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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

REPLY BRIEF OF PETITIONER-PLAINTIFF PEGUY DELVA

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REPLY

Petitioner Peguy Delva hereby replies to Respondent The Continental Group, Inc.'s Answer Brief.

I. Introduction.

The question in this case requires an interpretation of the words "because of sex" in the Florida Civil Rights Act of 1992 at Fla.Stat. § 760.01, *et seq.* ("FCRA") and a determination of whether those words encompass "pregnancy" or not. Respondent essentially argues that no sex-based characteristic including "pregnancy" can be properly construed as part of the definition of "sex" unless the Legislature expressly defines "sex" by listing each such characteristic.

However, if "sex" discrimination does not include "pregnancy" under the FCRA, then, in addition to discrimination in employment, the Florida Bar could legally deny otherwise qualified individuals to sit for the bar examination if they are, were ever, or could become pregnant. *See* pgs. 5-6, *infra*.

As noted in Petitioner's Initial Brief and in response to Respondent's arguments in its Response Brief, Petitioner argues that "sex" discrimination *includes* discrimination based upon the sex-specific physiological condition of pregnancy.

II. Using dictionary definitions to determine plain language of FCRA.

Respondent argues that the "FCRA is clear and unambiguous with respect to its scope of coverage. By its express terms, the FCRA extends to eight protected classes. Pregnancy is not one of them." Answer Brief at pg. 10. This statement, of course, presumes that pregnancy is or should be construed as a class by itself and not related, inextricably or otherwise, to sex. This presumption is not warranted and not in keeping with Florida's statutory construction principles. Pregnancy is simply not treated as a *separate* protected class under Title VII or the state civil rights statutes cited by Respondent that expressly use the word "pregnancy." Instead, the statutes refer to "pregnancy" as being *part of* the concept of "sex" and do not place "pregnancy" in a protected class by itself.

Respondent also argues that a simple and straightforward reference to dictionary definitions of the word "sex" must lead to the conclusion that the "fair import" and "common and ordinary meaning" of the word "sex" does *not* include pregnancy. Answer Brief at pg. 10. A review of the dictionary references provided by Respondent at page 15 of its Answer Brief (and in its Appendix) dispels that notion.

Respondent only *partially* quotes (one might say "cherry-picks") from the dictionaries it cites. For instance, Respondent partially quotes *Webster's New World Dictionary* (3d College ed. 1988) for the definition of "sex" but

omits language describing reproductive functions and gender-distinguishing attributes. The actual definition reads (the portions omitted by Respondent are underlined):

> "[E]ither of the two divisions, male of female, into which persons, animals, or plants are divided, with reference to their reproductive functions, the character of being male or female; all the attributes by which males and females are distinguished, anything connected with sexual gratification or reproduction or the urge for these …"

The actual definition found in *Merriam-Webster's Collegiate Dictionary* (11th ed. 2009) reads:

> "[E]ither of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures, the sum of the structural, functional, and behavioral characteristics of organisms that are involved in reproduction marked by the union of gametes and that distinguish males and females …"

The actual definition found in *The American Heritage Dictionary* (4th ed. 2001) reads:

> "The property or quality by which organisms are classified on the basis of their reproductive organs, [e]ither of the two divisions, designated female and male, of this classification, [f]emales and males collectively, [t]he condition or character of being female or male."

The actual definition found in *The Random House Dictionary of the English Language* (1967) reads:

> "[T]he fact or character of being male or female: *persons of different sex*, either of the two groups of persons exhibiting this character: *the stronger sex; the gentle sex*, the sum of the structural and functional differences by which the male and female are distinguished,

> or the phenomena or behavior dependent on these differences …" (italics in original).

Respondent obviously omitted all definitions of "sex" that relate to distinguishing attributes between the genders, structural and functional differences, differing reproductive organs, and "phenomena" dependent on such differences. If one considers these definitions in their totality, the real question is how pregnancy could *not* be considered part of "sex."

Does Respondent seriously contend unless the FCRA expressly defines "sex" to include each and every one of the biological, structural, and functional characteristics unique to each gender (including pregnancy) that employers are free to discriminate based on those characteristics?

For instance, does Respondent contend that if an employer refused to hire prospective employees that had a penis or a prostate, then that would not be "sex" discrimination under the FCRA because the statute does not expressly define "sex" to include those specific physical attributes that are unquestionably unique to one gender?

What if an employer terminated an employee based upon a physiological function or condition unique to one gender? Does Respondent contend that an employer could fire an employee because she menstruates? Is this an example of legal discrimination in Florida because the FCRA does not expressly define "sex" to include menstruation?

None of the above gender-specific attributes -- like pregnancy -- are expressly defined as "sex" in the FCRA.[1] "Sex" is not defined in the statute *at all*. However, in light of the *full* dictionary definitions of sex, must the Court turn a blind eye to the obvious definitional references to physical attributes, structures, functions, and conditions which make up a person's "sex"? Of course not. Petitioner asserts that a restrictive view of the word "sex" would lead to the absurd results posited above. That is, if the Respondent's narrow definition of "sex' were to be deemed the intent of the Florida Legislature, then attributes that are unquestionably unique to one gender or the other -- including pregnancy -- would simply not be protected from discrimination under the FCRA.

Another ignoble result of Respondent's definition is, as noted in the Introduction to this Reply Brief, if "sex" discrimination does not include "pregnancy" under the FCRA, then the Florida Bar could legally deny otherwise qualified individuals to sit for the bar examination if they are, were ever, or could become pregnant. The FCRA states:

> Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an

[1] There are, of course, many other physical, biological, and structural characteristics and conditions that are unique to one gender or the other. Most healthy females, through the accident of birth, are endowed with vaginas, ovaries, cervixes, uteruses, fallopian tubes and other female-specific structures. Only men have penises, testicles, prostates, and Y chromosomes. Only women can give birth. Only men can inseminate naturally.

> unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status. Fla.Stat. § 760.10(5).

This subsection makes clear that the scope of potential liability under the FCRA is not limited to "employers" with 15 or more employees. It also includes "persons." A "person" is defined as:

> [A]n individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, or unincorporated organization; any other legal or commercial entity; the state; or any governmental entity or agency. Fla.Stat. § 760.02(6).

Therefore, Respondent's interpretation of "sex" to exclude "pregnancy" would allow the Florida Bar (a "person" under the FCRA) to thwart individuals from taking the bar exam or fulfill any of the other requirements needed for membership thereby preventing them from engaging in the profession of law "because of" a sex-specific physiological trait.

As another example, the Florida Department of Business and Professional Regulation could legally turn away women seeking to become architects, engineers, cosmetologists, veterinarians, certified public accountants, numerous occupations in the construction industry, and many other professions and trades requiring licensure in Florida. Respondent's definitional position withers in the crucible of reasoned scrutiny.

Also, curiously, Respondent failed to present the definition of "sex" from Black's Law Dictionary even though this Court regularly turns to Black's for definitional authority. Raymond James Financial Services, Inc. v. Phillips, 2013 WL 2096252 *3-4 (Fla. May 16, 2013); Miele v. Prudential-Bache Securities, Inc., 656 So.2d 470, 472 (Fla. 1995). Black's defines "sex" as:

> "The sum of the peculiarities of structure and function that distinguish a male from a female organism…" *Black's Law Dictionary* (9th ed. 2009).

As with other dictionary definitions, note Black's' reference to "structure and function." Petitioner urges this Court not to divorce from the definition of "sex" any "peculiarities of structure and function" of either sex … one "peculiar function" of which is unquestionably pregnancy.

Interestingly, on the very day that Respondent filed its Answer Brief, a Florida federal court determined that the FCRA's prohibition against "sex" discrimination *includes* pregnancy using the dictionary definition approach as the feature of its analysis. Glass v. Captain Katanna's, Inc., 2013 WL 3017010 *7-8 (M.D. Fla. June 17, 2013).

After reviewing dictionary definitions of "sex" -- including Black's -- the Glass court held that "[t]he focus on reproductive functions as a means of defining 'sex' supports the notion that Florida legislators would have understood 'sex' to include pregnancy as a function unique to the female sex. Accordingly, a plain reading of the phrase 'to discharge or to fail or

refuse to hire any individual, or otherwise to discriminate against any individual ... because of such individual's ... sex' should be understood to ban discrimination against any individual 'because of such individual's' reproductive functions (*e.g.*, pregnancy). To hold otherwise would be contrary to the Florida Legislature's directive to construe the FCRA 'according to the fair import of its terms' and to 'liberally' construe the FCRA 'to further the general purposes stated in this section' … " Id. at 8. (citations omitted).

The Glass court also noted that the "general purposes" of the FCRA 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." Id. at n. 18 citing Fla. Stat. § 760.01 (2012) (emphasis by court).

Therefore, the court concluded: "A woman's dignity and full productive capacity are fairly understood to include biological reproduction, especially under an admonition to interpret the statute liberally." Id.

Petitioner asserts that the Glass court's definitional reasoning and conclusion is exactly correct and urges this Court to adopt same *in toto*.

A few words are in order about Respondent's reliance throughout its brief on Donato v. AT&T Co., 767 So.2d 1146 (Fla. 2000). This Court was called upon to determine the meaning of "marital status" where the choice was between a so-called expansive definition and a narrower one. This Court chose the narrower one. Respondent argues that Donato is precedent for adopting a narrow construction of an undefined term from the FCRA.

Unlike the "sex/pregnancy" issue in this case, the Donato Court was faced with interpreting the definition of a protected characteristic ("marital status") that *had no federal counterpart*. Therefore, the Court could not apply the longstanding statutory construction principle that where a Florida statute is patterned after a federal law, the Florida statute will be given at least the same construction as federal courts give the federal statute. State v. Jackson, 650 So.2d 24, 27 (Fla. 1995).

So what did the Donato Court do without such federal guidance? It looked to *other* jurisdictions' jurisprudence on the issue.[2] Then it noted that because the Florida Legislature had expressly excluded anti-nepotism

[2] Curiously, Respondent criticized Petitioner for citing to other states' case law dealing with the "sex/pregnancy" issue and deemed it to be "of no value." *See* Answer Brief at pg. 47, n. 30. However, the Donato Court did just that to help resolve the definition of "marital status." Petitioner also notes the irony of Respondent's criticism since it liberally cited to other state laws ostensibly in support of its argument. *See* Answer Brief at pgs. 28-29, n. 19-21.

policies from the scope of actionable unlawful employment practices, the amendment reflected an intent to "limit the scope of the term 'marital status' instead of broaden it." Donato *supra* at 1152. There is no such limiting language in the FCRA regarding the issue of sex discrimination. Therefore, Donato is of little pertinence to the issue presented in this case.

III. That the FCRA has not been amended by the Florida Legislature is not "evidence" that the Legislature believes that "sex" should not include "pregnancy."

Other than touting a "dictionary definition" approach to the issue before this Court (as discussed above, such approach is actually advantageous *to the Petitioner*) and devoting numerous pages of criticism of Petitioner's interpretations of General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), Nashville Gas Company v. Satty, 434 U.S. 136 (1977), and O'Loughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991), the Respondent's remaining argument is essentially this: Because the Florida Legislature has not amended the various iterations of its civil rights statute to specifically define "sex" to include "pregnancy," then it *must mean* that the Legislature has never intended to define sex in the manner that the Petitioner urges. *See* Answer Brief at pgs. 25-32, 39-43, and 48-50.

Respondent's argument sidesteps the points raised by Petitioner in her Initial Brief. That is, when 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) (citing to O'Loughlin *supra* for that very proposition).

Further, *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 is undisputed that the U.S. Congress enacted the PDA amendment to the federal Title VII statute *clarifying* that "pregnancy" was intended to be part of "sex" discrimination.

Since these are longstanding and controlling principles of statutory construction, why would the Florida Legislature need to amend its civil rights statute when its state courts *must* construe the FCRA to provide at least the same protection as Title VII (which is what the O'Loughlin court did) and has a "duty" to consider subsequent legislation to determine the correct meaning of a prior statute (which is what both the O'Loughlin and Carsillo courts did)? Respondent simply fails to answer this question.

Next, Respondent provides a list of states that did amend their respective civil rights statutes in a manner similar to what Congress did with Title VII by enacting the PDA in 1978. Of course, many states did *not* so amend their statutes. Respondent again fails to address Petitioner's point

that legislative action in Florida is unnecessary given the statutory construction principles mentioned again here or Petitioner's citation to numerous states whose *courts* properly determined that their respective states' statutes' prohibition against "sex" discrimination *included* "pregnancy" even where the word "pregnancy" was not expressly mentioned in those statutes. *See* Initial Brief at pgs. 28-33.

Similarly, it was not necessary to amend the FCRA to add language that expressly states that "sexual harassment" is a form of prohibited "sex" discrimination. Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099, 1102 (Fla. 1989) (noting that the words "sexual harassment" and "hostile work environment" were not mentioned let alone defined in the FCRA or Title VII but nevertheless agreeing that such claims are viable under FCRA in reliance on federal court interpretations of Title VII).

Despite Byrd conclusively establishing that "sexual harassment" is a viable claim under the FCRA, this did not stop some Florida legislators from sponsoring legislation on issues already resolved by the courts in order to appease constituents or for other politically expedient reasons. *See, e.g.*, Respondent's Appx. 36 citation to failed Florida Senate Bill 1596 which was a proposed amendment to the FCRA in 1994.

Did that bill fail because it sought to define the term "sexual harassment"? Did it fail because it also sought to define the term

"pregnancy"? Did it fail because it sought to reduce the minimum threshold for employer liability for those characteristics from 15 employees to just 1? Or did it fail because the definitions were unnecessary given the Byrd and O'Loughlin rulings which determined that the FCRA would be construed to prohibit sexual harassment and pregnancy discrimination respectively?

Similarly, why did Senate Bill 774 and House Bill 717 fail to make it out of committee review in the 2013 Florida legislative session? *See* Respondent's Appx. 44-45. Was it because the proposed legislation sought to expressly define "sex" to include "pregnancy"? Was it because the bills sought to increase the time that the FCHR would have to investigate *all types* of discrimination claims from 180 to 240 days (thereby further delaying litigants' access to court)? Was it because the bills would allow a FCHR commissioner to award a prevailing claimant emotional distress and punitive damages (thereby broadening the scope of relief to a successful claimant)? Was it because of other political considerations such as the identity or party of the sponsoring legislators? Who can say?

Respondent next presents two Florida statutes that contain the word "pregnancy"; one in the context of state career service employee leave rights at Fla.Stat. § 110.221 and one in the context of "familial status" discrimination in Florida's Fair Housing Act ("FFHA") at Fla.Stat. § 760.20, *et seq.* Since the Legislature "knows how to amend a statute when it wants to", Respondent

argues that legislative intent in this case must be construed to exclude "pregnancy" from FCRA's use of the word "sex" because "pregnancy" can be found in these two other statutory sections.

It would be utopian to believe that legislative bodies always act to address discrete issues of legislative concern at a particular time in perfect harmony with all other existing statutes. Respondent appears to suggest that any inconsistency among statutes or their subsections reflects a type of affirmative legislative intent. There is no authority for this proposition.[3]

In all events, Respondent failed to mention many other Florida statutes that have the word "pregnancy" as part of their text.[4]

Rather than rigidly requiring perfect textual consistency among all statutory definitions, and as noted in Byrd *supra* at 1103-1104, this Court can and should construe legislative intent and Florida public policy by viewing the FCRA's prohibition against sex discrimination *in harmony* with other enactments. Just one example is Fla.Stat. § 445.019 which created a

[3] To the contrary, while many Florida statutes expressly provide for a right to jury trial, many others do not. Does this mean that the Legislature never intends for a jury trial to be allowed for any claims arising under statutes that do not expressly provide for a right to jury trial? No. O'Neal v. Florida A&M Univ., 989 So.2d 6 (Fla. 1st DCA 2008).

[4] Interestingly, Respondent also failed to note that the word "pregnancy" is found in the Florida Constitution. *See* Fla.Const., Art. 10 § 21. Perhaps Respondent did not wish to draw attention to the fact that if its argument is accepted, pregnant pigs in Florida would enjoy superior protections under Florida law than pregnant human beings.

statewide teen pregnancy diversion program. The Legislature stated the reason why Fla.Stat. § 445.019 was enacted:

> The Legislature recognizes that teen pregnancy is a major cause of dependency on government assistance that often extends through more than one generation. The purpose of the teen parent and pregnancy prevention diversion program is to provide services to reduce and avoid welfare dependency by reducing teen pregnancy, reducing the incidence of multiple pregnancies to teens, and by assisting teens in completing educational or employment programs, or both.

It would be an odd reading of legislative intent and Florida public policy if it were to provide taxpayer supported services and resources to help teens stay off welfare by avoiding pregnancy but permit employers and other "persons" to discriminate against these same young women if they do become pregnant *thereby ensuring that welfare would be their only option*. There would be nothing harmonious (or logical or legally justifiable) about that result.

IV. Conclusion.

Petitioner requests that this Court reverse the Third DCA's decision in this case and hold that the FCRA's definition of "sex" discrimination includes "pregnancy, childbirth, or related medical conditions."[5]

[5] Petitioner notes that, in addition to Glass v. Captain Katanna's , Inc. discussed *infra* at pgs. 7-9, yet another Florida federal court has recently determined that the FCRA prohibits pregnancy discrimination as a form of sex discrimination. Juarez v. Tornado Bus Company, 2013 WL 2903281 *n. 8 (M.D. Fla. June 13, 2013).

Respectfully submitted this 8th day of July 2013.

/s/ Travis R. Hollifield

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to Florida Supreme Court Administrative Order No. AOSC13-7, this document has been electronically filed through the Florida Courts e-Filing Portal and an electronic version has been served via e-mail on this 8th day of July 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 as Counsel for Respondent and to dan@magidwilliams.com for P. Daniel Williams, Esq., Magid & Williams, P.A., 3100 University Boulevard South – Suite 115, Jacksonville, Florida 32216 as Counsel for Amicus Curiae.

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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 3,527 words and 412 lines of text. The Brief was written in 14 point type - Times New Roman font.

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