ADULTS ONLY: FLORIDA'S BOTCHED CASE OF "YOUTH" EMPLOYMENT DISCRIMINATION

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I. THE PROBLEM DEFINED

Colin Smith was seventeen years old when he applied, on April 16, 2012, for a part-time Sales Teammate position with Buckle, a teen clothing store at the Oaks Mall in Gainesville, Florida.[1] Two weeks later, Smith followed up with the store to inquire about the status of his application.[2] The store manager replied that Smith would not be hired because he was under eighteen—the qualifying age for employment with the company.[3] Refusing to accept Buckle manager's reasoning, Smith filed a charge of discrimination with the Florida Commission on Human Relations (FCHR, Commission, or Agency), claiming unlawful discrimination, in violation of the Florida Civil Rights Act of 1992[4] (FCRA or Act).[5] Following an investigation, the Commission found that reasonable cause existed to believe unlawful discrimination had taken place.[6] Armed with the "cause" letter, Smith filed a lawsuit in Alachua County, Florida, which Buckle subsequently removed to the United States District Court for the Northern

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1. *See* Complaint at 2, Smith v. Buckle, Inc., No. 2014 CA 000172 (Fla. Cir. Ct. filed Jan. 16, 2014); Cindy Swirko, *Gainesville Teen Wins Initial Ruling for 'Youth Discrimination'*, GAINESVILLE SUN (Mar. 1, 2013, 6:50 PM), http://www.gainesville.com/news/20130301/gainesville-teen-wins-initial-ruling-for-youth-discrimination.
2. Swirko, *supra* note 1.
3. *Id.*
4. Florida Civil Rights Act of 1992, FLA. STAT. §§ 509.092, 760.01–760.11 (2016).
5. Swirko, *supra* note 1.
6. *Id.*; *see also* Complaint at 1, Smith v. Buckle Inc., No. 2014 CA 000172 (Fla. Cir. Ct. filed Jan. 16, 2014) (attaching the FCHR letter of cause determination to the Complaint as an exhibit to establish that reasonable cause existed to believe that an illegal employment practice had occurred).

District of Florida[7] and defended, in part, by asserting Smith did not state a claim upon which relief could be granted.[8] Not long after the removal—the parties mediated their differences[9] and stipulated to dismissal.[10] Even if the case had *not* concluded early, it would likely have been subject to a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Smith's situation presented a case of "reverse,"[11] or "youth,"[12] discrimination—the cause of action Florida courts do not recognize as viable.[13]

Florida courts interpret the FCRA to follow the Age Discrimination in Employment Act of 1967 (ADEA)—the federal law that protects

7. Defendant's Notice of Removal at 1, Smith v. Buckle, Inc., No. 1:14-cv-00062-MW-GRJ (N.D. Fla. filed Apr. 16, 2014).

8. Defendant's Answer and Statement of Defenses to Plaintiff's Complaint at 4, Smith v. Buckle, Inc., No. 1:14-cv-00062-MW-GRJ (N.D. Fla. filed Apr. 16, 2014). Buckle also argued that it acted in good faith and with reasonable grounds to believe its actions did not violate the FCRA. *Id.*

9. *See* Scheduling and Mediation Order at 1, 5–8, Smith v. Buckle, Inc., No. 1:14-cv-00062-MW-GRJ (N.D. Fla. filed May 29, 2014) (ordering Smith and Buckle to mediate before trial and scheduling a mediation conference).

10. *See* Joint Stipulation of Dismissal with Prejudice at 1, Smith v. Buckle, Inc., No. 1:14-cv-00062-MW-GRJ (N.D. Fla. filed Feb. 10, 2015).

11. *See* D. Aaron Lacy, *You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination Under the ADEA*, 26 BERKELEY J. EMP. & LAB. L. 363, 364 (2005) (defining "reverse" age discrimination in the Age Discrimination in Employment Act's context); *see also id.* at 371 (defining "reverse" age discrimination as "the right of a younger protected worker to sue his employer because the employer gave preferential employment benefits to someone older because of age." (citing Jeffrey Paul Fuhrman, Comment, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association?*, 3 U. PA. J. LAB. & EMP. L. 585, 600–01 (2001))); discussion *infra* Part VI. "Reverse" age discrimination refers to situations "when an employer favors [an] older employee over a . . . younger employee in an employment decision." Lacy, *supra* at 364. There are two types of "reverse" age discrimination: (1) a twenty-five year old disfavored in an employment decision in favor of a thirty-five or a forty-five year old (i.e., at least one party is outside of the ADEA-protected class); and (2) a forty-five year old disfavored in favor of a fifty-five year old (i.e., both are within the protected class). Lacy, *supra* at 371. This Article concerns the former type. *See* discussion *infra* Part VI.

12. *See* discussion *infra* Part II. Semantically, the Author believes, the term "youth" discrimination better communicates the message of this Article. In contrast to "reverse" discrimination—the phrase that by its terms implies discrimination of a younger worker in favor of an older worker—"youth" discrimination denotes a per se discrimination of a "young" person (i.e., a person outside the protected class). Because this Article primarily focuses on the FCRA's anti-age-discrimination provisions' application to individuals under forty—while validity of the claim "younger in favor of older" is auxiliary—"youth" discrimination appears to be a better fitting term. *See* discussion *infra* Part II.

13. *See infra* Part II (explaining that unlike the FCHR, which extends the FCRA's protections to individuals of all chronological ages, Florida courts follow the ADEA, which requires that the individual be at least forty years old to receive the federal law's protections).

individuals *only* of forty years old or older.[14] Although, neither the express language of the FCRA nor its legislative history support such interpretation, the state courts continue to deprive Floridians of the basic protections guaranteed by chapter 760, Florida Statutes.[15] Until Florida courts adopt the Commission's correct all-inclusive reading of the anti-discrimination law, which extends the protections to *all* aggrieved persons, including minors,[16] the legislative intent will not be carried out.

This Article argues that Florida courts got it wrong.[17] Part II of this Article reviews the chronological evolution of Florida's anti-discrimination law. It then contrasts Florida courts' reading of the FCRA to extend age-related protections only to individuals over forty to the Commission's unyielding argument for the Act's age-neutral application. This Part further illustrates this interpretative incongruity by juxtaposing the Fourth District Court of Appeal's holding in *City of Hollywood v. Hogan*[18] to the Commission's final order in *Williams v. Sailorman, Inc.*[19] Part III of this

14. *See* 29 U.S.C. §§ 621–634 (2015); *see also* 29 U.S.C. § 631(a) (2015); *infra* notes 31 and 34 and accompanying text (discussing the age limitations under the federal anti-age-discrimination law).

15. *See* FLA. STAT. § 760.01 (2016); Florida Civil Rights Act of 1992, FLA. STAT. §§ 509.092, 760.01–760.11 (2016) (describing the basic rights specifically in section 760.01 of the Florida Statutes).

16. *See* discussion *infra* Part IV. This Article was inspired by the Author's curiosity about the effect of Florida courts' interpretation of the FCRA's anti-age-discrimination provisions on minors, specifically. Over time, the scope of the Article grew, and the reasoning and arguments contained in the Article equally apply to any aggrieved person outside the ADEA-protected age category. *See* discussion *infra* Part IV.

17. *Compare, e.g.*, CONN. GEN. STAT. § 46a-60(a)(1) (2015) (setting no qualifications on "age"), *and* HAW. REV. STAT. § 378-2(a)(1) (2015) (setting no qualifications on "age"), *and* N.M. STAT. § 28-1-7(A) (West 2015) (setting no qualifications on "age"), *with* Guglietta v. Meredith Corp., 301 F. Supp. 2d 209, 212–13 (D. Conn. 2004) (acknowledging that the state anti-discrimination law "does not contain an age 'floor,'" but dismissing the plaintiff's claim because "at age [thirty-seven], she is not within the age group protected by this statute."), *and* Kocsis v. Delta Air Lines, Inc., 963 F. Supp. 2d 1002, 1015 (D. Haw. 2013) (admitting that "[u]nlike the ADEA, the Hawaii state statute does not establish a specific age group which it protects," but nevertheless analogizing the statute to the ADEA), *and* Cates v. Regents of N.M. Inst. of Min. & Tech., 954 P.2d 65, 70 (N.M. 1998) (noting that "[a] protected class in an age discrimination case is not defined" under the New Mexico Human Rights Act, but looking to the ADEA in holding that "[forty] years old marks the minimum age in the protected age class in cases of employment discrimination" under the statute). Although the scope of this Article is limited to Florida's misinterpretation of state anti-discrimination law, the reasoning in this Article can similarly guide the inquiry into the appropriateness of other states' interpretation of their civil rights statutes in the image of the ADEA. Connecticut, Hawaii, and New Mexico are examples of states whose statutes do not, on their face, set age parameters on the protected class, but whose courts apply the ADEA's lower age threshold to reserve the protections to only those over forty.

18. City of Hollywood v. Hogan, 986 So. 2d 634 (Fla. Dist. Ct. App. 2008).

19. Williams v. Sailorman, Inc., No. 02-3995, 2003 WL 21978284, at *14 (Fla. Div. Admin.

Article reviews the Commission on Human Relations' role enforcing the FCRA and describes the two enforcement avenues—judicial and administrative—the Florida Legislature inscribed into the Act. This Part posits that the courts' analysis of the FCRA's age protections de facto eliminates the judicial enforcement mechanism from the Act. Part IV of this Article expands on this argument by engaging in statutory interpretation. This Part reasons that, on its face, the FCRA is unambiguous, and the statutory language must be given its plain and obvious meaning. In the alternative, it reasons, the FCRA should not be interpreted in the image of the ADEA because such interpretation is not "harmonious with the spirit of the Florida legislation." This Part explains that the "harmony" cannot be achieved for four reasons: (1) the 1977 legislative record of the FCRA (then-Human Rights Act) does not only *not* express the intent to set a lower age ceiling—it in fact expresses a *contrary* intent; (2) the Florida Legislature provided all aggrieved persons with two enforcement routes and did not intend to exclude anyone from the FCRA's all-inclusive statutory framework; (3) the courts' reading controverts the Act's "manifest purpose" to provide Floridians with the maximum protection against unlawful discrimination in employment; and finally, (4) the Florida Legislature *knows how* to express its intent that a state statute follow the federal law, and intentionally omitted such expression from the FCRA with respect to "age discrimination." Part V of this Article discusses two out-of-state case analogs—Michigan's *Zanni v. Medaphis Physician Services Corp.*[20] and New Jersey's *Bergen Commercial Bank v. Sisler*,[21] in which state courts overturned their prior precedents, declining to follow the ADEA's lower age ceiling, and held that their states' respective anti-discrimination statutes, similar to Florida's, protected individuals of all ages. This Article concludes with Part VI, which offers final thoughts on the Florida courts' and the FCHR's interpretive "disconnect," and provides suggestions to the Florida courts, the Florida Legislature, and the Commission on how to reconcile their differences.

Hearings Aug. 15, 2003), *dismissing with prejudice*, Williams v. Sailorman, Inc., Order No. 04-037 (Fla. Comm'n on Human Relations June 2, 2014), http://fchr.state.fl.us/fchr/complaints__1/final_orders/final_orders_2004/fchr_order_no_04_037.

20. Zanni v. Medaphis Physician Services Corp. (*Zanni II*), 612 N.W.2d 845 (Mich. Ct. App. 2000).

21. Bergen Commercial Bank v. Sisler, 723 A.2d 944 (N.J. 1999).

II. AGE DISCRIMINATION UNDER THE FLORIDA CIVIL RIGHTS ACT OF 1992

Florida enacted its first anti-discrimination statute—the Florida Human Relations Act—in 1969,[22] after the United States Congress passed the federal Title VII of the Civil Rights Act of 1964 (Title VII).[23] The original statute created a cause of action for employment discrimination in derogation of common law[24] and purported "to secure for all individuals within the state freedom from discrimination because of race, color, religion, or national origin."[25] Age, as a protected characteristic, was added in 1977, at the same time that the Florida Human Relations Act was renamed the Human Rights Act of 1977.[26] Although the statute was amended to add new definitions, the amendments failed to include or define the term "age."[27] During the 1992 legislative session, the Human Rights Act of 1977 was re-named the Florida Civil Rights Act of 1992;[28] like its predecessors, the FCRA left "age" undefined.

Because the FCRA was modeled after the federal Title VII, courts interpreted the FCRA to follow federal precedent.[29] Nevertheless, there was an important difference between Title VII and the Florida anti-discrimination statute: after the 1977 legislative amendments, the Florida law included "age" as a protected category, while the federal Title VII did not.[30] Like federal courts, the Florida judiciary looked to the ADEA[31] to

22. FLA. STAT. §§ 13.201–13.251 (2016) (codifying 1969 Fla. Laws 1049, 1049–52); *see also* James C. Cunningham, Jr., *Florida: The Rules Are Different Here – Accommodations and Protections of Pregnant Employees in the Workplace*, LEXOLOGY (Jan. 12, 2015), http://www.lexology.com/library/detail.aspx?g=02784009-3d0f-40cd-80c7-ea2d2b1d29d9 ("[I]n 1969 the Florida [L]egislature adopted the Florida Human Relations Act . . . .").

23. 42 U.S.C. § 2000e-2(a) (2015) (outlawing employment practices that discriminate based on "race, color, religion, sex, or national origin"); Kendra D. Presswood, *Interpreting the Florida Civil Rights Act of 1992*, 87 FLA. B.J. 36, 36 (2013) (citing 42 U.S.C. § 2000e-2).

24. Kenneth M. Curtin, *Administrative Pitfalls of Litigating Under the Florida Civil Rights Act*, 13 ST. THOMAS L. REV. 523, 524 (2001).

25. 1969 Fla. Laws 1049, 1049.

26. 1977 Fla. Laws 1461, 1461; *see also* 1977 Fla. Laws 1461, 1461–68 (codified as FLA. STAT. §§ 13.201–13.261 (1977)).

27. *See* FLA. STAT. § 760.02 (2016) (omitting the word "age" and failing to define the meaning of "age").

28. Florida Civil Rights Act of 1992, FLA. STAT. §§ 509.092, 760.01–760.11 (2016); 1992 Fla. Laws 1726, 1726–38 (amending section 760.01(1) of the Florida Statutes, which initially read, "Human Rights Act of 1977," to read, "Florida Civil Rights Act of 1992").

29. Presswood, *supra* note 23, at 36.

30. *Id.*

31. *See* 29 U.S.C. §§ 621–634 (2015); *see also* Lacy, *supra* note 11, at 367 (describing the enactment of the ADEA). "Congress enacted the [ADEA] in 1967 to protect employees from adverse employment actions based on [unfounded] age-based stereotypes." *Id.* (citation omitted).

decide age discrimination cases.[32] The first problem with the ADEA application was that the ADEA was patterned after the Fair Labor Standards Act of 1938, which arose out of a different statutory scheme than Title VII.[33] The second problem, critical to this Article, was the fact that only individuals of forty years old or older fell within the protected category under the ADEA.[34] Because Florida courts undertook to interpret the FCRA in the image of the ADEA, they have historically held that Florida anti-discrimination law similarly protects only individuals of at least forty years of age who are disadvantaged in favor of younger individuals.[35]

"The two primary purposes of the ADEA [were] to 'prohibit arbitrary age discrimination in employment' and to 'promote employment of older persons based on their ability rather than age.'" *Id.* at 368 (quoting 29 U.S.C. § 621(b)). Section 623(a)–(b) of the United States Code reads:

> (a) Employer practices
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> It shall be unlawful for an employer—
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> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
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> (2) to limit, segregate, or classify his employees 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 age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.
>
> (b) Employment agency practices
>
> It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

29 U.S.C. § 623(a)–(b) (2015).

32. *See, e.g.*, City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. Dist. Ct. App. 2008) ("[The FCRA] follows federal law, which prohibits age discrimination through the [ADEA]." (citing 29 U.S.C. § 623)); Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So. 2d 1227, 1230 n.1 (Fla. Dist. Ct. App. 2005) ("Federal case law interpreting . . . the ADEA is applicable to cases arising under the [FCRA]." (internal quotation marks omitted)).

33. *See* Presswood, *supra* note 23, at 39 n.4 (citing 29 U.S.C. § 201).

34. 29 U.S.C. § 631(a) (2015); *see* Bryan B. Woodruff, Note, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1301 (1998) ("[T]he young individual is still 'subjected to a discrimination which cannot, through anything within his control, be overcome [as a result of the ADEA's age limitations].'"). *See generally id.* at 1301–07 (presenting an interesting argument against the arbitrary age discrimination effectuated by the ADEA's age limitations). The ADEA provides, "[t]he prohibitions in this chapter shall be limited to individuals who are at least [forty] years of age." 29 U.S.C. § 631(a).

35. *See, e.g.*, Miami-Dade Cty v. Eghbal, 54 So. 3d 525, 526 (Fla. Dist. Ct. App. 2011) (per curiam) (stating to prove a prima facie case of age discrimination under the FCRA, the plaintiff had to demonstrate, inter alia, membership in a protected class, which included individuals of "at

If the underlying conflict has not yet sprung out as obvious, consider this: unlike the ADEA, that expressly protects individuals of at least forty years of age, the FCRA does not contain similar limiting language. When the Florida Legislature added "age" to the FCRA, it was not preempted by the ADEA; it was free to expand its anti-age-discrimination protections beyond the federal statute,[36] and accordingly, set no age parameters on the protected class.[37] On its face, the FCRA allows an employee or applicant of *any* age—whether an older worker mistreated in employment in favor of a younger worker or a younger worker mistreated in employment in favor of an older worker—to bring a claim. That is the reading of the FCRA that the Florida Commission on Human Relations has adopted. The Commission has unwaveringly advocated for such interpretation[38]—alas, the Florida judiciary has never entertained the Commission's view. The following two age discrimination cases—the Commission's final order in *Williams v. Sailorman, Inc.*[39] and the Florida's Fourth District Court of Appeal's decision in *City of Hollywood v. Hogan*[40]—illustrate the internal incongruity presented by the Agency's and the courts' diverging

least forty years of age."); *Hogan*, 986 So. 2d at 642 ("Age discrimination statutes protect only employment decisions which disadvantage an older worker in favor of a younger worker.").

36. *See* 29 C.F.R. § 1625.10(g) (2015) ("The ADEA does not preempt [s]tate age discrimination in employment laws."); Kunzman v. Enron Corp., 902 F. Supp. 882, 902 (N.D. Iowa 1995) ("[T]he federal act does not preempt state age discrimination laws, so that the state court looks to its own act to determine if plaintiff is a protected person."); Jeffrey Paul Fuhrman, Comment, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association?*, 3 U. PA. J. LAB. & EMP. L. 585, 600 (2001) ("This lack of preemption indicates that state law can supplement the protection afforded under the ADEA. This paves the way for influential state legislation . . . which prohibits age discrimination without targeting a specific age group. When interpreting their own laws, states have the opportunity to allow reverse age discrimination claims." (internal footnote omitted)). *See generally* Chad A. Stewart, Comment, *Young, Talented, and Fired: The New Jersey Law Against Discrimination and the Right Decision in* Bergen Commercial Bank v. Sisler, 84 MINN. L. REV. 1689, 1720 (2000) (providing a discussion regarding whether Congress intended that the ADEA preempt state anti-discrimination legislation).

37. *See* Florida Civil Rights Act of 1992, FLA. STAT. §§ 509.092, 760.01–760.11 (2016) (providing no age limitations for purposes of suing under the FCRA's anti-age-discrimination provisions); *see also* Presswood, *supra* note 23, at 39 n.4 (explaining that courts have interpreted the FCRA "as if it were the same as the federal statute except that the FCRA covers discrimination against people under [forty] years of age, which the ADEA does not.").

38. *See infra* notes 49–52 and accompanying text (affording no significance to the age of forty under the FCRA and providing examples of the Commission's decisions).

39. Williams v. Sailorman, Inc., No. 02-3995, 2003 WL 21978284, at *14 (Fla. Div. Admin. Hearings Aug. 15, 2003), *dismissing with prejudice*, Williams v. Sailorman, Inc., Order No. 04-037 (Fla. Comm'n on Human Relations June 2, 2014), http://fchr.state.fl.us/fchr/complaints__1/final_orders/final_orders_2004/fchr_order_no_04_037.

40. *Hogan*, 986 So. 2d 634.

interpretations of the Act's age-related protections.

A. *WILLIAMS V. SAILORMAN*

In *Williams*, the Florida Commission on Human Relations ruled that the FCRA protected all individuals—"birth to death"—from unlawful age discrimination.[41] In *Williams*, the petitioner, a sixteen-year-old crew member at Popeye's, a fast-food restaurant, filed a charge of discrimination against her employer, alleging an unlawful termination based on age.[42] Following a reasonable cause determination, Williams filed a petition for relief, and the matter was transferred to the Division of Administrative Hearings (DOAH) for a formal evidentiary hearing.[43] Administrative Law Judge (ALJ) T. Kent Wetherell recommended dismissal of Williams's petition,[44] and the Commission ultimately adopted his findings that no unlawful employment practice had occurred.[45]

Even though the Commission found certain aspects of ALJ Wetherell's reasoning concerning "age" as a bona fide occupational qualification[46] "troublesome,"[47] it nonetheless resoundingly reinforced his conclusion that the FCRA protects aggrieved persons of *all* ages.[48] In its written opinion, the Commission cited its long-standing practice of interpreting the FCRA as applicable to all chronological ages:

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41. Williams v. Sailorman, Inc., Order No. 04-037 (Fla. Comm'n on Human Relations June 2, 2014), http://fchr.state.fl.us/fchr/complaints__1/final_orders/final_orders_2004/fchr_order_no_04_037 [hereinafter FCHR Final Order]; *see also Williams*, 2003 WL 21978284, at *7. In the *Williams* matter, the Administrative Law Judge explained:

> [Florida court] cases rely on or refer to . . . the ADEA in which [C]ongress declared that a purpose of the ADEA was "to promote employment of older persons based on their ability rather than age." There are no similar statements of legislative intent in the Act. To the contrary, Section 760.01(2) [of the Florida Statutes] broadly states that the purpose of the Act is to protect "all individuals" from discrimination.

Id. (citations omitted).

42. *Williams*, 2003 WL 21978284, at *2–5.

43. *Id.* at *1.

44. *Id.* at *14.

45. FCHR Final Order, *supra* note 41.

46. FLA. STAT. § 760.10(8)(a) (2016) (explaining that the Florida civil rights law permits differentiating based on age if age is a bona fide occupational qualification (BFOQ)); O'Loughlin v. Pinchback, 579 So. 2d 788, 792 (Fla. Dist. Ct. App. 1991) (stating that as an affirmative defense, BFOQ is extremely narrow); *see Williams*, 2003 WL 21978284, at *6, *9–11.

47. FCHR Final Order, *supra* note 41.

48. *Id.* ("We specifically adopt the Administrative Law Judge's conclusion that the Florida Civil Rights Act of 1992 'protects "all individuals," including minors, from age discrimination,' and we note that this includes protection from discrimination against younger individuals in favor of older individuals." (internal citation omitted)).

> Commission panels have long concluded that the Florida Civil Rights Act of 1992 and its predecessor law the Human Rights Act of 1977, as amended, prohibited age discrimination in employment on the basis of any age "birth to death."[[49]] A Commission panel has indicated that one of the elements in determining a prima facie case of age discrimination is that [p]etitioner is treated differently than similarly situated individuals of a "different" age, as opposed to a "younger" age.[[50]] The Commission has concluded that, unlike the federal Age Discrimination in Employment Act (ADEA), *the age [forty] has no significance in the interpretation of the Florida Civil Rights Act of 1992*.[51]

Indeed, over the years, the Commission stood unmoved in its interpretation of the FCRA as affording no particular weight or significance to the age of forty.[52] Just as unmoved, Florida courts have analyzed age discrimination claims brought under the FCRA through the prism of the ADEA, thereby only considering individuals over forty as those protected under the Act.

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49. *Id.* (citing Green v. ATC/VANCOM Management, Inc., 20 Fla. Admin. L. Report 314 (Fla. Comm'n on Human Relations 1997); Simms v. Niagara Lockport Industries, Inc., 8 Fla. Admin. L. Report 3588 (Fla. Comm'n on Human Relations 1986)).

50. *Id.* (citing Musgrove v. Gator Human Services, c/o Tiger Success Center, 22 Fla. Admin. L. Report 355, 356 (Fla. Comm'n on Human Relations 1999)); *see, e.g.*, Qualander v. Avante at Mt. Dora, Order No. 13-016, 2013 WL 782290, at *1 (Fla. Div. Admin. Hearings Feb. 26, 2013); Lombardi v. Dade Cty. Circuit Court, Order No. 10-013, at *2 (Fla. Comm'n on Human Relations Feb. 16, 2010), http://fchr.state.fl.us/fchr/complaints__1/final_orders/final_orders_2010/fchr_order_no_10_013; Johnson v. Tree of Life, Inc., Order No 05-087 (Fla. Comm'n on Human Relations July 12, 2005), http://fchr.state.fl.us/fchr/complaints__1/final_orders/final_orders_2005/fchr_order_no_05_087.

51. FCHR Final Order, *supra* note 41 (emphasis added); *see also* Chun v. Dillard's, No. 14-029, 2014 WL 4415428, at *2 (Fla. Div. Admin. Hearings Aug. 21, 2014) ("[W]e *yet again* note that the age '[forty]' has *no significance* in the interpretation of the [FCRA] of 1992." (emphasis added)).

52. Recommended Order at 13–14 n.2, Smith v. Wal-Mart Stores, No. 15-3942 (Fla. Div. Admin. Hearings Mar. 25, 2016), https://www.doah.state.fl.us/ROS/2015/15003942.pdf. As a matter of fact, as this Article's draft is in its final stages, the Florida Division of Administrative Hearings (DOAH), sitting in Tallahassee, Florida, issued the most recent Recommended Order that reiterated the Commission's long-standing practice of the FCRA's anti-age-discrimination provisions' uniform application. *Id.* Once again, Administrative Law Judge James H. Peterson, III emphasized the Commission's—rather than the courts'—interpretation of the Act: "As this Recommended Order will be subject to the Commission's Final Order authority, rather than relying on [the caselaw], the undersigned has applied the elements for age discrimination as described by the Commission." *Id.*

B. *CITY OF HOLLYWOOD V. HOGAN* [53]

Hogan is the Florida's Fourth District Court of Appeal's decision that illustrates Florida courts' position on age discrimination under the FCRA. In *Hogan*, police sergeants Michael Springstun and Frances Hogan perceived having been "passed over for promotion to lieutenant[s] in favor of younger officers."[54] Having exhausted their administrative remedies, the plaintiffs filed a lawsuit.[55] The jury found for the plaintiffs both on their claims of unlawful age discrimination and retaliation, and the defendant city appealed.[56]

Pertinent to this Article is the Fourth District's discussion of the analytical framework in age discrimination cases brought under the FCRA. The court explained:

> The Florida Civil Rights Act of 1992 (FCRA) prohibits age discrimination in the workplace. It follows federal law, which prohibits age discrimination through the Age Discrimination in Employment Act (ADEA). Federal case law interpreting Title VII and the ADEA applies to cases arising under the FCRA.
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> . . . .
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> The Supreme Court established the order and allocation of proof in a case alleging discrimination in *McDonnell Douglas Corp. v. Green[*[57]], which involved racial discrimination. However, this same analytical method has been applied in age discrimination cases. The plaintiff must first make a prima facie showing of discriminatory treatment. He or she does that by proving: 1) the plaintiff is a member of a protected class, i.e., *at least forty years of age* . . . .
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> . . . .
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> Age discrimination statutes protect only employment decisions which disadvantage an older worker in favor of a younger worker. To prove a prima facie case the *McDonnell Douglas* framework requires that the plaintiff prove that a younger person was hired or promoted in lieu of the older worker.[58]

Hogan is often cited for the proposition that the courts read the FCRA to mimic the ADEA in that only an individual over the age of forty, who has

53. City of Hollywood v. Hogan, 986 So. 2d 634 (Fla. Dist. Ct. App. 2008).
54. *Id.* at 638; *id.* at 639. The plaintiffs were fifty-one and fifty years old, respectively. *Id.* at 639.
55. *Id.* at 640.
56. *Id.*
57. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
58. *Hogan*, 986 So. 2d at 641–42 (emphasis added) (citations omitted).

been disadvantaged in favor of a younger worker, may succeed in proving his or her prima facie case of age discrimination under the *McDonnell-Douglas* burden-shifting model.

The contrast between the Agency's and the Fourth District's holdings illuminates the problem. If on the one hand, Florida courts apply the ADEA to decide age discrimination claims,[59] but on the other, the Commission's final orders faithfully buttress the Act's application to aggrieved persons of all ages—how does one reconcile the disconnect? More importantly, why is there a "disconnect" in the first place? The Author posits that Florida courts unjustifiably *created* the "disconnect" by the faulty interpretation of the FCRA's language, coupled with their blunt dismissal of the statute's legislative history. Before getting to the meat of this argument, this Article will review the FCHR's role in enforcement of Florida's anti-discrimination statute, as well as the remedies the FCRA provides to an aggrieved person.

59. *See, e.g.*, Ashkenazi v. S. Broward Hosp. Dist., 607 F. App'x 958, 960–61 (11th Cir. 2015) (applying Florida law and stating, because the "[f]ederal case law interpreting . . . the ADEA applies to cases arising under the FCRA[,] [the plaintiff's] discrimination claims under the FCRA—rise or fall with the ADEA claims." (internal quotation marks and citation omitted)); Diaz v. AIG Mktg., Inc., 396 F. App'x 664, 666 (11th Cir. 2010) (applying Florida law and stating, "both state and federal courts have held that '[f]ederal case law interpreting . . . the ADEA applies to cases arising under the Florida Act.'" (quoting *Hogan*, 986 So. 2d at 641)); Lee v. Emerald Pointe Condo. Ass'n, Inc., No. 2:12-cv-685-FtM-38DNF, 2014 WL 2441839, at *3 (M.D. Fla. May 30, 2014) (applying Florida law and stating, "[t]he FCRA prohibits age discrimination in the work place and follows federal law, which prohibits age discrimination through the ADEA."); Bray v. Paetec Commc'ns, Inc., No. 2:12-cv-282-FtM-38UAM, 2014 WL 279652, at *1 (M.D. Fla. Jan. 24, 2014) (commenting that the ADEA and FCRA claims are governed by the same standard of proof); Carlson v. WPLG/TV-10, Post-Newsweek Stations of Fla., 956 F. Supp. 994, 1005 (S.D. Fla. 1996) ("Both federal and state law hold that a prima facie case can be established under the Florida Civil Rights Act of 1992 . . . in the same manner as under the ADEA."); Trumbull v. Health Care and Ret. Corp. of Am., 756 F. Supp. 532, 536 (M.D. Fla. 1991) (applying Florida law and explaining that a prima facie case under the FCRA may be established in the same way as under the ADEA), *aff'd*, Trumbull v. Health Care, 949 F.2d 1162 (11th Cir. 1991); Morrow v. Duval Cty Sch. Bd., 514 So. 2d 1086, 1087–88 (Fla. 1987) ("Florida's legislation is similar to the federal Age Discrimination in Employment Act of 1967 . . . . The policy behind Florida's statute is similar to the policy behind the federal legislation, 'to promote employment of older persons based on their ability rather than age' and to 'prohibit arbitrary age discrimination in employment.'" (quoting 29 U.S.C. § 621(b) (2015))); Fla. Dep't of Cmty. Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. Dist. Ct. App. 1991) ("Because [Florida's Human Rights Act of 1977, which is a predecessor of the FCRA,] is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, federal case law dealing with Title VII is applicable.").

III. REMEDIES UNDER THE ACT

The Florida Commission on Human Relations was established by section 760.03, Florida Statutes.[60] The Agency's mission is to "promote and encourage fair treatment and equal opportunity for *all persons regardless of . . . age*" and strive to eliminate discrimination and antagonism among heterogeneous groups of individuals.[61] According to the statutory grant of powers, the Commission has the authority "to adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of the Florida Civil Rights Act of 1992 and govern the proceedings of the [C]ommission."[62]

The Commission enforces the FCRA through section 760.11, Florida Statutes, which authorizes any person aggrieved of unlawful employment practices to file with the FCHR a complaint within 365 days of the alleged violation.[63] After a complaint is filed, the Commission has 180 days to investigate the allegations and determine whether a reasonable cause exists to believe the alleged discriminatory practices have in fact occurred.[64] If the Commission finds no support for the allegations in the charge of discrimination, it dismisses the petitioner's complaint.[65] On the other hand, if reasonable cause exists to believe a violation of the FCRA has occurred, the Commission issues a reasonable cause determination.[66] Armed with such a determination, the petitioner has two options to choose from: (1) to bring a civil suit against the named respondent in the complaint in a court of law,[67] or (2) to request a formal administrative hearing.[68]

So far so good: on the face of section 760.11(4), Florida Statutes, the Florida Legislature provides a potential victim of discriminatory employment practices with some options. If the petitioner elects the

60. FLA. STAT. § 760.03 (2016); Florida Comm'n on Human Relations v. Parrish Mgmt., Inc., 682 So. 2d 159, 159 (Fla. Dist. Ct. App. 1996).

61. FLA. STAT. § 760.05 (2016) (emphasis added).

62. FLA. STAT. § 760.06(12) (2016).

63. FLA. STAT. § 760.11(1) (2016).

64. FLA. STAT. § 760.11(3) (2016).

65. FLA. STAT. § 760.11(7) (2016). *See generally* Curtin, *supra* note 24, at 524–25 (providing an overview of the FCHR administrative process). To nevertheless preserve the right to file suit, the aggrieved party must appeal the no-reasonable-cause determination within the FCRA administrative framework, prevail, and then forego any benefits awarded at the administrative level. § 760.11(7) (incorporating sections 120.569 and 120.57 of the Florida Statutes).

66. § 760.11(3).

67. FLA. STAT. § 760.11(4)(a) (2016).

68. FLA. STAT. § 760.11(4)(b) (2016).

administrative route, the case goes either before a commissioner or an administrative law judge.[69] If either decision-maker determines section 760.10, Florida Statutes, has been violated, he or she may prohibit the unlawful employer practices and grant appropriate relief.[70] Should the petitioner elect the civil action route, on the other hand, he or she may quickly hit a dead end: the remedy provided by the Florida Legislature will not survive a motion to dismiss in court.

That outcome is forthcoming for a plaintiff who has not reached the ADEA-protected age of forty at the time the alleged discrimination took place. In Florida courts, to state a claim for age discrimination under the FCRA, construed in accordance with the ADEA, the plaintiff will need to prove the following four elements of his prima facie case: "(1) that he [is] a member of a protected class, i.e., *at least forty years of age*; (2) he [is] qualified for the position[] sought; (3) he [is] rejected for the position; and (4) the position [is] filled by a worker who [is] substantially younger than the plaintiff."[71] It is evident that the plaintiff's prima facie case will crumble immediately on the first element. Therefore, even assuming a lawsuit for age discrimination under the FCRA on behalf of such a plaintiff is not outright frivolous,[72] it will certainly not survive the employer's motion to dismiss. If the plaintiff cannot even clear a motion to dismiss for a failure to state a claim under Florida Rule of Civil Procedure 1.140(b)(6), or its federal counterpart, Rule 12(b)(6), the remedy for unlawful employment practices under section 760.11(4)(a), Florida Statutes,

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69. FLA. STAT. § 760.11(6) (2016) (incorporating sections 120.569 and 120.57 of the Florida Statutes).

70. *Id.* If the commissioner concludes a prohibited employment act has occurred, he or she can enjoin the unlawful practice and issue appropriate affirmative relief. *Id.* Similarly, an Administrative Law Judge who finds a violation of the Act, will issue a recommended order, prohibiting the unlawful practice and providing affirmative relief, to be adopted, modified, or rejected by the Commission. *Id.*

71. Miami-Dade Cty. v. Eghbal, 54 So. 3d 525, 526 (Fla. Dist. Ct. App. 2011) (per curiam).

72. *See* FLA. STAT. § 57.105(1)(b) (2016) (providing a penalty against attorneys who bring frivolous claims that were unsupported by then-existing law). Section 57.105(1)(b) of the Florida Statutes reads,

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee . . . [where] the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> . . . .
>
> (b) [w]ould not be supported by the application of *then-existing law* to those material facts.

Id. (emphasis added).

evaporates and eviscerates the Florida Legislature's promise that the Commission will "promote and encourage fair treatment and equal opportunity for *all persons regardless of . . . age*."

The Florida Legislature surely did not anticipate such an outcome. The following Part demonstrates that the Florida courts' approach to interpretation of the Florida anti-age-discrimination law has been misguided. Plainly, Part IV explains that the express statutory language, the legislative intent, and the policy behind the Act—all support the application of the FCRA's age-neutral protections to all Floridians regardless of their chronological age.

IV. STATUTORY INTERPRETATION

In Florida, legislative intent—the metaphorical "pole star"—guides construction of statutes.[73] The intent is primarily determined from the language of the statute itself.[74] In statutory interpretation, the courts give the first consideration to the statute's plain language[75]: where the language is unambiguous and conveys a clearly ascertainable meaning, resorting to the rules of statutory interpretation is unnecessary.[76] Under such circumstances, "the statute must be given its plain and obvious meaning."[77]

On its face, section 760.01(2), Florida Statutes, is unambiguously age-neutral; it reads:

> 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 . . . age . . . 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

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73. St. Petersburg Bank & Trust Co. v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982); *see also* State v. Sullivan, 116 So. 255, 261 (Fla. 1928) (en banc) ("In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect . . . . [N]o literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or to a purpose not designed by the lawmakers.").

74. *St. Petersburg Bank & Trust Co.*, 414 So. 2d at 1073.

75. *Id.*; Ellsworth v. State, 89 So. 3d 1076, 1078 (Fla. Dist. Ct. App. 2012) ("When analyzing a statute, courts look to legislative intent and to determine such intent, the language and plain meaning of the statute must be examined first.").

76. *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (citations omitted).

77. *Id.* (internal quotation marks omitted) (quoting A. R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (1931)); *see also State v. Egan,* 287 So. 2d 1, 4 (Fla. 1973) ("Where the legislative intent as evidenced by a statute is *plain and unambiguous,* then there is no necessity for any construction or interpretation of the statute, and the courts need only *give effect to the plain meaning of its terms.*").

> promote the interests, rights, and privileges of individuals within the state.[78]

The language referring to "age" as one of the protected characteristics is not in any way limiting.[79] Section 760.02, Florida Statutes, the Act's definitional section, likewise omits any qualifications on "age,"[80] thereby leaving this conclusion unaffected. Nor does section 760.02, Florida Statutes, define "person" to exclude minors.[81] No other provision of the Act expressly places any restrictions on age-related protections in employment. In the absence of any qualifying language, the "plain and obvious meaning" of the FCRA is to afford protections to individuals of all

78. FLA. STAT. § 760.01(2) (2016).

79. *Compare id.*, *with, e.g.*, 29 U.S.C. § 631(a) (2015) ("The prohibitions in this chapter shall be limited to individuals who are at least [forty] years of age."), *and* ALA. CODE § 25-1-21 (2016) ("No employer . . . shall discriminate in employment against a worker [forty] years of age and over . . . ."), *and* GA. CODE ANN. § 34-1-2 (2016) (protecting "any individual between the ages of [forty] and [seventy] years."), *and* IND. CODE § 22-9-2-2 (2016) (protecting "any person . . . [who] has attained the age of forty (40) years and has not attained the age of seventy-five (75) years."), *and* KY. REV. STAT. § 344.040(1)(a) (2016) ("It is an unlawful practice for an employer . . . [t]o fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual . . . because of the individual's . . . age forty (40) and over . . . ."), *and* TEX. CODE ANN. § 21.101 (2015) (directing that the anti-discrimination provisions referring to age discrimination "apply only to discrimination against an individual [forty] years of age or older.").

80. *Compare* FLA. STAT. § 760.02 (2016) (failing to define the term "age"), *with, e.g.*, 775 ILL. COMP. STAT. ANN. § 5/1-103(A) (LexisNexis 2016) (defining "age" as "the chronological age of a person who is at least forty years old."), *and* N.D. CENT. CODE § 14-02.4-02(1) (2016) ("'Age' insofar as it refers to any prohibited unfair employment or other practice means at least forty years of age."), *and* OHIO REV. CODE ANN. § 4112.01(A)(14) (LexisNexis 2016) ("'[A]ge' means at least forty years old."), *and* S.C. CODE § 1-13-30(c) (2016) ("'Age' means at least forty years."). *See generally* Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 204–05 (Fla. 2003); *Age*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A period of time; esp., a period of individual existence or the duration of a person's life."). Where a statute leaves a term undefined, courts must resort to the words' plain and ordinary meaning, "'unless words are defined in the statute or by the clear intent of the legislature.'" *Nehme*, 863 So. 2d at 204–05 (Fla. 2003) (quoting Green v. State, 604 So. 2d 471, 473 (Fla. 1992)). "'[T]he plain and ordinary meaning of words can be ascertained by reference to a dictionary.'" *Id.* at 205 (quoting Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001)). The Black's Law Dictionary defines "age" as duration of life. BLACK'S LAW DICTIONARY, *supra*.

81. *Compare* FLA. STAT. § 760.02 (including minors in the definition of "person" by not expressly excluding them), *with, e.g.*, IOWA CODE § 216.6(3) (2016) ("This section shall not prohibit discrimination on the basis of age if the person subject to the discrimination is under the age of eighteen years, unless that person is considered by law to be an adult."), *and* N.Y. EXEC. LAW § 296(3-a)(a) (McKinney 2016) ("It shall be an unlawful discriminatory practice . . . [f]or an employer or licensing agency to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age."), *and* VT. STAT. ANN. tit. 21, § 495(c) (West 2016) ("The provisions of this section prohibiting discrimination on the basis of age shall apply for the benefit of persons [eighteen] years of age or older.").

ages. Florida courts' finding to the contrary is misleading[82] and an impermissible act of "legislating from the bench."[83]

Assuming, for argument's sake, that section 760.01, Florida Statutes, is ambiguous,[84] statutory interpretation and inquiry into the legislative intent are required.[85] Two long-standing canons of statutory interpretation guide this inquiry.[86] The first canon "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 federal courts to the extent the construction is harmonious with the spirit of the Florida legislation."[87] The second canon calls upon the courts to "presume the legislature was aware of the effect that the first canon had on the interpretation of the FCRA, which was modeled after [the federal law]."[88] The next two Sections under Part IV of this Article will demonstrate that Florida courts' reading of the FCRA fails to fulfill the legislative intent—the metaphorical "pole star" that must guide the courts' inquiry—under both canons.

82. *See* FLA. STAT. § 760.10 (2016) (implying that there are no restrictions on how old someone must be to receive protections under the Act because no restrictions are listed in the plain text referring to age); *see also* FCHR Final Order, *supra* note 41. To limit application of the FCRA's anti-age-discrimination provisions is misleading, because it will not be immediately obvious to a thirty-nine-year-old lay person who walks into a public library, picks up a book of the Florida Statutes, and reads section 760.10 of the Florida Statutes, that he or she is not protected against age discrimination under Florida law. *See* § 760.10. On March 24, 2016, in Gulfport, Florida, the author of this Article had the opportunity to meet with Jim Mallue—Senior Attorney for the FCHR and Legal Advisor for the Commission Panel in *Williams v. Sailorman*, *see* FCHR Final Order, *supra* note 41—to get his perspective on whether a fair reading of section 760.10 of the Florida Statutes suggests the FCRA is age-neutral. In explaining his position on this issue to the author, Mr. Mallue used the example above to illustrate that a lay person who reads section 760.10 of the Florida Statutes would reasonably think he or she is protected against age discrimination in Florida.

83. Curtin, *supra* note 24, at 526–27 (citing Temple v. Aujla, 681 So. 2d 1198, 1199 (Fla. Dist. Ct. App. 1996)).

84. *See* Nicarry v. Eslinger, 990 So. 2d 661, 664 (Fla. Dist. Ct. App. 2008) ("A statute is 'ambiguous' when its language is subject to more than one reasonable interpretation and may permit more than one outcome.").

85. *See, e.g.*, Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003) (stating that if the statutory language is unclear, courts will apply the rules of statutory construction and examine legislative history to discern legislative intent).

86. Winn-Dixie Stores, Inc. v. Reddick, 954 So. 2d 723, 728 (Fla. Dist. Ct. App. 2007).

87. *Id.* (internal quotation marks omitted) (quoting O'Loughlin v. Pinchback, 579 So. 2d 788, 791 (Fla. Dist. Ct. App. 1991)).

88. *Id.* (citing Seagrave v. State, 802 So. 2d 281, 290 (Fla. 2001) ("Florida's well-settled rule of statutory construction [is] that the legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.'")).

A. "HARMONIOUS WITH THE SPIRIT OF THE FLORIDA LEGISLATION"?

Efforts to pinpoint the exact moment of time the judiciary conceived the ultimate interpretative "disconnect" lead to the conclusion that Florida courts never scrupulously examined the legislative intent behind the Human Rights Act of 1977's addition of "age" as a protected category. Rather, the application of the ADEA to the then-Human Rights Act was hastily linked to its predecessor, the Florida Age Discrimination in Employment Act (FL-ADEA),[89] and grounded in the three statutes' "similarity." In *Morrow v. Duval County School Board*,[90] the Florida Supreme Court discussed that, for all intents and purposes, chapter 760, Florida Statutes, is sufficiently "similar" to the Federal ADEA:

> Section 760.10, Florida Statutes (1985), is part of the Human Rights Act of 1977. . . . One year prior to enacting the Human Rights Act, the Florida Legislature enacted the Florida Age Discrimination in Employment Act, prohibiting age discrimination by public employers. . . . The Human Rights Act prohibits discrimination by both public and private employers. *Florida's legislation is similar to the federal Age Discrimination in Employment Act of 1967*, which prohibits employers from discriminating on the basis of age. The policy behind Florida's statute is similar to the policy behind the federal legislation, "to promote employment of older persons based on their ability rather than age" and to "prohibit arbitrary age discrimination in employment."[91]

Even assuming that FL-ADEA mirrored the Federal ADEA in its setting of the lower age ceiling on public-sector employees (despite some commentators' beliefs to the contrary[92]), the *Morrow* court perfunctorily analogized the Human Rights Act to the ADEA. Contrary to *Morrow*, the legislative record unequivocally establishes that the Florida Legislature

89. *See* FLA. STAT. §§ 112.044–112.051 (Supp. 1976); *see also* § 112.044(1) (Supp. 1976) ("It is the purpose of this act to promote employment of older persons based on ability rather than age . . . .").

90. Morrow v. Duval Cty. Sch Bd., 514 So. 2d 1086 (Fla. 1987). In *Morrow*, a seventy-year-old plaintiff asserted a claim of age discrimination against the school board under the Human Rights Act of 1977, alleging the board discriminatorily refused to reemploy him on an annual contract basis. *Id.* at 1086.

91. *Id.* at 1087–88 (emphasis added) (quoting 29 U.S.C. § 621(b)).

92. *See, e.g.*, Wayne J. Birschbach, *Florida Age Discrimination in Employment Act—A Cautious First Step*, 51 FLA. B.J., 445, 445 (1997) (discussing the "discernible trend" of states in adopting anti-discrimination legislation in the wake of the Congress' passage of the ADEA, and noting that the FL-ADEA "place[d] no age limitation on the persons protected, unlike [the] ADEA.").

intended to all-inclusively protect individuals of all ages against unlawful discrimination in employment.

Although the FCRA is modeled after the federal Title VII law,[93] there are at least four arguments against the statute's construction in the image of the federal law. First, such construction is not "harmonious with the spirit of the Florida legislation" because the legislative history for the 1977 Senate Bill 1165, by which "age" was added to the class of protected characteristics, does not express the legislative intent that the FCRA follow the ADEA with respect to "age discrimination."[94] To the contrary, the 1977 Senate Bill 1165 expresses a diametrically *polar* intent.[95] Second, the Florida Legislature did not intend to exclude younger individuals from its all-inclusive statutory scheme and intended that all aggrieved persons have equal access to both the judicial and the administrative enforcement mechanisms under the Act.[96] Third, such construction is inconsistent with the "manifest purpose" of the FCRA to provide Floridians with the maximum protection against unlawful discrimination in employment.[97] Finally, although the Florida Legislature *knows how* to express its intent that the construction of a statutory provision follow the federal law, such express intent is not found in the FCRA with respect to age discrimination, and can be presumed to have intentionally been omitted.[98] This Article will take these arguments one at a time.

1. Senate Bill 1165's Legislative Record: The Legislative "Pole Star"

With Senate Bill 1165, sponsored by Florida Senator Jack D. Gordon during the 1977 legislative session, the Florida Legislature expanded

93. *See, e.g.*, Fla. Dep't of Cmty. Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. Dist. App. 1991) (citations omitted).

94. SB 1165, HUMAN RIGHTS ACT OF 1977, S., 1977 Leg., Reg. Sess., at 3–4 (Fla. 1977) (on file with the State Archives of Florida, Series 83, Governor Reubin O'Donovan Askew Bill Files, 1971–1978, Box 21, SB569–SB1231; and the *St. Thomas Law Review*) [hereinafter SB 1165, HUMAN RIGHTS ACT OF 1977].

95. *See* discussion *infra* Part IV, Section A, Subsection 1 (explaining that the legislative record contains express declaration of the legislative intent that the protections of the amended civil rights statute apply uniformly to all age categories).

96. *See* discussion *infra* Part IV, Section A, Subsection 2 (explaining that the legislature provided all individuals with two avenues to choose from in pursuing a claim of discrimination and did not intend to exclude younger Floridians from the FCRA's all-inclusive statutory framework).

97. *See* discussion *infra* Part IV, Section A, Subsection 3 (describing the "manifest purpose" supporting the Act).

98. *See* discussion *infra* Part IV, Section A, Subsection 4 (comparing the Act's anti-age discrimination provisions with the provisions on attorney's fees).

coverage of the then-Human Rights Act of 1977 to include "freedom from discrimination because of age";[99] extended to the Commission the authority to promote equal opportunity in employment "*regardless* of . . . age"[100] and without reliance on the federal Equal Employment Opportunity Commission;[101] and augmented the definition of unlawful employment practices to include age discrimination.[102] While significantly expanding the statute, the legislative record captured no legislative intent to limit its "age discrimination" provisions' application to individuals over forty alone. *To the contrary*, the legislative record contains express declaration that the protections of the amended civil rights statute apply uniformly to all ages: "The Age Discrimination in Employment Act of 1967 covers substantially the same employers as Title VII, only in regard to age discrimination. *The [federal] act however limits the protection to those between the ages of [forty] and [sixty-five].*[[103]] *The Human Rights Bill has no such*

99. ECON., CMTY. & CONSUMER AFFAIRS COMM., STAFF ANALYSIS AND ECONOMIC STATEMENT, S., 1977 Leg., Reg. Sess., pt. I, at 1 (Fla. May 5, 1977) [hereinafter 1977 STAFF ANALYSIS AND ECONOMIC STATEMENT, ECON., CMTY. & CONSUMER AFFAIRS COMM.].

100. *Id.* (emphasis added).

101. *Id.* pt. II(A)–(B), at 2 ("[I]n 1976, the [C]ommission was receiving, investigating, and conciliating discrimination complaints, but had no authority to take further action. If voluntary compliance with the [C]omission's recommendations could not be obtained, the [C]omission would refer the complaint to the EEOC [for enforcement,]" which had a backlog of thousands of cases in 1977); COMMERCE COMM., STAFF ANALYSIS AND ECONOMIC STATEMENT, S., 1977 Leg., Reg. Sess., pt. II(A)–(B), at 1 (Fla. May 10, 1977) [hereinafter 1977 STAFF ANALYSIS AND ECONOMIC STATEMENT, COMMERCE COMM.]; SB 1165, HUMAN RIGHTS ACT OF 1977, *supra* note 94, at 1. The passage of Senate Bill 1165 effectively authorized Florida to handle discrimination matters on its own, *see* 1977 STAFF ANALYSIS AND ECONOMIC STATEMENT, ECON., CMTY. & CONSUMER AFFAIRS COMM., *supra* note 99, pt. II(A)–(B), at 2; 1977 STAFF ANALYSIS AND ECONOMIC STATEMENT, COMMERCE COMM., *supra* pt. II(A)–(B), at 1, thus promoting "a more speedy amelioration of citizen complaints," so that Floridians no longer have to "rely on an increasingly unwieldy federal system for redress of these grievances." SB 1165, HUMAN RIGHTS ACT OF 1977, *supra* note 94, at 1.

102. *See* 1977 STAFF ANALYSIS AND ECONOMIC STATEMENT, ECON., CMTY. & CONSUMER AFFAIRS COMM., *supra* note 99, pt. I, at 1–2; *see also id.* pt. I, at 3 (listing bona fide qualifications). The legislature noted an employer's actions did not constitute unlawful employment practices if they were based on "[b]ona fide occupational qualifications; . . . [b]ona fide seniority system; . . . [or] [l]aws designed to benefit persons of a particular age group." 1977 STAFF ANALYSIS AND ECONOMIC STATEMENT, ECON., CMTY. & CONSUMER AFFAIRS COMM., *supra* note 99, pt. I, at 1–2.

103. *See* Lacy, *supra* note 11, at 368 (discussing that as originally enacted, the ADEA protected only individuals between the ages of forty and sixty-five (citing the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, 607 (1967))). In 1978, the ADEA was amended to extend protections to individuals up to seventy years old because of the concern that employers were more likely to force mandatory retirement after individuals reached the age of sixty-five. *Id.* at 368–69 (citing the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978)). Congress finally removed the upper age limit in 1986. *Id.* at 369 (citing Age Discrimination in Employment Amendments of 1986, Pub. L. No.

qualification."[104] If this language is not the beaming, blinding legislative "pole star"—what *is*?

2. The Legislature Could Not Have Intended to Exclude a Thirty-Nine Year Old from Chapter 760's All-Inclusive Statutory Framework

The key language quoted in the previous Subsection of this Article unmistakably communicates that age discrimination claims under the FCRA are not reserved to the ADEA-protected class, thereby making any contrary conclusion conflict with the "spirit" of the Florida legislation. However, there is other indirect support to the same end. For starters, the Florida Legislature intended section 760.11(4), Florida Statutes, to provide any aggrieved party, regardless of age, with *both* administrative *and* judicial remedies to choose *from*—*not* one to the absolute exclusion of the other—in deciding the ultimate forum.[105] This matters because to interpret section 760.11(4), Florida Statutes, as providing only the option of an administrative hearing to younger Floridians (which is the result of construing the law under the ADEA) excludes them from the all-inclusive statutory scheme. The Florida Legislature could not have intended that result.

Recall that section 760.11(4), Florida Statutes, provides two avenues to pursue a claim of age discrimination.[106] Section 760.11(4)(a) allows an "aggrieved person" (whom the statute, notably, defines even to include "children"[107]), armed with a right-to-sue letter, to file a lawsuit against the

99-592, 100 Stat. 3342 (1986)).

104. SB 1165, HUMAN RIGHTS ACT OF 1977, *supra* note 94, at 3–4 (emphasis added).

105. *See* FLA. STAT. § 760.11(4) (2016) ("The election by the aggrieved person of filing a civil action or requesting an administrative hearing under [section 760.11(4)] is the exclusive procedure available to the aggrieved person pursuant to this act."). Notably, section 760.11(4) does not state that an aggrieved party can take *both* the judicial *and* administrative avenues to resolve his or her claim of discrimination. *Id.* Rather, section 760.11(4) posits an aggrieved party *has both* avenues to choose *from* in deciding where to ultimately bring his or her claim. *Id.*

106. *See id.* (supporting the contention that, in the absence of any qualifying language, the legislature intended that either of the two routes, a civil or an administrative forum, be equally available to the aggrieved party); H.R. COMM. ON JUDICIARY, FINAL BILL ANALYSIS AND ECONOMIC IMPACT STATEMENT, H.R. 92-177, 1992 Leg., Reg. Sess., at 1 (Fla. Apr. 13, 1992) [hereinafter 1992 FINAL BILL ANALYSIS AND ECONOMIC STATEMENT] ("The bill . . . permits aggrieved persons the opportunity to proceed with their claims through *either* a civil *or* an administrative forum." (emphasis added)). Notably, the bill placed no limitations on a *younger* "aggrieved person's" ability to pursue the judicial avenue. *See id.*

107. FLA. STAT. § 1.01(3) (2016) ("The word 'person' includes individuals, *children*, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." (emphasis added)).

defendant in court,[108] while section 760.11(4)(b) authorizes him or her to request a formal administrative hearing.[109] The language of the statute joins the two avenues—section 760.11(4)(a)'s judicial avenue and section 760.11(4)(b)'s administrative avenue—with the conjunction "or": "[T]he aggrieved person may either: (a) [b]ring a civil action against the person named in the complaint in any court of competent jurisdiction; *or* (b) [r]equest an administrative hearing."[110]

Now, imagine that instead of in the alternative, the two options offered to an aggrieved person are read in the aggregate. Intuitively, this proposition seems illogical—commonly, the use of "or" signals *alternatives* (i.e., either one or the other, *but not both*).[111] Conjunction "or" can nonetheless be equivalent to conjunction "and" where used in the copulative, and not in the disjunctive sense.[112] Florida courts have especially been inclined to liken "or" to "and" when reading the two (or more) parts disjunctively would undermine the statute's overarching purpose and conflict with the legislative intent.[113] The Florida Supreme Court explained:

> In ascertaining the meaning and effect to be given in construing a statute *the intent of the legislature is the determining factor*. Although in its elementary sense the word 'or' is a disjunctive participle that marks an alternative generally corresponding to 'either' as '*either this or that*'; a connective that marks an alternative. There are, of course, familiar instances in which the conjunctive 'or' is held equivalent to the copulative conjunction 'and,' and such meaning is often given . . . to effectuate . . . the legislative intent in enacting a statute when it is clear that the word 'or' is used in the copulative and not in a disjunctive sense. Particularly do these rules apply, *even if the results seem contrary to the rules of construction* to the strict letter of the

108. FLA. STAT. § 760.11(4)(a) (2016).

109. FLA. STAT. § 760.11(4)(b) (2016).

110. § 760.11(4)(a)–(b) (emphasis added).

111. D.M. v. State, 712 So. 2d 1204, 1204 (Fla. Dist. Ct. App. 1998) (per curiam); Suddath Van Lines, Inc. v. Fla. Dep't of Envtl. Prot., 668 So. 2d 209, 212 (Fla. Dist. Ct. App. 1996).

112. Razin v. A Milestone, LLC, 67 So. 3d 391, 400 n.3 (Fla. Dist. Ct. App. 2011).

113. *See* Pompano Horse Club, Inc. v. State, 111 So. 801, 805 (Fla. 1927) (en banc) ("In ascertaining the meaning and effect to be given the word 'or' when construing a statute, the intent of the [l]egislature is the determining factor."); *see also Razin*, 67 So. 3d at 397 n.3; *Suddath Van Lines, Inc.*, 668 So. 2d at 212. *See generally* Pinellas Cty. v. Woolley, 189 So. 2d 217, 219 (Fla. Dist. Ct. App. 1966) (citing out-of-state authority and support for the "rule of construction that the words 'or' and 'and' may be interchanged when it is required to effectuate the obvious intention of the [l]egislature and to accomplish the purpose of the statute.").

> statute, *when a construction based on the strict letter of the statute would . . . defeat the evident purpose of the legislation*.[114]

Capitalizing on this logic, this Article argues section 760.11(4)'s remedies can—and *should*—be read as envisioned by the legislative in the aggregate. Given the overarching legislative intent to deliver the aggregate of statutory protections to all aggrieved persons,[115] excluding those under forty from this all-inclusive scheme is improper. The Senate Bill 1165's legislative record strongly suggests the Florida Legislature was troubled by the lack of remedy Floridians received under the then-existing anti-discrimination laws.[116] By adding "age" as a protected category under the Human Rights Act of 1977, the Florida Legislature intended to broaden the spectrum of available remedies, thereby "securing for *all individuals* . . . freedom from discrimination."[117] In light of the Florida Legislature's focus on expanding—not abridging—the remedies, the Florida Legislature hardly intended to provide individuals under forty with only one forum to bring a claim to the absolute exclusion of the other (the result under the ADEA). It appears more in unison with the law's spirit to read "or" as an equivalent of "and" in the sense that it would treat a thirty-nine-year-old victim of unlawful discrimination the same as a forty-year-old in offering *both* section 760.11(4)(a)'s judicial *and* section 760.11(4)(b)'s administrative remedies to choose *from*, instead of de facto restraining the thirty-nine-year-old exclusively to a section 760.11(4)(b) administrative hearing.[118]

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114. Rudd v. State, 310 So. 2d 295, 298 (Fla. 1975) (emphasis added) (citations omitted) (quoting Dotty v. State, 197 So. 2d 315, 317–18 (Fla. Dist. Ct. App. 1967)).

115. *See* 1992 FINAL BILL ANALYSIS AND ECONOMIC STATEMENT, *supra* note 106, at 1 (stating that "[t]he bill . . . permits aggrieved persons the opportunity to proceed with their claims through either a civil or an administrative forum," but setting no qualifications on the age of aggrieved persons); *see also* SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, S. 92-177, 1992 Leg., Reg. Sess., at 3 (Fla. Feb. 6, 1992) [hereinafter 1992 SENATE STAFF ANALYSIS AND ECONOMIC STATEMENT] (stating that "[i]f the [Human Relations Commission] determines that there is reasonable cause, the complainant can either bring a civil action or request an administrative hearing," but again setting no qualifications on the age of complainants).

116. *See* 1977 STAFF ANALYSIS AND ECONOMIC STATEMENT, *supra* note 94, at 2 (referring specifically to the pre-existing FL-ADEA and stating, "[w]hile Florida law already proscribes certain forms of discrimination, it provides little in the way of remedy." (citing, inter alia, FLA. STAT. § 112.044 (1976))).

117. S. 1977-35-822-7, SB 01165, 1977 Leg., Reg. Sess., at 13 (Fla. 1977) (on file with the State Archives of Florida, Series 18, Box 88, File Folder SB 1165; and the *St. Thomas Law Review*) [hereinafter Senate Summary SB 1165] (emphasis added).

118. *See* FLA. STAT. § 760.11(4) (2016). As an axiomatic side-note, the legislature was limited to the use of the conjunction "or" to avoid misleading an aggrieved party that he or she can pursue *both* administrative and judicial routes, whether concurrently or consecutively, based on the use of the word "and." *See id.*

Because the Florida Legislature designed the FCRA to protect all aggrieved persons, regardless of chronological ages, this result makes sense.

3. The Statute's "Manifest Purpose": Maximal Protections

Recall that ascertaining the true purpose and meaning of the legislature is the primary goal of statutory interpretation.[119] In Florida, statutes are construed in light of the public policy[120] and the "manifest purpose to be achieved by the legislation."[121] Construing the FCRA after the ADEA would be inconsistent with the "manifest purpose" of the Act to provide Floridians the maximum quantum of protection against unlawful discrimination in employment.

The FCRA is remedial in nature and was designed to grant access to all available remedies.[122] The 1977 legislative expansion of the then-Human Rights Act's anti-discrimination provisions to include "age" as a protected category was done with the "manifest purpose" to afford maximum protection to Floridians. The legislative record contains several references to the public policy underlying the passage of the 1977 amendments. The record explains that Senate Bill 1165 was passed to "add[] to the general purposes of the act the purpose of securing for *all individuals* in this state freedom from discrimination because of age,"[123] to protect Florida citizens "from the ravages of discrimination, and [to] breathe life into [Florida's] constitutional provision to prevent deprivation of the rights of its citizens."[124] In light of this rationale, the law's "manifest

119. *See* Tyson v. Lanier, 156 So. 2d 833, 836 (Fla. 1963); *see also* Byrd v. Richardson–Greenshields Sec., Inc., 552 So. 2d 1099, 1102 (Fla. 1989) ("As the Court often has noted, our obligation is to honor the obvious legislative intent and policy behind an enactment . . . ."); State v. Egan, 287 So. 2d 1, 4 (Fla. 1973) ("[T]he purpose of all rules relating to the construction of statutes is to discover the true intention of the law.").

120. *See* Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606 (Fla. 2006) (citing White v. Pepsico, Inc., 568 So. 2d 886, 889 (Fla. 1990)).

121. Tampa–Hillsborough Cty. Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So. 2d 926, 929 (Fla. 1983) ("Statutes should be construed in light of the manifest purpose to be achieved by the legislation.").

122. *See* Curtin, *supra* note 24, at 526; *see also* Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) ("[C]hapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the [l]egislature."); Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1148 (Fla. 2000) ("In 1977, the Florida [l]egislature expanded its Civil Rights Act . . . to include age . . . [to] provide[] greater protection to Florida citizens than is provided under the federal Civil Rights Act . . . ."). As a remedial statute, the Act should be construed liberally. *See* Curtin, *supra* note 24, at 526.

123. Senate Summary SB 1165, *supra* note 117, at 13 (emphasis added).

124. SB 1165, HUMAN RIGHTS ACT OF 1977, *supra* note 94, at 5.

purpose" was not to guard a select subset of the population from unlawful age discrimination, but rather, to enhance the "freedom" from the "ravages of discrimination" for *all*. Any construction of chapter 760, Florida Statutes, which conflicts with the purpose expressly stated in the legislative record would be contrary to public policy.

4. The Legislative Know-How

Although the legislation is silent on age qualifications in chapter 760's anti-discrimination provisions, this silence speaks volumes. Under the principle of *expressio unius est exclusio alterius*,[125] "the mention of one thing implies the exclusion of another."[126] This principle is often invoked to defeat an argument that something is implied within the scope of a particular statutory provision.[127] According to this interpretive device, where elsewhere in a statute the legislature has shown it *knows* how to express its intent regarding a particular issue, the legislature's omission of similar guidance in other provisions should be presumed intentional.[128]

In the Act, the Florida Legislature unequivocally demonstrated it *knew* how to exhibit its intent. One illustration is section 760.60, Florida

125. *See* 82 C.J.S. *Statutes* § 421 (2016) ("[W]here a statute enumerates the [persons affected or] the subjects or things on which it [will govern,] and the intention of the legislature is not otherwise clear, [the maxim "*expressio unius est exclusio alterius*" dictates that] the statute . . . be construed as excluding from its effect . . . [the] subjects or things [that it did] not expressly mention[].").

126. State v. Hearns, 961 So. 2d 211, 219 (Fla. 2007) ("Under the canon of statutory construction *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.").

127. State v. Quetglas, 901 So. 2d 360, 363 (Fla. Dist. Ct. App. 2005).

128. *See, e.g.*, Kucana v. Holder, 558 U.S. 233, 249 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted) (quoting Nken v. Holder, 556 U.S. 418, 430 (2009))); Haworth v. Chapman, 152 So. 663, 666 (Fla. 1933) (en banc) (explaining that where certain words may have inadvertently been omitted from a statute, as apparent from the context, the court may supply the omitted words to express the legislative intent; however, where the omission was purposeful, the court cannot supply words); Subirats v. Fidelity Nat'l Prop., 106 So. 3d 997, 1000 (Fla. Dist. Ct. App. 2013) ("It is a familiar interpretive principle that when a legislature uses particular language in one section of a statute and omits it from another section, courts must presume the omission was intentional."); Bd. of Trs. of Fla. State Univ. v. Esposito, 991 So. 2d 924, 926 (Fla. Dist. Ct. App. 2008) ("[W]hen the legislature includes particular language in one section of a statute but not in another section of the same statute, the omitted language is presumed to have been excluded intentionally." (internal quotation marks omitted) (quoting L.K. v. Dep't of Juvenile Justice, 917 So. 2d 919, 921 (Fla. Dist. Ct. App. 2005))); Fla. Wildlife Fed'n v. Collier Cty., 819 So. 2d 200, 204 (Fla. Dist. Ct. App. 2002) (commenting that intentional legislative omissions "cannot be lightly disregarded.").

Statutes, which prohibits discriminatory practices of certain clubs with respect to membership applications.[129] In section 760.60(1), Florida Statutes, the Florida Legislature unambiguously expressed its intent to place qualifications on club applicants' age, by stating: "It is unlawful for a person to discriminate against any individual because of . . . age above the age of [twenty-one] . . . in evaluating an application for membership."[130] Another illustration is chapter 760's provisions for attorney's fees. With regard to attorney's fees for resolving age discrimination disputes brought under section 760.11(4), Florida Statutes, the statute expressly authorizes the courts to follow the federal law. In four different provisions of the Act, the statute reiterates the Florida Legislature's intent that the fees be governed by Title VII: "It is the intent of the [l]egislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action."[131] The legislative record likewise articulates the intent that the fee allocation follows the Title VII caselaw. The House of Representatives Committee on Judiciary Final Analysis of Senate Bill 1368[132] expressly states that the federal caselaw interpreting Title VII actions shall govern the attorney's fees distribution.[133]

By contrast to the attorney's fees provisions, which the Florida Legislature expressly anticipated to follow the federal law, such direct legislative guidance is missing with respect to interpretation of "age discrimination." Recall that not only did the Florida Legislature *not* instruct the courts that the FCRA's "age discrimination" provisions be interpreted in a manner consistent with federal caselaw interpreting the ADEA, it explicitly cautioned to the contrary: "The [federal] act . . . limits the protection to those between the ages of [forty] and [sixty-five]. The

129. FLA. STAT. § 760.60(1) (2016).

130. *Id.*

131. FLA. STAT. § 760.11(5) (2016) (authorizing reasonable attorney's fees for bringing a civil action under section 760.11(4) of the Florida Statutes); *see also* FLA. STAT. § 760.11(6) (2016) (authorizing reasonable attorney's fees for adjudicating a discrimination claim in the administrative forum, as permitted under section 760.11(4)(b) of the Florida Statutes); FLA. STAT. § 760.11(7) (2016) (authorizing reasonable attorney's fees relating to the appeal of the Commission's no-reasonable-cause determination); FLA. STAT. § 760.11(13) (2016) (authorizing reasonable attorney's fees relating to judicial review of the Commission's final orders).

132. 1992 FINAL BILL ANALYSIS AND ECONOMIC STATEMENT, *supra* note 106. With Senate Bill 1368, the 1992 legislature amended the FCRA to add the attorney's fees provisions. *Id.* at 4.

133. *Id.*; H.R. COMM. ON JUDICIARY, FINAL BILL ANALYSIS AND ECONOMIC IMPACT STATEMENT, H.R. 92-282, 1992 Leg., Reg. Sess., at 2 (Fla. 1992) [hereinafter 1992 FINAL BILL ANALYSIS AND ECONOMIC STATEMENT, H.R. 92-282]; *see also* 1992 Fla. Laws 1726, 1734–36 (codified as FLA. STAT. § 760.11 (1992)).

Human Rights Bill has *no such qualification*."[134] This simple, but effective comparison between the attorney's fees and "age discrimination" provisions leads to the conclusion that, because the Florida Legislature *knows* how to express its intent that a provision of the Act be analogized in its construction to the federal law, the omission of such intent elsewhere in the Act was intentional. Reaching any conclusion to the contrary would demonstrate the Florida courts' arbitrary act of "legislating from the bench."

These four arguments against the courts' application of the ADEA in confining the class of protected individuals to those over forty[135] are dispositive. Although the FCRA follows the Federal Title VII, which prohibits age discrimination through the ADEA, construction of the Act's "age discrimination" provisions under the ADEA is not "harmonious with the spirit of the Florida legislation." As a result, under the first canon of statutory interpretation, Florida courts' placement of the age limitations on the protected class is unwarranted.

B. PRESUMPTION THAT THE FLORIDA LEGISLATURE WAS AWARE OF THE EFFECT OF THE FIRST CANON

Part IV of this Article began by explaining that in the case of an ambiguous statutory provision, the courts will employ two long-standing canons to guide their inquiry into the provision's true meaning.[136] Under the first canon, the courts will afford the state law, patterned after a federal law, the same construction as in federal courts, so long as such construction does not conflict with "the spirit of the Florida legislation"; under the second canon—the courts will presume the legislature knew of the effect

134. SB 1165, HUMAN RIGHTS ACT OF 1977, *supra* note 94, at 3–4 (emphasis added).

135. *See supra* Part IV, Section A, Subsection 1 (explaining that while significantly expanding the civil rights statute, Senate Bill 1165 expressed no legislative intent to limit the "age discrimination" provisions' application to individuals over forty, and, in fact, the legislature expressed a contrary intent); Part IV, Section A, Subsection 2 (explaining that the legislature provided all individuals with two avenues to choose from in pursuing a claim of discrimination and did not intend to exclude younger Floridians from the FCRA's all-inclusive statutory framework); Part IV, Section A, Subsection 3 (arguing that construction of the FCRA under the ADEA is inconsistent with its "manifest purpose" to provide Floridians the maximum quantum of protection against the "ravages of discrimination"); Part IV, Section A, Subsection 4 (discussing how the principle *expressio unius est exclusio alterius* leads to the conclusion that because the legislature has expressed its intent that the FCRA's attorney's fees provisions follow the federal law, its omission of similar guidance regarding the ADEA's application to the FCRA's "age discrimination" provisions should be presumed intentional).

136. *See supra* Part IV.

the first canon had on the interpretation of the enacted law.[137] Notably, this presumption may be rebutted by a clear expression to the contrary.[138]

Even assuming the inquiry into construction of the FCRA's age protections can clear the first-canon threshold (which it cannot, given that such construction would controvert the Florida legislation's "spirit," as this Article maintains), the inquiry will necessarily stagger over the second. In the interpretation of the Act, Florida courts must presume that when the 1977 legislative amendments added "age" as a protected category, the Florida Legislature knew that the age discrimination in employment was prohibited through the Federal ADEA. With the knowledge of the ADEA's elements of a prima facie case in mind, the Florida Legislature could have taken one of the three routes: (1) expressly endorsed the ADEA's application; (2) remained silent on the application of the ADEA, thus impliedly adopting the pre-existing judicial construction;[139] or (3) clearly expressed its intention to deviate from construing the FCRA in the ADEA's image. The Florida Legislature elected the last route: it expressly renounced the lower age threshold. Recall the 1977 legislative record's guidance: "The [ADEA] . . . limits the protection to those between the ages of [forty] and [sixty-five]. The *Human Rights Bill has no such qualification*."[140] Because the legislation clearly expressed its intent to defeat the presumption that the then-Human Rights Act's anti-age-discrimination provisions be interpreted under the ADEA, any contrary conclusion impermissibly flouts the legislative intent.

V. OUT-OF-STATE ANALOGS: *ZANNI* AND *SISLER*

Several courts have already made the arguments this Article sets forth—i.e., that state civil rights laws can be broader than the ADEA and should recognize youth age discrimination claims. Part V of this Article

137. Winn-Dixie Stores, Inc. v. Reddick, 954 So. 2d 723, 728 (Fla. Dist. Ct. App. 2007) (per curiam).

138. *See* B.K. v. S.D.C., 122 So. 3d 980, 983 (Fla. Dist. Ct. App. 2013) (stating that if the legislature intends the statutes to be interpreted differently, it should clearly express such intent).

139. *See* Wood v. Fraser, 677 So. 2d 15, 18 (Fla. Dist. Ct. App. 1996) ("'[B]ecause the legislature has failed to make any substantive changes to the pertinent statutory language, we must assume that it has no quarrel' with the judicial construction placed on these statutes . . . ." (quoting State v. Hall, 641 So. 2d 403, 405 (Fla. 1994))); *see also* White v. Johnson, 59 So. 2d 532, 533 (Fla. 1952) (en banc) (concluding that legislative inaction can be taken as an indication of a legislature's acceptance of a prior construction of a statute).

140. SB 1165, HUMAN RIGHTS ACT OF 1977, *supra* note 94, at 3–4 (emphasis added); *see also supra* Part IV, Section A, Subsection 1 (discussing the legislative record's express declaration that the protections of the Florida's civil rights statute apply uniformly to all age categories).

will discuss two such cases. The Michigan Court of Appeals, in *Zanni v. Medaphis Physician Services Corp.*,[141] and the New Jersey Supreme Court, in *Bergen Commercial Bank v. Sisler*,[142] held, with negligible differences, that the concept of "age," as it is found in the states' respective anti-discrimination statutes, extends protections to individuals of all chronological ages. Florida can use these two cases as guidance, build upon their well-reasoned rationales, and abandon the flawed thought process it has employed in treating Floridians' age discrimination claims for nearly four decades.

A. *ZANNI V. MEDAPHIS PHYSICIAN SERVICES CORP.*

Zanni v. Medaphis Physician Services Corp. involved a thirty-something-year-old plaintiff, who sued her former employer for age discrimination in violation of Michigan's Elliott-Larsen Civil Rights Act (E-LCRA).[143] The plaintiff was hired by Medaphis Physician Services Corporation (Medaphis) in 1985.[144] Medaphis discharged the plaintiff after eleven years of service, citing two lost client accounts and a violation of an employee plan.[145] Almost immediately, the employer replaced the plaintiff with a less qualified, older female worker.[146] In support of her discrimination claim, the plaintiff alleged that prior to termination, she was told her "voice sounded too young on the phone and that the clients wanted an older account executive."[147] She further alleged that older account representatives, who had similarly lost accounts, kept their jobs.[148] The plaintiff felt she was not judged based on the quality of her performance; rather, her youthful age became a determinative factor in her termination.[149]

The plaintiff sued for violations of the E-LCRA, and Medaphis moved for summary judgment, arguing that a cause of action for age discrimination of a

141. Zanni v. Medaphis Physician Servs. Corp. (*Zanni II*), 612 N.W.2d 845, 847 (Mich. Ct. App. 2000) (citing Zanni v. Medaphis Physician Servs. Corp. (*Zanni I*), 612 N.W.2d 858, 861 (Mich. Ct. App. 1999) (per curiam)).
142. Bergen Commercial Bank v. Sisler, 723 A.2d 944, 958 (N.J. 1999).
143. *Zanni II*, 612 N.W.2d at 846 (citing *Zanni I*, 612 N.W.2d at 859); *see also* Elliott-Larson Civil Rights Act, MICH. COMP. LAWS §§ 37.2101–37.2211 (2016); MICH. COMP. LAWS § 37.2202 (2016) (explaining that an employer cannot discriminate against an employee based on their age).
144. *Zanni II*, 612 N.W.2d at 846 (citing *Zanni I*, 612 N.W.2d at 859).
145. *Id.*
146. *Id.*
147. *Id.* (internal quotation marks omitted) (quoting *Zanni I*, 612 N.W.2d at 859).
148. *Id.* (citing *Zanni I*, 612 N.W.2d at 859).
149. *Id.*

younger employee in favor of an older employee—i.e., "reverse" discrimination—did not exist under the statute.[150] The trial court agreed.[151] The Court of Appeals took over the matter and, having noted the prior precedent of *Zoppi v. Chrysler Corp.*,[152] undertook to settle the question of whether the E-LCRA "provides protection to workers who are discriminated against because of their youth."[153]

The anti-discrimination statute in question in *Zanni* read:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age . . . .
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of . . . age . . . .[154]

Elsewhere in the chapter, "age" was defined as "chronological age except as otherwise provided by law."[155] Because the Court of Appeals found the statutory language unambiguous, it enforced the statute as written:[156]

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150. *Zanni II*, 612 N.W.2d at 846.

151. *Id.*

152. *See* Zoppi v. Chrysler Corp., 520 N.W.2d 378 (Mich. Ct. App. 1994) (per curiam), *abrogated by Zanni II*, 612 N.W.2d 845. In *Zoppi*, the Michigan Court of Appeals rejected a forty-nine-year-old plaintiff's claim of "reverse" age discrimination under the E-LCRA after the plaintiff's application for an early retirement plan, offered to employees of fifty-five years of age and older, had been denied. *Id.* at 378. The court declined to extend the statute's protections in this situation, commenting:

> In this case, plaintiff has not been denied a benefit by reason of advanced age, but, rather, because he was too young to qualify. The Civil Rights Act was conceived to deter discrimination against older workers who still are capable. Therefore, we believe that plaintiff is not a member of the protected class in a reverse age discrimination case under the Civil Rights Act in light of its intended purpose.

Id. at 379 (citation omitted). In support of its belief, the court cited federal cases involving similar claims brought under the ADEA. *Id.* The court cited the Seventh Circuit's decision in *Hamilton v. Caterpillar Inc.* for the proposition that "[t]here [was] no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they [were] too *young*." *Id.* at 380 (quoting Hamilton v. Caterpillar Inc., 966 F.2d 1226, 1228 (7th Cir. 1992)). Rather, the Seventh Circuit explained that "Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities," concluding that "[t]he young . . . [could not] argue that they [were] similarly victimized." *Id.* (quoting *Hamilton*, 966 F.2d at 1228). In the end, the *Zoppi* court found that the plaintiff's "reverse" age discrimination claim lacked merit. *Id.*

153. *Zanni II*, 612 N.W.2d at 847.

154. MICH. COMP. LAWS § 37.2202(1)(a)–(b) (2016).

155. *Zanni II*, 612 N.W.2d at 847 (internal quotation marks omitted) (quoting MICH. COMP. LAWS § 37.2103(1)(a) (2016)).

156. *Id.* ("The primary goal of judicial interpretation of statutes is to ascertain and give effect

> [W]e conclude that the plain language of the statute provides no basis to limit the protections of [the E-LCRA] to older workers. On the contrary, the statute refers . . . to "chronological age," without limiting its reach to any particular age group. Accordingly, . . . age in the context of this case means a person's chronological age. If an employer disfavors an employee because the employer perceives the employee as being too young, the employer has plainly disfavored that employee on the basis of the employee's chronological age just as much as if the employer disfavored the employee for being perceived as too old. Thus, a proper understanding of the clear language of the applicable statutory definition of age would require a conclusion *that the general prohibition of [the statute] against age discrimination encompasses discrimination against an individual because an employer perceives that person as being too young*.[157]

The Court of Appeals next pointed out that to follow the ADEA in interpretation of the E-LCRA was an error:

> [T]he *Zoppi* [trial court] erred in relying on case law construing the federal . . . [ADEA] . . . . Unlike the [E-LCRA], the ADEA limits the prohibitions against age discrimination "to individuals who are at least 40 years of age." *We decline to read a similar restriction into the [E-LCRA] when the Legislature apparently chose not to do so.* Accordingly, we hold that [the anti-discrimination provision] of the [E-LCRA] *protects workers who are discriminated against on the basis of their youth*.[158]

The Michigan Court of Appeals reasoned that such an outcome was perfectly in tune with the purpose of the state's civil rights statute, which sought "to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases."[159] The court noted that although it was less common for younger employees to experience bias and stereotypes about their skills and abilities, the possibility was nevertheless real: younger workers could be unfairly viewed as immature and unreliable, without consideration for their true merits.[160] The *Zanni* decision was ground-breaking in its own right and built a solid framework for Michigan's all-

to the intent and purpose of the Legislature. The first criterion in determining intent is the specific language of the statute. If statutory language is clear, judicial construction is normally neither necessary nor permitted, and the statute must be enforced as it is written." (citation omitted)).

157. *Id.* (emphasis added).

158. *Id.* (emphasis added) (citations omitted).

159. *Id.*

160. *Id.* at 847–48; *see also Zanni II*, 612 N.W.2d at 848 n.1. However, the court noted that employers were still free to discriminate among workers based on experience and education—factors that are often directly related to age. *Id.* at 848 n.1.

inclusive treatment of its residents' age discrimination claims in the years to come.[161]

B. *BERGEN COMMERCIAL BANK V. SISLER*

In *Bergen Commercial Bank v. Sisler*,[162] the New Jersey Supreme Court had before it a first-impression issue of whether a twenty-five year old, who was perceived too young for his job, could invoke the anti-age-discrimination protections of the New Jersey Law Against Discrimination (NJLAD) as grounds for an unlawful discrimination suit against his employer.[163] In 1993, the plaintiff was offered a position as vice president of credit card operations at the defendant bank.[164] Before starting his employment with the defendant, the plaintiff met with the bank's chairman and co-founder, who for the first time, inquired about the plaintiff's age.[165] When the plaintiff revealed his age, the co-founder "appeared shocked" and asked that the plaintiff not mention his age to other bank employees, explaining that it "would be embarrassing," given the plaintiff's position's responsibilities and salary.[166]

The indicia of trouble manifested itself after only a week of the plaintiff's employment at the bank when both the bank's co-founder and CEO hinted that the plaintiff might be terminated.[167] The news shocked the plaintiff who was genuinely puzzled about the bank's ability to evaluate his

161. *See, e.g.*, Mason v. Arctic Cat, Inc., No. 11-11390, 2012 WL 380243, at *9 (E.D. Mich. Feb. 6, 2012) ("Unlike the ADEA, the ELCRA does not draw a bright line at age forty. In Michigan, thirty-nine can be 'too old.'"); Nishi v. Siemens AG, 290 F. Supp. 2d 772, 779–80 (E.D. Mich. 2003) ("Plaintiff claims that he has been discriminated against not by reason of advanced age, but, rather, because he was considered too young for the . . . position . . . Michigan recognizes [p]laintiff's cause of action under the [E-LCRA]."); Foster v. Tweddle Litho Co., No. 225169, 2002 WL 207575, at *3 n.2 (Mich. Ct. App. Feb. 8, 2002) (per curiam) ("This [c]ourt follows federal precedent, which defines a protected class for age discrimination in the employment context as persons between the ages of forty and seventy. However, this [c]ourt also determined that it is not necessary that the plaintiff fit within the strict federal age limits." (citation omitted)); Matheson v. Gen. Motors Corp., No. 213957, 2001 WL 889203, at *9 n.15 (Mich. Ct. App. Aug. 7, 2001) (per curiam) ("[T]he protected class in an age discrimination case under the [E-LCRA] does not have to fit [any] strict age limits.").

162. Bergen Commercial Bank v. Sisler, 723 A.2d 944 (N.J. 1999). *See generally* Stewart, *supra* note 36, at 1695–98, 1702–06 (providing a detailed discussion and analysis of the New Jersey Supreme Court's decision in *Sisler* and cases from other states involving "reverse age discrimination claims" under state civil rights laws).

163. *Sisler*, 723 A.2d at 947.

164. *Id.* at 948.

165. *Id.*

166. *Id.* (internal quotation marks omitted).

167. *Id.*

performance within such a short timeframe and without having previously mentioned dissatisfaction with his work.[168] Reluctant to accept an alternative employment arrangement, the plaintiff continued in his capacity until he was formally terminated—it simply "wasn't working out."[169] The plaintiff was replaced by a thirty-one year old.[170]

The plaintiff sued, asserting age discrimination under the NJLAD, but the trial court summarily dismissed the suit, commenting that "'there is no doubt of the intent of the legislature' to limit the 'age' protected class to persons above forty years of age."[171] The intermediary appellate court disagreed, and the issue of whether the civil rights statute's anti-discrimination provisions[172] protected only older workers from age discrimination was eventually elevated to the New Jersey Supreme Court.[173] To address the issue, the highest court construed sections 10:5-4 and 10:5-12(a) of the NJLAD in a manner consistent with both the law's plain language and the underlying rationale.[174] Having noted that the legislative intent was not self-evident on the face of the statute,[175] the court turned to "extrinsic aids": the law's "legislative history, legal commentary[,] and prior [case] precedent."[176] The court held,

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168. *Id.*

169. *Sisler*, 723 A.2d at 948 (internal quotation marks omitted).

170. *Id.*

171. *Id.*

172. *Id.* at 949 (citing N.J. STAT. ANN. §§ 10:5-4, 10:5-12(a) (West 2016)); *see also* N.J. STAT. ANN. §§ 10:5-4, 10:5-12(a) (West 2016). The lawsuit involved the following two anti-discrimination sections of the NJLAD: 10:5-4 and 10:5-12(a). *Sisler*, 723 A.2d at 949. Section 10:5-4 of the New Jersey Statutes reads, "[a]ll persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." N.J. STAT. ANN. §§ 10:5-4 (West 2016). Section 10:5-12(a) of the New Jersey Statutes reads,

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or an employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

§ 10:5-12(a).

173. *Sisler*, 723 A.2d at 948–49.

174. *Id.* at 949.

175. *Id.* at 950–51. The court began its statutory analysis by sifting through the statute's plain language. *Id.* at 950. It noted that the trial court, which narrowly construed the term "age," and the intermediate court, which broadly applied the statute's anti-discrimination protections to workers of all ages, reached the opposite conclusions. *Id.* at 951. The Supreme Court found that the "divergent interpretations militate[d] against a finding that the meaning of the term 'age' [was] facially obvious or self-evident." *Id.*

176. *Sisler*, 723 A.2d at 952.

> [T]he [NJLAD's] prohibition against age discrimination is broad enough to accommodate [a] claim of age discrimination based on youth. . . . [S]ignificant language differences between the [NJLAD] and ADEA preclude wholesale reliance on federal law in deciding whether younger workers are within the ambit of the act's protection. The result in cases applying the ADEA is necessarily driven by the fact that the ADEA by its terms limits the protected class to workers over forty. Because the [NJLAD] contains no such express limitation, our decision rests on our independent assessment of the [statutory] language and purpose . . . .
>
> Our examination of [the statute] reveals no evidence of a legislative intent to exclude younger workers from the [NJLAD's] anti-age-discrimination protection. [Two pertinent statutory provisions] protect "[a]ll persons" from employment discrimination on the basis of age. Neither section, on its face, specifies a qualifying age at which the act's protections vest. . . .
>
> Related state anti-discrimination legislation further supports the conclusion that the [NJLAD] protects against age discrimination directed at young workers.[177]

In so holding, the New Jersey Supreme Court relied on the principle that state anti-discrimination laws, which are remedial in nature, deserve a liberal construction.[178]

Zanni and *Sisler* are two well-developed and well-reasoned cases that illustrate this Article's core argument. These cases are not outliers; they continued the trend of, or set a trend for, other states[179] that had before

177. *Id.* at 957–58 (internal citations omitted).

178. *Id.* at 958 (citation omitted).

179. *See* Ace Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers, Local Union No. 292, AFL-CIO, 414 F.3d 896, 900–01 (8th Cir. 2005) ("[T]he context set forth in the [Minnesota Human Rights Act] differs significantly from that of the ADEA with regard to the term 'age' and does not permit an age ratio requirement that favors older workers on the basis of their age. . . . Contrary to the ADEA, Minnesota chose not to ignore everyone under [forty]."); Aldridge v. Yamhill Cty., No. CV. 05-1257-PK, 2006 WL 1788178, at *7 (D. Or. June 23, 2006) ("Oregon law prohibits age discrimination against individuals between [eighteen] and [seventy] years old. In addition to protecting older individuals from discrimination, Oregon state law prohibits discrimination on the basis of youth."); Tappe v. All. Capital Mgmt. L.P., 198 F. Supp. 2d 368, 370, 376 (S.D.N.Y. 2001) (denying the employer's motion to dismiss for failure to state a claim and holding that a thirty-eight-year-old terminated employee could have stated a prima facie case of age discrimination under New York City Human Rights Law); Kunzman v. Enron Corp., 902 F. Supp. 882, 902 (N.D. Iowa 1995) ("[T]he federal act does not preempt state age discrimination laws, so that the state court looks to its own act to determine if plaintiff is a protected person. Membership in the protected class is age-neutral [in] Iowa . . . ." (internal citation omitted)); Graffam v. Scott Paper Co., 848 F. Supp. 1, 5 (D. Me. 1994) ("[T]he Maine [Human Rights Act] does not specifically limit its protection to a particular age group. Anyone, regardless of age, may maintain a claim based on age discrimination in employment under the MHRA." (internal

Zanni and *Sisler*, or have since, expanded their state statutes' anti-age-discrimination protections to protect all individuals from unlawful age discrimination. Florida should follow suit.

VI. THE "BOTCHED" CASE: CONCLUSION

Traditionally, older individuals are perceived to be more susceptible to age discrimination than younger individuals because "age," like race or sex, is an immutable characteristic.[180] In reality, age discrimination can just as likely affect the young;[181] a young employee or job applicant is "subjected to a discrimination which cannot, through anything within his control, be overcome. For him, on any given day, his age on that day is immutable, too."[182] The Florida courts, Florida Legislature, and Florida Commission on Human Relations can all take steps to reconcile the "disconnect" this Article brings to the surface.

To correct the created interpretative imbalance, Florida courts should revisit their understanding of the FCRA's anti-age-discrimination provisions. As this Article demonstrated, the construction of the FCRA under the ADEA is consistent with neither the facial statutory language nor the legislative intent. Florida courts' reading of the statute cuts short the protections against the "ravages of discrimination" the Florida Legislature intended to reserve to all Floridians. Florida courts should abandon their flawed reading of the FCRA's anti-age discrimination provisions—that superficially hinges on the FCRA's and ADEA's "similarities"—and embrace the legislative intent, expressed both directly and indirectly, by removing any qualifications on "age" and opening section 760.11(4)(a)'s

citations omitted)); Taylor v. Dep't of Fish, Wildlife & Parks, State of Mont., 666 P.2d 1228, 1232 (Mont. 1983) ("[T]he intent of the legislature in passing the Human Rights Act was to prevent all age discrimination in employment . . . .").

180. *See* Woodruff, *supra* note 34, at 1301 (stating that "for the old, age is an immutable characteristic," while the "young individual who an employer has discriminated against knows that he or she will someday outgrow the disability.").

181. *See id.* ("Ageism . . . is . . . a form of stereotypical thinking that singles out any age-defined group or individual for adverse treatment because of age." (internal quotation marks omitted) (quoting 1 HOWARD C. EGLIT, AGE DISCRIMINATION § 1.02, at 1-10 n.30 (2d ed. 1994))).

182. *Id.* at 1301 (internal quotation marks omitted) (quoting Howard Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 907 (1981)); *see also id.* at 1301 ("The aging of America makes today's youth even more vulnerable to attack . . . . [It] has produced a significantly older population, making the youthful minority more susceptible to discrimination. Compounding the problem is the inexperience of this age group in collective political action." (internal quotation marks omitted) (quoting Ted Galen Carpenter, *The New Anti-Youth Movement*, NATION, Jan. 19, 1985, at 39, 40)).

judicial remedies to *all* plaintiffs.

The Florida Legislature can amend the language of chapter 760, Florida Statutes, to clarify its intent that the statute be age-neutral and that its age protections apply equally to all Floridians. First, the Florida Legislature can amend section 760.02, Florida Statutes, to define the term "age." For example, it can either communicate that "age" encompasses all chronological ages "birth to death" (all-encompassing) or all chronological ages past the age of minority (less expansive). Second, the Florida Legislature can amend the language of section 760.10, Florida Statutes, to expressly prohibit discrimination in employment against individuals of all chronological ages "birth to death" (all-encompassing) or all chronological ages after a person has reached the age of majority (less expansive).[183] Alternatively, the Florida Legislature can amend chapter 760's language to expressly denounce the application of the ADEA's lower age ceiling, thereby embracing its right to provide more expansive protections than the federal law.

At a minimum, the Commission should step in to promulgate an interpretative rule to commit Florida courts to the FCHR's understanding of the FCRA's age discrimination provisions. Under section 760.06(12), Florida Statutes, which delegates to the Commission the right "[t]o adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of the Florida Civil Rights Act of 1992,"[184] the Commission has the authority to issue such interpretive guidance. Because the FCHR is an expert on the statute it is charged with administering,[185] Florida courts

183. *See, e.g.*, IOWA CODE § 216.6(2)(e)(3) (2016) ("This section shall not prohibit discrimination on the basis of age if the person subject to the discrimination is under the age of eighteen years, unless that person is considered by law to be an adult."); N.Y. EXEC. LAW § 296(3-a)(a) (McKinney 2016) ("It shall be an unlawful discriminatory practice . . . [f]or an employer . . . to refuse to hire or employ or . . . to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in [terms of employment] because of such individual's age."); OR. REV. STAT. § 659A.030(1)(a) (2016) ("It is an unlawful employment practice . . . [f]or an employer, because of an individual's . . . age if the individual is [eighteen] years of age or older . . . to refuse to hire or employ the individual or to bar or discharge the individual from employment."); VT. STAT. ANN. tit. 21, § 495(c) (West 2016) ("The provisions of this section prohibiting discrimination on the basis of age shall apply for the benefit of persons [eighteen] years of age or older.").

184. FLA. STAT. § 760.06(12) (2016).

185. *See* Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2086 (2005) (quoting Peter Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 329 (1990)). While the courts are "generalists," the agencies are "specialists":

> Administrative agencies specialize in the statutes they administer; they have technical competence and expertise. Administrative agencies interpret individual

should not only be open to its reading of the FCRA, but must afford much deference to any interpretive guidance promulgated by the Agency.[186] Instead of merely reiterating its view on the law in every new age discrimination case that comes before it, the Commission can use the section 760.06(12) mechanism to finally stitch together the Florida courts' and its own understanding of the Act's anti-age-discrimination provisions. The Agency can finally take a meaningful step to remedy the "botched" case of youth age discrimination under the Florida Civil Rights Act of 1992, so that the Florida legislative intent to protect all Floridians "from the ravages of discrimination" may finally be given full effect.

> statutory provisions in light of the entire statutory scheme entrusted to it and with awareness of all parties affected by their interpretation . . . . Agencies' understanding of the statutory scheme is both broad and deep, and they must be active rather than reactive in administering it. "[A]gencies essentially *live* the process of statutory interpretation[.]"

Aprill, *supra*.

186. *See* Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 323 (Fla. 2001) ("The [Florida Department of Revenue'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."); *Beach v. Great Western Bank,* 692 So. 2d 146, 149 (Fla. 1997) (per curiam) ("[A]n agency's interpretation of its own regulations has traditionally been accorded considerable respect . . . ."); S. Fla. Racing Ass'n v. State, Dep't of Bus. and Prof'l Regulation, Div. of Pari-Mutuel Wagering, No. 14-2654, 2015 WL 4546935, at *3 (Fla. Dist. Ct. App. July 29, 2015) ("We start by recognizing the great deference appellate courts typically afford an agency's interpretation of its own statute."); Wells Fargo Guard Servs. Inc. of Fla. v. Lehman, 799 So. 2d 252, 254 (Fla. Dist. Ct. App. 2001) ("[C]ourts generally defer to an agency's interpretation of the statutes it is charged with administering . . . ."). *But see* Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1153 (Fla. 2000) (recognizing the general rule that administrative interpretation of a statute receives great deference, but declining to accept the Commission's interpretation of a statute because the term "marital status" was unambiguous); Summer Jai Alai Partners v. Dep't of Bus. & Prof'l Regulation, Div. of Pari–Mutuel Wagering, 125 So. 3d 304, 307 (Fla. Dist. Ct. App. 2013) (declining to defer to the "agency's construction or application of a statute if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute." (internal quotation marks omitted)).