IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WENDI J. LEE,

Plaintiff,

Case No. 8:10-cv-02904-SDM-TBM

v.

PMSI, INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT

Defendant, PMSI., INC., ("PMSI") by and through its undersigned counsel and pursuant to Rule 12(b)(6), Fed.R.Civ.P., hereby moves this Court to dismiss with prejudice Count II of the Plaintiff's Complaint, Plaintiff's claim of pregnancy discrimination brought pursuant to the Florida Civil Rights Act ("FCRA"), Chapter 760, Fla. Stat. The grounds upon which this motion is based are set forth in the following memorandum of law.

MEMORANDUM OF LAW

I. PRELIMINARY STATEMENT

On or about December 10, 2010, the Plaintiff, Wendi J. Lee ("Lee" or "plaintiff") filed a Complaint in this action against PMSI. The Complaint alleges violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and the FCRA. The instant motion is directed at Lee's claim of pregnancy discrimination under the FCRA found in Count II of Plaintiff's Complaint.

II. ARGUMENT

A. Lee's FCRA Claim Should Be Dismissed Because Title VII Preempts Claims of Pregnancy Discrimination Brought Under The FCRA.

In O'Loughlin v. Pinchback, 579 So. 2d 788, 792 (Fla. 1st DCA 1991), the Florida First District Court of Appeal ruled that a claim of pregnancy discrimination brought under the FCRA is preempted by Title VII. Under the doctrine of Erie v. Tompkins,[1] absent any convincing evidence that the Florida Supreme Court would rule differently, this Court is required to follow the Florida appellate court's interpretation of Florida law.[2] Indeed in Zemetskus v. Eckerd Corporation, Case No. 8:02-CV-1939-T-27TBM. (M.D. Fla. April 1, 2003) (copies of all unpublished decisions cited herein are attached as **Exhibit A**), the Court followed the O'Loughlin court's interpretation of Florida law pursuant to the Erie doctrine. In Zemetskus, this Court discussed the Florida appellate court ruling in O'Loughlin, found that the plaintiff had not shown that the Florida Supreme Court would rule contrary to the O'Loughlin holding, and held that O'Loughlin was therefore binding on it. Accordingly, the Court dismissed the plaintiff's pregnancy discrimination claim under the FCRA, holding that the claim was preempted by Title VII.

Other judges within the United States District Court for the Middle District of Florida, Tampa Division, have also followed O'Loughlin. [1] See Swiney v. Lazy Days R.V. Ctr., Inc., 2000 WL 1392101, 83 FEP Cases (BNA) 1424 (M.D. Fla. 2000); Renee Digruccio v. Pasco County, Case No. 8:01-CV-2089-T-26MAP (M.D. Fla. December 4, 2001); Jami Orlando v. Bay Dermatology, Case No. 8:02-CV-2203-T-26EAJ (M.D. Fla. December 4, 2003); Stephanie

[1] Erie R.R. v. Tompkins, 304 U.;S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). See also Stoner v. New York Life Ins. Co., 61 S. Ct. 336 (1940); Maseda v. Honda Motor Company, Ltd., 861 F. 2d 1248, 1257, n. 14 (11th Cir. 1988).
[2] In 2008, the Fourth District Court of Appeal found that the FCRA prohibits pregnancy discrimination. See Carsillo v. City of Lake Worth, 995 So. 2d 1118 (Fla. 4th DCA 2008). Defendant maintains that Florida Supreme Court would decline to follow the Carsillo decision for the reasons set forth in O'Loughlin.

Monahan v. Moran Foods, Inc., Case No. 8:02-CV-301-T-26MAP (M.D. Fla. March 25, 2002); Jessica Hammons v. Durango Steakhouse of Bradenton, Inc., Case No. 8:02-CV-2165-T-23MPA; Frazier v. T-Mobile, USA, Inc., Case No. 3:03-CV-764-J-20MMH (M.D. Fla. November 4, 2003); and Susan Martin v. Tampa Bay Federal Credit Union, Case No. 8:04-CV-00083-JDW-EAJ (M.D. Fla., March 4, 2005); Cf. Rose v. Commercial Truck Terminal, Inc., 2007 U.S. Dist. Lexis 75409 (M.D. Fla. 2007) (Allowing a claim of pregnancy discrimination under the FCRA); and Wesley-Parker v. Keiser Sch .Inc., 2006 U.S. Dist. Lexis 96870 (M.D. Fla. 2006) (same). In Swiney, the court granted the defendant's motion to dismiss "on the basis that Title VII preempts the Plaintiff's pregnancy discrimination claim brought in Count I pursuant to the Florida Civil Rights Act." Swiney, 2000 U.W. WL 1392101 at *1. In so holding, the Swiney court cited the Florida appellate court ruling in O'Loughlin, stating that it was binding on the Court because there was no convincing evidence that the Florida Supreme Court would rule differently.

Neither the FCRA nor its predecessor, the Florida Human Rights Act of 1977 ("FHRA"), expressly addresses discrimination based on pregnancy. Section 760.10(1)(a) of the FCRA states: "[i]t is an unlawful employment practice for an employer: (a) [t]o discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap or marital status." § 760.01(1)(a), Fla. Stat. The text of this section of the FCRA is identical to that of its predecessor statute, the FHRA. See § 760.10(1)(a), Fla. Stat. (1989).

In enacting the 1992 FCRA, the Florida Legislature could have chosen to amend Section 760.10(a)(1) to expressly prohibit pregnancy discrimination. The Florida Legislature did not do

In enacting the 1992 FCRA, the Florida Legislature could have chosen to amend Section 760.10(a)(1) to expressly prohibit pregnancy discrimination. The Florida Legislature did not do so, despite the fact that two significant events had occurred between 1978 and 1992. First, on the heels of the Supreme Court's decision in Gilbert v. General Electric, 429 U.S. 125, 97 S. Ct. 401 (1976), in which the court held that discrimination on the basis of pregnancy was not discrimination on the basis of sex, Congress passed the Pregnancy Discrimination Act ("PDA") in 1978, amending Title VII to expressly prohibit pregnancy-based discrimination. Then, in 1991, the Florida First District Court of Appeal ruled that § 760.10 is preempted by Title VII with respect to pregnancy discrimination. In O'Loughlin, Judge Nimmons reasoned: "The protections afforded by Title VII and the PDA cannot be eroded by the Florida Act which does not contain a similar provision. Thus, we conclude that the Florida Human Rights Act, specifically 760.10, Florida Statues, is preempted by Title VII . . . to the extent that Florida law offers less protection to its citizens than does the corresponding federal law." O'Loughlin, 579 So. 2d at 792.[3]

Following O'Loughlin, with the passage of the FCRA in 1992, the Florida Legislature had the opportunity to change the wording in § 760.10(1)(a) to add the same wording that appears in the PDA amendment to Title VII, but it chose not to do so. The Florida Legislature is presumed to have been aware of O'Loughlin when it passed the FCRA. See Gulfstream Park Racing Ass'n., Inc. v. Dept. of Bus. Regulation, 441 So. 2d 627, 628 (Fla. 1982) ("[w]hen the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary"). This presumption is particularly compelling because it is well settled that the

[3] But see Jolley v. Phillips Educ. Group, 71 FEP Cases 916, 920 (M.D. Fla. 1996) (without considering the effect of Erie v. Tompkins, declining to follow O'Loughlin because "no other Florida courts hold that Title VII preempts state law pregnancy-based discrimination claims").

FHRA was patterned after Title VII.[4] Therefore, by declining to expressly prohibit pregnancy-based discrimination in re-enacting § 760.01., et seq., following O'Loughlin, the Florida Legislature is presumed to have intended to adopt and maintain the O'Loughlin construction of the Florida Act. See Boone v. Total Renal Labs, Inc., 565 F. Supp. 2d 1323, 1326 (M.D. Fla. 2008) (holding that because the Florida Legislature did not add language similar to the PDA to the FCRA when it was enacted in 1992 – after O'Loughlin – the Legislature did not intend to include a proscription on pregnancy discrimination in the FCRA.)

Pursuant to the Erie doctrine, the United States District Court for the Middle District of Florida, Tampa Division, in both Zemetskus and Swiney, following O'Loughlin's interpretation of Florida law. As held by the Swiney Court, there is no "convincing evidence," that the Florida Supreme Court would reach a different result than the First District Court of Appeal reached in O'Loughlin. Moreover, given the principles of statutory construction discussed above, it is unlikely that the Florida Supreme Court could reach a different decision. Therefore, under the teaching of Erie v. Tompkins, this Court should to follow the holding of O'Loughlin that pregnancy-based discrimination claims brought under Florida law are preempted by Title VII.

III. CONCLUSION

For the foregoing reasons, Count II of the Plaintiff's Complaint should be dismissed with prejudice.

[4] Parr v. Woodmen of the World Life Ins. Co., 791 F. 2d 888, 892 (11th Cir. 1986); Dept. of Corrections v. Chandler, 582 So. 2d 1183, 1185-86 (Fla. 1st DCA 1991); School Bd. Of Leon Cty v. Hargis, 400 So. 2d 103, 108 n.2 (Fla. 1st DCA 1981).

Dated this 4th day of January, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 4, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.to the following attorneys:

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/s/ Luis A. Cabassa
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EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JACQUELINE ZEMETSKUS,

Plaintiff(s),

vs.

Case No. 8:02-CV-1939-T-27TBM

ECKERD CORPORATION,

Defendant(s).
_____/

ORDER

BEFORE THE COURT is Defendant's Motion to Dismiss Count II with Prejudice (Dkt. 6) and Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Count II (Dkt. 9). Upon consideration, the Court finds as follows.

Jacqueline Zemetskus ("Plaintiff") has filed a two count Complaint against Eckerd Corporation ("Defendant"). Count I alleges a claim of discrimination on the basis of pregnancy under Title VII of the Civil Rights Act, 42 U.S.C. § 2000 *et seq.* Count II alleges a claim for discrimination on the basis of pregnancy under Chapter 760, Florida Statutes (the "Florida Civil Rights Act"). Defendant seeks dismissal with prejudice of Count II.

Applicable Standard

A court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citations omitted); *South Florida Water Management Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996). The court will accept as true all well-pleaded factual allegations and will view them in a light most favorable to the nonmoving party. *Hishon*

v. King & Spalding, 467 U.S. 69, 73 (1984). The threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985). Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law. *See Marshall County Bd. of Educ. v Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

Discussion

Defendant seeks dismissal of Count II, arguing that a pregnancy discrimination claim under the Florida Civil Rights Act is preempted by Title VII. Plaintiff argues that the definition of "sex" found within Title VII, which includes "pregnancy, childbirth, or related medical conditions", should be applied to the Florida Civil Rights Act and that Florida's Civil Rights Act should be liberally construed to permit a pregnancy discrimination claim.

In *O'Loughlin v. Pinchback*, 579 So. 2d 788, 792 (Fla. 1st DCA 1991), the Florida Court of Appeals held that Title VII and the Pregnancy Discrimination Act of 1978 preempted Florida's Human Rights Act because by not recognizing sex-based discrimination against pregnant employees, the Florida Human Rights Act offered less protection than the corresponding federal law. In 1992, after the *O'Loughlin* decision was rendered, the Florida Civil Rights Act was passed as the reenactment of the Florida Human Rights Act of 1977. However, in passing the Florida Civil Rights Act, the Florida Legislature did not amend the language of §760.10 and the Florida Civil Rights Act remains silent with respect to discrimination on the basis of pregnancy. Since *O'Loughlin* was decided, neither the Eleventh Circuit nor the Florida Supreme Court has addressed the issue of preemption.

On questions of state law, federal courts are bound by the decisions of a Florida District Court of Appeal, absent a strong showing that the Florida Supreme Court would decide the issue

differently. *See Maseda v. Honda Motor Company, Ltd.*, 861 F.2d 1248, 1257, n.14 (11th Cir. 1988). Here, Plaintiff has not shown that the Florida Supreme Court would rule contrary to the *O'Loughlin* holding. *O'Loughlin*, therefore, is binding on this Court and Plaintiff's pregnancy discrimination claim in Count II is preempted.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss Count II with Prejudice (Dkt. 6) is **GRANTED**.

DONE AND ORDERED in chambers this 1st day of April, 2003.

JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record
Courtroom Deputy
Law Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RENEE DIGRUCCIO,

Plaintiff,

v.

CASE NO: 8:01-cv-2089-T-26MAP

PASCO COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER

Before the Court is the Defendant's Motion to Strike and Motion to Dismiss Count II and Memorandum of Law (Dkt. 4). Because the law clearly mandates the relief requested in the motion, the Court does not need a response from the Plaintiff.

The Defendant seeks to strike Plaintiff's prayer for punitive damages in her Title VII claim against the Defendant as framed in Count I of the complaint. Because there can be no question that the Defendant is a political subdivision of the State of Florida, a fact acknowledged by the Plaintiff in paragraph 2 of her complaint, punitive damages are statutorily prohibited. See 42 U.S.C. § 1981a(b)(1) (providing in pertinent part that "[a] complaining party may recover damages under this section against a respondent (other than a government, government agency or *political subdivision*) . . ." (Emphasis added).

The Defendant also seeks to dismiss Count II of the complaint in which the Plaintiff alleges a violation of section 760.10, Florida Statutes, based on a claim of pregnancy discrimination. As the Defendant correctly points out, this Florida statute has been preempted by Title VII when the claim of discrimination is based on pregnancy. See O'Laughlin v. Pinchback, 579 So. 2d 788 (1st DCA Fla. 1991). Because this Court has followed O'Laughlin in another case, see Swiney v. Lazy Days R.V. Center, Inc., 2000 WL 1392101 (M.D. Fla. 2000), the Court will follow it in this case.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** as follows:

1) The Motion to Strike (Dkt. 4) is granted. The claim for punitive damages is stricken from Count I..

2) The Motion to Dismiss Count II (Dkt. 4) is granted. Count II is dismissed with prejudice.

DONE AND ORDERED at Tampa, Florida, on December 4, 2001.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMI ORLANDO,

Plaintiff,

v. CASE NO: 8:03-cv-2203-T-26EAJ

BAY DERMATOLOGY &
COSMETIC SURGERY, P.A.,

Defendant.

/

ORDER

Before the Court is the Defendant's Motion to Dismiss or, in the Alternative, for Partial Summary Judgment. In the motion, the Defendant contends that count II of Plaintiff's complaint, which alleges sex discrimination based on pregnancy in violation of the Florida Civil Rights Act (FCRA), must be dismissed because Title VII preempts such a claim. The Defendant cites O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. 1st DCA 1991), in support of its contention. Because this Court has previously adopted the analysis in O'Loughlin in dismissing a pregnancy discrimination claim brought under the FCRA in another case, see Swiney v. Lazy Days R.V. Center, Inc., 2000 WL 1392101 (M.D. Fla. 2000), and because neither the Florida Supreme Court nor the Eleventh Circuit

Court of Appeals has as of this date ruled to the contrary, the Court needs no response from the Plaintiff and the motion is due to be granted.[1]

ACCORDINGLY, it is **ORDERED AND ADJUDGED** as follows:

1) The Motion to Dismiss (Dkt. 6) is granted.

2) The Alternative Motion for Partial Summary Judgment (Dkt. 6) is denied as moot.

3) Count II of Plaintiff's complaint is dismissed with prejudice.

DONE AND ORDERED at Tampa, Florida, on December 4, 2003.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

[1] The Court notes that two other district court judges of the Middle District of Florida have recently followed the rationale of O'Loughlin in dismissing claims brought under the FCRA for pregnancy discrimination. See exhibits 1 & 2 to Defendant's motion.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEPHANIE MONAHAN,

Plaintiff,

v.

CASE NO: 8:02-cv-301-26MAP

MORAN FOODS, INC., d/b/a SAVE-A-LOT,

Defendant.
_____/

ORDER

Before the Court is the Defendant's Motion to Dismiss Count II of the Complaint and Memorandum of Law (Dkt. 5). Because the motion is due to be granted, the Court does not need a response.

In Count II, the Plaintiff claims that the Defendant violated the Florida Civil Rights Act by discriminating against her on the basis of her pregnancy. As pointed out by the Defendant, this Court has previously determined that Title VII preempts a plaintiff's pregnancy discrimination claim brought under the Florida Civil Rights Act. See Swiney v. Lazy Days R.V. Center, Inc., 2000 WL 1392101 (M.D. Fla. 2000) (relying on O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. 1st DCA 1991). The Court continues to adhere to this position.

Accordingly, it is ordered and adjudged that the Motion to Dismiss Count II (Dkt.

5) is granted.

DONE AND ORDERED at Tampa, Florida, on March 25, 2002.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
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F I L E C O P Y

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JESSICA HAMMONS,

Plaintiff,

v.

CASE NO. 8:01-cv-2165-T-23MAP

DURANGO STEAKHOUSE OF BRADENTON, INC., a Florida corporation,

Defendant.
_____/

ORDER

The plaintiff's two-count complaint (Doc. 1) alleges employment discrimination based on pregnancy (i.e., "pregnancy discrimination"). Count I alleges a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"). Count II alleges a violation of the Florida Civil Rights Act, Florida Statute § 760.01, et seq. ("FCRA"). The defendant moves to dismiss the FCRA claim asserting that the FCRA affords no protection from pregnancy discrimination (Doc. 6). The plaintiff filed a timely response opposing the motion (Doc. 9).

Although similar in many respects, Title VII and the FCRA are not textually equivalent with respect to pregnancy discrimination. By means of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), Congress amended Title VII to prohibit explicitly pregnancy discrimination. The FCRA contains no similar explicit prohibition. This incongruity has led at least one Florida appellate court to conclude that Title VII preempts the FCRA with respect to pregnancy discrimination. See

O'Loughlin v. Pinchback, 579 So. 2d 788, 792 (Fla. 1st DCA 1991).[1] Absent convincing evidence that the Supreme Court of Florida would rule differently, none of which is provided by either party or is otherwise apparent, O'Loughlin controls. See Stoner v. New York Life Ins. Co., 311 U.S. 464, 467 (1940); see also Swiney v. Lazy Days R.V. Center, Inc., 2000 WL 1392101, at *1 (M.D. Fla. Aug. 1, 2000) and Walsh v. Food Supply, Inc., 1997 WL 401594, at *2 (M.D. Fla. March 19, 1997) (both citing O'Loughlin and concluding that pregnancy discrimination falls outside the prohibitions of the FCRA).[2]

Accordingly, the defendant's motion to dismiss (Doc. 6) is **GRANTED**. The plaintiff's FCRA pregnancy discrimination claim is **DISMISSED**.

ORDERED in Tampa, Florida, on March 7th, 2002.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[1] The FCRA was enacted in 1992, one year after the appellate court decided O'Loughlin. However, the pertinent language of the FCRA is identical to that contained in the predecessor statute that the appellate court analyzed (i.e., the Florida Human Rights Act of 1977). See Walsh v. Food Supply, Inc., 1997 WL 401594, at *2 (M.D. Fla. March 19, 1997).

[2] The Court respectfully declines to adopt the view set forth in Jolley v. Phillips Educ. Group of Cent. Florida, Inc., 1996 WL 529202 (M.D. Fla. 1996).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

TAMARA FRAZIER,

Plaintiff,

v. Case No.: 3:03-cv-764-J-20MMH

T-MOBILE USA INC.,

Defendant.

ORDER

This cause is before the Court on Defendant's Motion to Dismiss or in the Alternative for Partial Summary Judgment (Doc. No. 5, filed October 7, 2003) and Plaintiff's Response and Request for Oral Argument (Doc. No. 8, filed October 21, 2003). Plaintiff's first two counts seek relief form alleged pregnancy-based employment discrimination under Title VII of the Civil Rights Acts of 1964 and the Florida Civil Rights Act of 1992. Defendant assert that the claim under the Florida Civil Rights Act is preempted. As Plaintiff's attorney is aware, the Court addressed the same issue in Perrin v. Sterling Realty Management, Inc., 3:02-cv-804-J-20HTS, Doc. No. 7, filed November 4, 2002. The Court reiterates its opinion from that Order.

Legal Standard

In deciding a motion to dismiss, the district court is required to view the complaint in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232 (1974). A complaint should not be dismissed for failure to state a cause of action "unless it appears beyond doubt that the

Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir. 1991).

Legal Background

Florida patterned the Florida Human Rights Act upon Title VII of the Civil Rights Act of 1964. See O'Loughlin v. Pinchback, 579 So.2d 788, 791 (Fla. 1st DCA 1991). In 1976, the U.S. Supreme Court held that discrimination on the basis of pregnancy was not sex discrimination under Title VII. See General Electric Co. v. Gilbert, 429 U.S. 125, 136 (1976). Congress responded by amending Title VII with the Pregnancy Discrimination Act of 1978 (PDA), which specified that discrimination on the basis of pregnancy was sex discrimination and violated Title VII. See O'Loughlin 579 So.2d at 791. In 1991, the First District Court of Appeal held that the Florida Human Rights Act did not state a cause of action for discrimination based on pregnancy, as it was preempted by Title VII "to the extent that Florida's law offers less protection to its citizens that does the corresponding federal law." O'Loughlin 579 So.2d at 792. In 1992, Florida reenacted the Florida Human Rights Act, renaming it the Florida Civil Rights Act (FCRA) and using the same language as its predecessor, without the language found in the federal PDA. See Walsh v. Food Supply, Inc. 1997 U.S. Dist. Lexis 9644, *5 (M.D. Fla. 1997).

Federal district courts are split about whether the FCRA allows a claim for pregnancy-based discrimination. Two courts have followed *O'Loughlin* and held that a claim of pregnancy-based discrimination under FCRA was preempted. See Swiney v. Lazy Days R.V. Center, 2000WL 1392101 (M.D. Fla. 2000); Walsh v. Food Supply, Inc. 1997 U.S. Dist. Lexis 9644, *5 (M.D. Fla. 1997). Two other courts, citing *Brand v. Florida Power Corp.*, 633 So.2d 504, 507 (Fla. 1st DCA

1994), have held that because the FCRA is based upon Title VII, federal case law dealing with Title VII applies, and therefore the FCRA permits a state law claim for pregnancy-based discrimination. See Jolley v. Phillips Educational Group of Central Florida, Inc., 1996 WL 529202, *6 (M.D. Fla. 1996); Kelly v. K.D. Const. of Florida, 866 F. Supp. 1406, 1411 (S.D. Fla. 1994).[1]

Analysis

This Court is of the opinion that the FCRA does not provide for a claim of pregnancy-based discrimination. The legislature passed the FCRA after the *O'Loughlin* decision, and as the Florida Supreme Court stated, "when the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary." Gulfstream Park Racing Ass'n, Inc. v. Dept. of Bus. Regulation, 441 So.2d 627, 628 (Fla. 1983). As the legislature did not include the language from the PDA, it is presumed that it was aware of the *O'Loughlin* opinion and did not intend to include pregnancy-based discrimination in the FCRA.

Further, the Court disagrees with the reasoning found in *Jolley*, which found that "[s]ince no other Florida courts hold that Title VII preempts state law pregnancy-based discrimination claims, this Court adopts the traditional statutory constructional rule that Florida laws which mirror federal laws will be construed identically." Jolley v. Phillips Educational Group of Central Florida, Inc., 1996 WL 529202, *6. First, the Court agrees that a Florida law that mirrors a federal law should be

[1] It is worth noting that *Jolley* and *Kelly* cases were decided on the merits with plaintiffs failing to satisfy their burdens, arguably making those holdings dicta. See Jolley 1996 WL 529202 at *6; Kelly, 866 F.Supp. at 1414. And *Swiney* and *Walsh*, like the instant case, were decided on motions to dismiss a claim brought under FCRA. See Swiney, 2000 WL 1392101 at *1; Walsh, 1997 U.S. Dist. LEXIS 9644 at *6.

construed identically, but the FCRA mirrors Title VII before the PDA. And Title VII, without the PDA, was construed not to include a pregnancy-based discrimination claim. See General Electric Co. v. Gilbert, 429 U.S. 125, 136 (1976). Additionally, federal courts must follow state intermediate appellate courts absent convincing evidence the state supreme court would rule differently. See Swiney v. Lazy Days R.V. Center, Inc., 2000 WL 1392101 *1, Fn. 1 (*citing* Stoner v. New York Life Ins. Co., 311 U.S. 464, 467 (1940)).

Accordingly, Plaintiff's Second Claim is preempted by Title VII, and Defendant's Motion to Dismiss Count II is GRANTED.

DONE AND ORDERED at Jacksonville, Florida, this 12 day of November, 2003.

HARVEY E. SCHLESINGER
United States District Judge

Copies to:

P. Daniel Williams, Esq.
Peter W. Zinober, Esq.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SUSAN A. MARTIN,

Plaintiff,

vs. **Case No. 8:04-CV-83-T-27EAJ**

TAMPA BAY FEDERAL CREDIT UNION,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss Count III and Strike Plaintiff's Claim for Compensatory and Punitive Damages (Dkt. 33) and Plaintiff's response (Dkt. 37). Upon consideration, Defendant's motion is granted.

Plaintiff filed an Amended Complaint (Dkt. 22) against Tampa Bay Federal Credit Union alleging violations of the Family and Medical Leave Act, 29 U.S.C. § 2615, in Counts I and II, and discrimination on the basis of pregnancy under the Florida Civil Rights Act, *Fla. Stat.* 760 ("FCRA") in Count III.[1] Defendant seeks dismissal of Plaintiff's pregnancy discrimination claim on the ground that the FCRA does not protect against discrimination based on pregnancy.

Applicable Standard

A court may grant a motion to dismiss "only when the defendant demonstrates beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004) (internal quotation omitted). The court

[1] Martin failed to file a timely charge of discrimination with the EEOC as required by Title VII, and therefore brings her pregnancy discrimination claim only under state law.

will accept as true all well-pleaded factual allegations and will view them in a light most favorable to the nonmoving party. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984).

Discussion

Defendant seeks dismissal of Count III, arguing that the FCRA does not provide a cause of action for pregnancy discrimination, relying on *O'Loughlin v. Pinchback*, 579 So. 2d 788, 792 (Fla. 1st DCA 1991). In *O'Loughlin*, the Florida First District Court of Appeal concluded that the Florida Human Rights Act, the predecessor to the FCRA, did not recognize pregnancy-related sex discrimination. That court reasoned that the Act offered less protection than corresponding federal law and therefore was preempted by Title VII and the PDA. 579 So. 2d at 792. In 1992, after *O'Loughlin* was decided, the Florida Legislature reenacted the Florida Human Rights Act, renaming it the FCRA. *Walsh v. Food Supply, Inc.*, 1997 U.S. Dist. LEXIS 9644, *5 (M.D. Fla. 1997). Significantly, the Florida legislature did not amend the relevant language in § 760.10 to mirror the language of the PDA and protect against discrimination based on pregnancy.

"When the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary." *Gulfstream Park Racing Ass'n Inc. v. Dept. of Bus. Regulation,* 441 So. 2d 627, 628 (Fla. 1983). Accordingly, since the Florida legislature effectively reenacted the relevant statute after *O'Loughlin* and chose not to include the language from the PDA, it must be presumed that the legislature did not intend to include a claim for discrimination based on pregnancy.

Plaintiff argues that the reasoning of the *O'Loughlin* court was flawed. Because the FCRA was patterned on Title VII, Plaintiff urges that it should be construed to include the definition of "sex" found within Title VII as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), which includes "pregnancy, childbirth, or related medical conditions." Plaintiff offers no persuasive

authority for this argument, however, and the Court has located no such authority.[2] Moreover, the plain language of the FCRA does not support the construction urged by the Plaintiff. Finally, federal courts are bound by decisions of a Florida District Court of Appeal on questions of Florida law, absent a strong showing that the Florida Supreme Court would decide the issue differently. *Maseda v. Honda Motor Company, Ltd.*, 861 F.2d 1248, 1257, n.14 (11th Cir. 1988). There is no indication that the Florida Supreme Court would overrule *O'Loughlin*.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss Count III (Dkt. 33) and the included demand for compensatory and punitive damages is **GRANTED**.

DONE AND ORDERED in chambers this **4th** day of March, 2005.

/s/James D. Whittemore
JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record

[2] There are Florida state court decisions which have apparently adjudicated claims for pregnancy discrimination under the FCRA on the merits. *E.g., Feliciano v. School Board of Palm Beach County*, 776 So. 2d 306 (Fla. Ct. App. 2000). However, research has not revealed any state court decisions other than *O'Loughlin* which squarely address whether the FCRA provides protection against discrimination based on pregnancy. Further, all of the plaintiffs in these cases were pursuing a companion Title VII claim. In the instant case, Plaintiff's FCRA claim must necessarily stand on its own.