417.5 LEGAL CAUSE — DISCRIMINATION

(Claimant’s) [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status] is the legal cause of (defendant’s) decision to [discharge] [fail to hire] [(describe discriminatory treatment)] (claimant) if (defendant) made the decision because of (claimant’s) [race] [color] [religion] [sex] [pregnancy] [national origin] [age] [handicap] [marital status].

(If necessary, clarify the causation standard further.)

NOTES ON USE FOR 417.5

1. This instruction uses “because of,” the causation language in F.S. 760.10(1). The committee takes no position on whether additional clarification is needed. We note that “because of” in employment statutes has been interpreted to mean numerous types of causation. See generally, “Gross Disunity,” 114 Penn. State L. Rev. 857 (2010) (“because of” can mean at least four different types of causation). Courts have focused on three possible meanings: “sole,” “but for,” and “motivating factor.” If an additional instruction is needed, it may vary depending on which protected factor is involved, as explained below.

2. Race, color, religion, sex, national origin. No Florida appellate court has stated which causation standard should be used for a Florida Civil Rights Act (“FCRA”) discrimination claim based on one of the five factors enumerated in Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. (“Title VII”). Florida courts have endorsed the general rule that, because the FCRA was patterned after Title VII, the Florida statute should be given the same construction as the federal courts give the federal act. See, e.g., Carsillo v. City of Lake Worth, 995 So. 2d 1118, 1119 (Fla. 4th DCA 2008). In 1991, Congress added the “motivating factor” causation standard to Title VII and added a “same decision” defense limiting damages. The Florida legislature never amended the FCRA to add the “motivating factor” causation standard and the “same decision” defense limiting damages.

3. Pregnancy. Title VII does not include “pregnancy” as a specifically enumerated factor. However, Title VII, as amended by the Pregnancy Discrimination Act, defines “[t]he terms ‘because of sex’ or ‘on the basis of sex’” to include “because of or on the basis of pregnancy, childbirth, or related medical conditions[.]” 42 U.S.C. § 2000e(k). “Under Title VII, a plaintiff may prevail on a [pregnancy discrimination] claim by showing that her pregnancy ‘was a motivating factor’ for an employment decision.” Holland v. Gee, 677 F.3d 1047, 1055 (11th Cir. 2012) (citing 42 U.S.C. § 2000e-2(m)); Torres-Skair v. Medco Health Solutions, Inc., 595 Fed. Appx. 847, 852 (11th Cir. 2014) (same).

The Florida Legislature amended the FCRA to include pregnancy as a specifically enumerated factor, effective July 1, 2015. F.S. 760.10; Laws 2015, c. 2015-68, § 6. Prior to that amendment, the Florida Supreme Court held that the FCRA’s prescription against discrimination because of “sex” includes discrimination based on pregnancy. Delva v. Continental Group, Inc., 137 So. 3d 371, 375 (Fla. 2014). No Florida appellate court has stated which causation standard should be used for an FCRA discrimination claim based on pregnancy. However, the “motivating factor” causation standard has been utilized in pregnancy discrimination claims brought concurrently under the FCRA and Title VII. See, e.g., Gee, 677 F.3d at 1054–1055, 1058–1059, 1062–1063 (noting that decisions construing Title VII guide the analysis of the plaintiff-employee’s pregnancy discrimination claim under the FCRA); Torres-Skair, 595 Fed. Appx. at 852–853.

4. Age. Courts have held that decisions construing the federal Age Discrimination in Employment Act (ADEA) apply to the FCRA’s age discrimination provision. See, e.g., Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996). The U.S. Supreme Court interpreted the ADEA to require “but for” causation. Gross v. FFL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

5. Handicap. Courts have held that decisions construing the federal Americans with Disabilities Act (ADA) apply to FCRA’s handicap discrimination provision. See, e.g., Byrd v. BT Foods, Inc., 26 So. 3d 600 (Fla. 4th DCA 2010). There is a split among the federal circuits as to whether the ADA requires “motivating factor” or “but for” causation. Compare Pinkerton v. Spellings, 529 F.3d 513, 519 (5th Cir. 2008) (“motivating factor”), with Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 322 (6th Cir. 2012) (“but for”).

6. Marital Status. Marital status discrimination cases decided under the FCRA do not provide clear guidance on the causation standard to be applied. See Sanders v. Mayor’s Jewelers, Inc., 942 F. Supp. 571 (S.D. Fla. 1996) (holding that complaint alleging “discriminatory intent” or marital status “as motivating factor” was sufficient to state a claim); Nat’l Indus., Inc. v. Comm’n on Human Relations, 527 So. 2d 894 (Fla. 5th DCA 1988) (holding that, because no record of the hearing was provided, the agency could not reject the hearing officer’s finding that marital status was not “a motivating factor” and that no “discriminatory intent” was present).

The Florida Supreme Court has held that the term “marital status,” as used in the FCRA section prohibiting discrimination based on marital status, “means the state of being married, single, divorced, widowed or separated, and does not include the specific identity or actions of an individual’s spouse.” Donato v. American Tel. & Tel. Co., 767 So. 2d 1146, 1154–1155 (Fla. 2000).

7. The committee takes no position as to whether a trial court should instruct on a permissive inference of pretext, that is, the employer’s stated reason for the adverse employment action was not the real reason but was given to hide a discriminatory reason. No Florida appellate decision has addressed the issue in a trial context. At least one Florida appellate decision has employed the pretext consideration in the context of a summary judgment motion. See generally Feizi v. Dep’t of Mgmt. Servs., 988 So. 2d 1192 (Fla. 1st DCA 2008) (reversing summary judgment where evidence was susceptible to a reasonable inference that the explanation offered by the defendant for eliminating plaintiff’s job was pretextual). There is disagreement among the federal circuits as to whether a pretext instruction is required in employment discrimination cases under Title VII. See Ratliff v. City of Gainesville, 256 F.3d 355 (5th Cir. 2001) (error not to give pretext inference instruction), with Palmer v. Bd. of Regents, 208 F.3d 969 (11th Cir. 2000) (no error in refusing to instruct jury that it could infer discrimination if it believed plaintiff’s prima facie case and disbelieved defendant’s reason for adverse employment action).

8. Cat’s Paw. There is an additional theory of causation in federal discrimination cases referred to as the “cat’s paw.” This theory recognizes that, in certain situations, a biased supervisor’s discriminatory animus may be the cause of the adverse employment action even though the actual decision-maker did not possess that discriminatory animus. See Staub v. Proctor Hosp., 562 U.S. 411 (2011); Fla. Dep’t of Children & Families v. Shapiro, 68 So. 3d 298, 306 (Fla. 4th DCA 2011). If the cat’s paw theory of causation applies, additional instructions may be necessary. See, e.g., Eleventh Circuit Pattern Jury Instruction 4.5.

9. Same Actor Inference. The law recognizes a permissible inference that discriminatory animus was not the cause of an adverse employment action when the person who hired the claimant is the same person who made the decision to take the adverse employment action. See Brown Distributing Co. of West Palm Beach v. Marcell, 890 So. 2d 1227, 1232 (Fla. 4th DCA 2005); see also Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1442–43 (11th Cir. 1998). A Florida appellate court has held it is reversible error to refuse to give an instruction on the “same actor” inference when it has been requested and applies to the circumstances of the case. See, e.g., Brown Distributing Co., 890 So. 2d at 1232. Additional instructions may thus be necessary based on the circumstances of a particular case.