to Title VII did not alter the original intent of that statute to proscribe gender discrimination in employment compensation on the basis of pregnancy."); Midstate Oil Co. v. Missouri Commission on Human Rights, 679 S.W.2d 842, 846 (Mo. 1984); Minnesota Mining & Manufacturing Co. v. State, 289 N.W.2d 396, 398-401 (Minn. 1979); Mountain States Telephone v. Commissioner of Labor, 608 P.2d 1047, 1055-1058 (Mont. 1980); Levelly v. E.B & A.C. Whiting Co., 692 A.2d 367, 369-373 (Vt. 1997); and Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W. 2d 862, 864-867 (Iowa 1978) *superseded by statute on other grounds* Gray v. Kinseth Corp., 636 N.W.2d 100, 103 (Iowa 2001).

[11] Lapeyronni v. Dimitri Eye Center, Inc., 693 So.2d 236, 238 (La. App. 4th Cir. 1997) (Louisiana state civil rights statute that prohibited sex discrimination but did not mention the word "pregnancy" held to bar pregnancy discrimination); Jones v. Department of Civil Service, 301 N.W.2d 12 (Mich. App. 1980); Solomen v. Redwood Advisory Co., 183 F.Supp.2d 748 (E.D. Pa. 2002); Brennan v. National Telephone Directory, 850 F.Supp. 331, 343 (E.D. Pa. 1994); Ganzy v. Allen Christian School, 995 F.Supp. 340, 350-361 (E.D.N.Y. 1998) (federal district court analyzed two New York state anti-discrimination statutes both of which prohibited sex discrimination and neither of which mentioned the word pregnancy and found that both statutes permitted a claim for pregnancy discrimination); Spagnoli v. Brown & Brown Metro, Inc., 2007 WL 2362602 *7 (D.N.J. 2007) citing Leahey v. Singer Sewing Co., 694 A.2d 609, 615-616 (N.J. Law Div. 1996) (State superior court ruled that discrimination against women by reason of pregnancy violates New Jersey statute prohibiting discrimination on the basis of sex);

As seen in the cited cases, it is clear that Florida is not the only state to have a civil rights statute that prohibits pregnancy discrimination as a form of sex discrimination but does not expressly mention the word "pregnancy" in the statute itself. When Florida enacted the FCRA in 1992, it was clearly modeled after the then-existing form of Title VII which had prohibited pregnancy discrimination as a form of sex discrimination since its inception in 1964 which was further clarified by the U.S. Congress's enactment of the PDA in 1978 to expressly overrule the narrow Gilbert holding relating to the use of the *per se* discrimination theory.

The foregoing principles will now be applied to the FCRA and the present circumstances of the inter-circuit conflict in Florida.

H. The First DCA's O'Loughlin v. Pinchback.

It is undisputed that there is exactly one Florida appellate decision concerning whether pregnancy discrimination constituted sex discrimination under HRA77 which was the predecessor statute to today's FCRA.[12] That sole decision is O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991) and, as noted above, its holding was correct but *not* the entirety of its reasoning.

Gorman v. Wells Manufacturing Corp., 209 F.Supp.2d 970, 979-980 (S.D. Iowa 2002) (Claims of discrimination under Iowa state civil rights act for pregnancy discrimination are treated as sex discrimination claims…state statute prohibits sex discrimination and does not expressly mention pregnancy but since state law is "patterned after Title VII" it is construed in same manner as federal law).

[12] As noted earlier, HRA77 was Florida's civil rights statute from 1977-1992. HRA77 chronologically succeeded the FHRA which was in effect from 1969-1977 (with the prohibition against sex discrimination added in 1972). There were no Florida district appellate court opinions that ever addressed whether the FHRA recognized pregnancy discrimination as a form of sex discrimination.

The First District Court of Appeal in O'Loughlin was presented with the following circumstances. A plaintiff correctional officer was terminated by the St. John's County Sheriff after she became pregnant. Id. at 790. The plaintiff filed a single count petition for relief with the Florida Commission on Human Relations ("FCHR") alleging pregnancy discrimination under HRA77. Id. at 791. After an administrative hearing, a Florida Commission on Human Relations ("FCHR") hearing officer concluded that the employer had violated HRA77 by discharging the plaintiff on the basis of her pregnancy. He prepared a recommended order to that effect. Id. The FCHR upheld the hearing officer's order. Id. The defendant employer then appealed the FCHR's decision to the First DCA. Id.

The plaintiff did *not* bring any claim for pregnancy discrimination under Title VII (which the FCHR would not have had jurisdiction to hear even if such a claim had been brought). The sole claim being analyzed at the FCHR hearing level and on appeal to the First DCA was for pregnancy discrimination under the then-current Florida state civil rights statute HRA77.

There can be no dispute that the plaintiff employee in *O'Loughlin* actually prevailed on her HRA77 pregnancy claim at the lower tribunal level and was awarded job reinstatement, back pay, benefits, and attorney's fees and costs. There is also no question that the FCHR's decision finding the employer liable under HRA77 for pregnancy discrimination was expressly affirmed on appeal. Id. at 796.

The First DCA merely modified the plaintiff's remedy by denying

reinstatement (since the Sheriff of St. John's County that had engaged in the prohibited behavior had already finished his term in office) and remanding to the lower tribunal for the sole purpose of assessing back pay through the date of expiration of the Sheriff's term. Id. As such, the First DCA expressly affirmed the award of reimbursement for back pay, benefits, attorneys' fees and costs under HRA77. Id. Based on this result, it is plainly obvious that the First DCA recognized a claim and remedy for pregnancy discrimination under HRA77 even though that statute did not mention the word "pregnancy."

Nevertheless, numerous courts including the Third DCA in the present Delva matter have cited to O'Loughlin as support for the proposition that an employee who wishes to bring a claim for pregnancy discrimination must do so pursuant to Title VII only because Florida's statute was never expressly amended to add the word "pregnancy" and that Title VII completely "preempted" HRA77. This view does not and cannot square, logically or otherwise, with the First DCA's express affirmation of the lower tribunal's finding in O'Loughlin that the terminated employee prevailed and was awarded statutory damages and other relief under HRA77 on her pregnancy discrimination claim.

The confusion arising from the opinion in O'Loughlin which has misled many courts (including the Third DCA in this case) is based upon two analytical errors made by the First DCA on its way to reaching the correct ultimate result. The two errors are (1) the O'Loughlin court misinterpreted the holding of Gilbert

by concluding that Gilbert meant that pregnancy discrimination could never constitute sex discrimination (which is obviously not accurate given the detailed analysis set forth earlier in this brief), and (2) a peculiar section dealing with preemption. Id. at 791-792. Many employment discrimination defendants and courts in Florida have erroneously accepted the O'Loughlin court's incorrect interpretation of the holding in Gilbert without further inquiry and selectively cited to language in O'Loughlin's unusual preemption section for the proposition that Title VII preempted HRA77 such that it does not provide for claims of pregnancy discrimination all while ignoring the actual outcome of that case. Some courts have taken the language out of context and defined "pre-emption" in a way that ostensibly favors a defending employer's position.

Put simply, the First DCA in O'Loughlin reached the correct result (upholding a claim and remedy for pregnancy discrimination under state law based on longstanding statutory construction principles) but erred in part of its analysis (misinterpretation of Gilbert and the preemption section).

The First DCA's faulty preemption analysis led it to conclude that Title VII preempts HRA 77 only to the extent that the state law provides less protection than Title VII. However, it is clear from the O'Loughlin opinion that the First DCA's analysis did *not* result in a finding that Title VII is the sole remedy for a pregnancy discrimination plaintiff in Florida. Rather, the effect of the holding and the law of the case is that HRA77 must be construed to provide at least the same level of

protection against pregnancy discrimination that Title VII does.

Although this may be an odd use of the term "pre-emption" it cannot be disputed that the employee in O'Loughlin did in fact prevail on her HRA77 pregnancy claim and that this victory was upheld on appeal. Any alleged ambiguity about the Court's atypical reference to the "pre-emption" legal concept completely disappears in light of the result.

It is the foregoing analysis that has led subsequent courts to err on the issue of FCRA pregnancy discrimination claims as discussed in more detail in the next section. This can be properly characterized as the "O'Loughlin confusion."

I. How the O'Loughlin confusion first began.

One of the first court opinions to contradict the actual holding in the O'Loughlin case was Swiney v. Lazy Days RV Center, Inc., 2000 WL 1392101 (M.D. Fla. 2000). In the Swiney opinion, the court relied upon O'Loughlin to support a ruling that there is no cause of action for pregnancy discrimination under the FCRA. In this regard, the Swiney court stated that the decision of the FCHR cited in Fuller v. Progressive American Insurance Company, 1989 WL 644301 *7 at para. 27 (Fla. Div. Admin. Hrgs. 1989) which concerned the very same issue presented in O'Loughlin was "overturned by the First District Court of Appeal in O'Loughlin." This was clear error. It is obvious from the O'Loughlin opinion that the First DCA *affirmed* the decision of the FCHR's ruling in favor of the plaintiff and that ruling actually provided support for the FCHR's earlier opinion in Fuller

that HRA77 permitted pregnancy discrimination claims.

The other opinions that defending employers often rely upon are also misguided.[13] They either rely upon the non-controlling precedent of Swiney or they contradict the actual holding of O'Loughlin as did the Swiney court. None of these opinions (nor any subsequent opinions including Delva) contain any effort whatsoever to reconcile their rulings with the fact that the plaintiff employee in O'Loughlin actually prevailed on her HRA77 pregnancy claim and was awarded statutory relief all of which was affirmed on appeal by the First DCA.

J. Many Courts, including Carsillo, have properly understood the ruling in O'Loughlin and held that state statutes like the FCRA are to be construed in the same manner as federal statutes like Title VII.

Numerous Florida state and federal courts, most notably the Fourth DCA in Carsillo v. City of Lake Worth, 995 So.2d 1118 (Fla. 4th DCA 2008) *rev. denied* City of Lake Worth v. Carsillo, 20 So.3d 848 (Fla. 2009), have properly understood the fundamental (and correct) statutory construction principle set forth in O'Loughlin.

As Judge Nimmons explained in O'Loughlin:

> "In Florida there is a long-standing rule of statutory construction which recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the Federal Courts to the extent that construction is

[13] *See, e.g.,* Frazier v. T-Mobile USA, Inc., 2003 WL 25568332 (M.D. Fla. 2003); Fernandez v. Copperleaf Golf Club Community Ass'n, 2005 WL 2277591 (M.D. Fla. 2005); Westrich v. Diocese of St. Petersburg, Inc., 2006 WL 1281089 (M.D. Fla. 2006) and their progeny.

> harmonious with the spirit of the Florida legislature. *Pidd v. City of Jacksonville*, 97 Fla. 297, 120 So. 556 (1929); *Massey v. University of Florida*, 570 So.2d 967 (Fla. 1st DCA 1990); *Holland v. Courtesy Corporation*, 563 So.2d 787 (Fla. 1st DCA 1990)." Id. at 792.

In the case of State of Florida v. Jackson, 650 So.2d 24, 27 (Fla. 1995), this Court actually cited to O'Loughlin for the proposition that "statutory construction in Florida recognizes that if a state law is patterned after a federal law on the same subject, **the Florida law will be accorded the same construction as given to the federal act in the federal courts**." [Emphasis added]. As such, this Court has already recognized and endorsed the true "O'Loughlin rule" which for purposes of this case is that the FCRA, being a state anti-discrimination law patterned on Title VII which is a federal law on the same subject, must be given at least the same construction as Title VII would in federal court. Title VII, as noted above, has *always* prohibited pregnancy discrimination as a form of sex discrimination.

A similar view of O'Loughlin is evident in the case of Mangin v. Westco Security Systems, 922 F.Supp. 563, 567 (M.D. Fla. 1996). In Mangin, the Court, relying in part on the O'Loughlin opinion's statutory construction principle, held that the handicap provision of the FCRA includes a requirement of reasonable accommodation since it was modeled after federal law (the Americans with Disabilities Act or "ADA") even though the FCRA did not specifically refer to any such accommodation requirement like the federal law did.

In Greenfield v. City of Miami Beach, 844 F. Supp. 1519, 1524 n. 1 (S.D.

Fla. 1992), another federal court cited to O'Loughlin for the proposition that "state law that is patterned after federal statutes must be interpreted as if they were one" and "the Florida law is accorded the same construction as Title VII."

The federal Eleventh Circuit Court of Appeals recognizes the same principle: "Because the FCRA is modeled on Title VII, Florida courts apply Title VII caselaw when they interpret the FCRA." Jones v. United Space Alliance, LLC, 494 F.3d 1306, 1310 (11th Cir. 2007). The Eleventh Circuit has also permitted a jury award in favor of a prevailing FCRA pregnancy claimant to stand. Holland v. Gee, 677 F.3d 1047, 1054 n. 1 (11th Cir. 2012).

Moreover, as seen below, many Florida federal courts have addressed the exact issue before this Court and expressly held that aggrieved plaintiffs may bring a claim for pregnancy discrimination under the FCRA.

K. Courts have relied on O'Loughlin or both O'Loughlin and Carsillo and expressly held that the FCRA provides employees with statutory protection from pregnancy discrimination.

There are numerous courts that have correctly followed O'Loughlin or both O'Loughlin and the Fourth DCA's Carsillo opinion by recognizing a claim for pregnancy discrimination under the FCRA.[14]

[14] Wright v. Sandestin Investments, LLC, 2012 WL 6194872 *6 (N.D. Fla. 2012); Wynn v. Florida Automotive Services, LLC, 2012 4815688 *1-2 (M.D. Fla. 2012); Selkow v. 7-Eleven, Inc., 2012 WL 2054872 *n. 1 (M.D. Fla. 2012); Constable v. Agilysys, Inc., 2011 WL 2446605 *6 (M.D. Fla. 2011); Valentine v. Legendary Marine FWB, Inc., 2010 WL 1687738 *4 (N.D. Fla. 2010); Terry v. Real Talent, Inc., 2009 WL 3494476 *2 (M.D. Fla. 2009); Rosales v. Keyes Company, 2007 WL 29245 *4 (S.D. Fla. 2007); In re Fierro, 2007 WL 1113257 *3 (M.D. Fla. 2007); Absher v. City of Alachua, Florida, Case No.: 1:05-cv-00069-MP-AK, Doc. 115 at pg. 22

As can be readily ascertained, the greater weight of authority favors permitting aggrieved employees to bring pregnancy discrimination claims under the FCRA and the far fewer number of cases representing the opposing view, including the Third DCA's opinion in this case, suffer from the same misreading and misapplication of the seminal O'Loughlin opinion along with the adoption of O'Loughlin's incorrect interpretation of Gilbert.

L. At the time of the FCRA's enactment in 1992, the Florida legislature was aware that the O'Loughlin court permitted a claim for pregnancy discrimination under state law.

Subsequent to the 1991 O'Loughlin decision, and as noted above, the Florida legislature passed the FCRA in 1992. The FCRA, like the HRA77 and FHRA before it, is clearly modeled on Title VII which has always permitted claimants to seek relief for pregnancy discrimination as a type of sex discrimination. At the time of the 1992 statutory reenactment, and as discussed below, the Florida legislature was deemed to have been aware of the O'Loughlin

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(N.D. Fla. 2007); Rose v. Commercial Truck Terminal, Inc., 2007 U.S. Dist. LEXIS 75409 (M.D. Fla. 2007); Wesley-Parker v. The Keiser School, Inc., 2006 U.S. Dist. LEXIS 96870 (M.D. Fla. 2006); Brewer v. LCM Medical, Inc., 2006 U.S. Dist. LEXIS 96865 (S.D. Fla. 2006); McMurray v. Hilton Hotels Corporation, Case No.: 04-22059-cv-COOKE/McALILEY, pgs. 2-3 (S.D. Fla. 2005); Fields v. Laboratory Corporation of America, 2003 WL 25544257 *3 FN2 (S.D. Fla. 2003); Berg v. Transcontinental Title Company, Case No.: 3:00-cv-01228-UA, Doc. 89 (M.D. Fla. 2003) (Judge Nimmons, who authored the O'Loughlin opinion for the 1st DCA in 1991 and who was subsequently appointed to the federal bench, permitted a plaintiff's pregnancy discrimination claim brought under both the FCRA and Title VII to go to trial at which plaintiff prevailed and was subsequently awarded attorney's fees, costs, and prejudgment interest); Feliciano v. School Board of Palm Beach County, 776 So.2d 306, 307 (Fla. 4th DCA 2000); Jolley v. Phillips Education Group of Central Florida, Inc., 1996 WL 529202 *6 (M.D. Fla. 1996); and Kelly v. K.D. Construction of Florida, Inc., 866 F.Supp. 1406, 1411 (S.D. Fla. 1994).

ruling that pregnancy discrimination is a viable cause of action under state law. It would be at best incongruous to suggest that the legislature was only aware of the unusual "preemption" section in O'Loughlin or viewed that language in a vacuum while ignoring the Court's clear and unequivocal affirmation of the lower tribunal's determination that the plaintiff employee had been the victim of pregnancy discrimination under HRA77.

Had the legislature intended to exclude pregnancy from the 1992 statute, it was required to have done so explicitly. "When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary." Gulfstream Park Racing Assn., Inc. v. Dept. of Bus. Regulation, 441 So.2d 627, 629 (Fla. 1983).

Because the legislature enacted the FCRA in 1992 and the predecessor statute HRA77 already had the O'Loughlin judicial construction placed upon it (affirming that the statute permitted claims and remedies for pregnancy discrimination) it is therefore presumed that the legislature knew of the construction and intended to adopt it especially where, as here, there was no clear legislative expression to the contrary.

M. The Second DCA's Carter v. Health Management Associates provides additional insight.

A notable case from the Second District Court of Appeal ("Second DCA") addressed an issue very close to the present one; that is, whether an employee may maintain a claim for retaliation under the FCRA where such employee objects to what she perceives to be pregnancy discrimination in the workplace. The Second DCA held that such a claim is recognized under Florida law. Carter v. Health Management Associates, 989 So.2d 1258 (Fla. 2nd DCA 2008).

Although the Second DCA did not directly address or decide whether the FCRA prohibits pregnancy discrimination as a form of gender discrimination, it did decide that a person opposing pregnancy discrimination in the workplace who later suffers some form of adverse employment action does have a FCRA cause of action under a retaliation theory. The court wrote:

> "Let us assume for the purpose of our discussion that the FCRA's retaliation clause includes a reasonableness requirement. If so, Ms. Carter's original belief that HMA had engaged in an unlawful employment practice was objectively reasonable when measured against the FCHR's interpretation of the FCRA on the issue of pregnancy discrimination. An administrative agency's 'interpretation of a statute which it is charged with enforcing is entitled to great deference and will not be overturned unless it is clearly erroneous or contrary to legislative intent.' *Fla. Dep't of Revenue v. Fla. Mun. Power Agency*, 789 So.2d 320, 323 (Fla.2001) (citing *Donato v. Am. Tel. Tel. Co.*, 767 So.2d 1146, 1153 (Fla.2000)). The FCHR is authorized '[t]o receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice, as defined by the [FCRA].' § 760.06(5). In the exercise of its role under the FCRA, the FCHR has taken the position that '[w]hile there is no specific prohibition against discrimination based on

> pregnancy in the [FCRA], pregnancy-based discrimination is prohibited by the [FCRA] within the context of 'sex' discrimination.' *Bailey v. Centennial Employee Mgmt. Corp.*, FCHR Order No. 02-027 (Fla. Comm'n on Human Relations May 31, 2002), *available at* http://fchr.state.fl.us (search for '02-027'; then follow 'FCHR Order No. 02-027' hyperlink); *see Torres v. Sweet Tomatoes Rest.,* 23 F.A.L.R. 3383 (Fla. Comm'n on Human Relations 2001) (assuming that pregnancy discrimination is covered under the FCRA but finding no discrimination under the facts of the case); *Pinchback v. St. Johns County Sheriff's Dep't*, 7 F.A.L.R. 5369, 5371 (Fla. Comm'n on Human Relations 1985) (''[t]ermination of employment because of pregnancy is a recognized discriminatory practice based on sex contrary to the [FCRA's predecessor]'' (quoting *Schmermund v. Hygroponics, Inc.,* 3 F.A.L.R. 2210-A, 2211-A (Fla. Comm'n on Human Relations 1981))), *aff'd, O'Loughlin*, 579 So.2d 788. Thus the FCHR's interpretation of the FCRA provided ample support for an objectively reasonable belief by Ms. Carter that pregnancy discrimination was covered under the FCRA." Id. at 1265.

As such, the Carter court ruled that the trial court erred when it dismissed the employee's FCRA pregnancy-based retaliation action with prejudice. Id. at 1266.

Petitioner includes this Carter case here to show that there is strong support for the proposition that the FHRA-HRA77-FCRA has been consistently and repeatedly interpreted by the FCHR, the administrative body charged with the duty of enforcing the state law, to prohibit pregnancy discrimination as a form of sex discrimination for decades. Id. at 1265 citing Schermund and Bailey *supra*.

II. CONCLUSION.

The Florida Supreme Court should construe pregnancy discrimination as a form of sex discrimination under the FCRA. O'Loughlin correctly determined that a state law like the HRA77 (now FCRA) that is modeled after federal law (like

Title VII in the area of employment discrimination) must be construed to provide at least the same level of protection as that federal law. In so holding, O'Loughlin found that HRA77's definition of "sex" must include pregnancy when construed in light of Title VII and affirmed the employee's victory in the lower tribunal as to both liability and damages under state law. The numerous subsequent decisions cited above including the Fourth DCA's Carsillo opinion have followed the O'Loughlin holding (but not its "preemption" reasoning or misinterpretation of Gilbert) that an aggrieved employee in Florida may advance a claim and sue for the relief available under the FCRA for pregnancy discrimination. The very few cases to the contrary either expressly misconstrued the holding in O'Loughlin or relied on that opinion's misinterpretation of Gilbert and its unusual preemption section without taking into consideration the correct statutory construction analysis and ultimate holding of the case.

Based on the longstanding statutory construction principles articulated above, Florida statutes in state court should be accorded at least the same construction (never less) as given to federal statutes in federal courts where the subject matter of the state statute is modeled on a corresponding federal law.

Therefore, the FCRA should be construed to provide at least the same level of protection as Title VII when it comes to providing Florida citizens with protection against sex discrimination which includes pregnancy discrimination. Further, this Court, as the highest court of the sovereign State of Florida, may and

should construe the FCRA in a manner that both rejects Gilbert's failure to recognize the *per se* discrimination theory in pregnancy discrimination cases (like the Massachusetts Supreme Court did in 1978) and gives credence to Congress' clarifying PDA amendment to Title VII later in 1978 that overturned Gilbert's narrow holding, permitted *per se* pregnancy discrimination claims, and clarified that all forms of pregnancy discrimination have always constituted prohibited sex discrimination.

The Petitioner requests that the Florida Supreme Court reverse the holding in the Third DCA's Delva opinion, adopt the holdings in the First DCA's O'Loughlin (but not its reasoning) and the Fourth DCA's Carsillo opinions, and remand this matter for further proceedings below.

Respectfully submitted this 28th day of May 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to the Supreme Court of Florida Administrative Order No. AOSC13-7, the foregoing has been electronically filed through the Florida Courts E-Filing Portal and an electronic and paper copy has been served this 28th day of May 2013 to arodman@stearnsweaver.com and baleman@stearnsweaver.com for Andrew Rodman, Esq. and Bayardo Aleman, Esq., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Museum Tower – Suite 2200, 150 West Flagler Street, Miami, Florida 33130.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's Brief complies with the Florida Rules of Appellate Procedure. The Brief contains 10,872 words and 1,049 lines of text. The Brief was written in 14 point type - Times New Roman font.

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