>>> THE NEXT CASE FOR THE DAY IS
DELVA VERSUS CONTINENTAL GROUP.
>> YOUR HONOR, MAY IT PLEASE THE
COURT.
MY NAME IS TRAVIS HOLLIFIELD.
I REPRESENT THE PETITIONER IN
THIS MATTER, PEGUY DELVA.
THE COURT TODAY IS CALLED UPON
TO DECIDE AN ISSUE OF LAW AND AN
ISSUE OF A STATUTORY DEFINITION.
AND THE STATUTORY DEFINITION
ARISES FROM THE FLORIDA CIVIL
RIGHTS ACT FOR THE FCRA WHICH
PROHIBITS EMPLOYMENT
DISCRIMINATION, AMONG OTHER
THINGS, BECAUSE OF SEX.
SO IT IS THE WORDS, BECAUSE OF
SEX, IN THE FLORIDA CIVIL RIGHTS
ACT THAT IS THE FOCUS OF TODAY'S
ARGUMENT.
THE PETITIONER BROUGHT A
ONE-COUNT FCRA,
PREGNANCY-RELATED SEX
DISCRIMINATION CASE IN
MIAMI-DADE CIRCUIT COURT.
AND THE EMPLOYER, THE
CONTINENTAL GROUP WHO IS THE
RESPONDENT HERE TODAY, IN
RESPONSE TO THAT COMPLAINT,
FILED A MOTION TO DISMISS AS A
MATTER OF LAW, ARGUING THAT SEX
DISCRIMINATION UNDER THE FLORIDA
CIVIL RIGHTS ACT DOES NOT
ENCOMPASS SEX-SPECIFIC PHYSICAL
OR PHYSIOLOGICAL CONDITIONS LIKE
PREGNANCY AND AS A RESULT ARGUED
THAT THE CASE MUST BE DISMISSED
WITH PREJUDICE.
THE MIAMI-DADE COUNTY CIRCUIT
COURT JUDGE --
>> WHAT WERE, WHAT WERE THE
ALLEGATIONS THAT WERE THE
FOUNDATION FOR THE COMPLAINT?
GIVE US, SHE WAS A FRONT OFFICE
MANAGER.
>> YES.
>> AND WHAT DID SHE, WHAT WAS IT
THAT SHE ALLEGED?
>> MS. DELVA WAS A FRONT DESK
MANAGER FOR A HIGH RISE

CONDOMINIUM WHICH IS WHAT THE
CONTINENTAL GROUP IS IN BUSINESS
TO DO.
>> OH, I THOUGHT THEY WERE AN
INSURANCE COMPANY.
>> NO.
THEY ARE A PROPERTY MANAGEMENT
COMPANY THAT PROVIDES
MANAGEMENT SERVICES FOR
RESIDENCES AND OTHER BUILDINGS I
THINK PRIMARILY IN SOUTH FLORIDA.
ANY EVENT, MY CLIENT, MISS DELVA,
WAS A FRONT DESK MANAGER FOR ONE
OF THOSE PROPERTIES.
SHE BECAME PREGNANT AND SHE
INFORMED HER EMPLOYER THAT SHE
BECAME PREGNANT AND SUDDENLY SHE
NOTICED THERE WAS DIFFERENTIAL
TREATMENT.
AMONG OTHER THINGS SHE WAS NOT
PERMITTED TO POST FOR OTHER
PEOPLE'S SHIFTS WHICH WAS A
MATTER OF COMPANY POLICY AS
ALLEGED IN THE COMPLAINT.
IN OTHER WORDS, THERE IS A
POLICY IF YOU'RE AN EXISTING --
POLICY YOU COULD POST IF ANOTHER
PERSON BECAME SICK OR WAS ON
LEAVE, OR WAS ILL, YOU COULD
INTERNALLY POST FOR THOSE HOURS
IN ORDER TO EARN EXTRA MONEY.
ALL THE EMPLOYEES HAD THE
ABILITY TO DO THAT.
BUT ONCE SHE ANNOUNCED HER
PREGNANCY SHE WAS NO LONGER
PERMITTED TO PICK UP THOSE
SHIFTS TO EARN EXTRA MONEY.
PERHAPS THE MOST SIGNIFICANT
ALLEGATION WHEN SHE WAS GRANTED A
MATERNITY LEAVE, IN OTHER WORDS,
SHE WAS PERMITTED TO LEAVE, IT
WAS UNPAID LEAVE, TO HAVE HER
BABY BUT UPON, GIVING BIRTH,
WHEN SHE GAME BACK TO WORK,
THERE WAS NO SHIFT FOR HER.
>> HOW SOON DID SHE COME BACK TO
WORK?
>> YOUR HONOR, I'M NOT REALLY
CERTAIN EXACTLY HOW LONG AFTER
THE ACTUAL CHILDBIRTH IT WAS

THAT SHE ASKED TO COME BACK.
I DON'T THINK IT WAS MORE THAN A MATTER AFTER COUPLE OF WEEKS OR A FEW WEEKS, BUT I'M NOT SURE THAT WAS ALLEGED IN THE COMPLAINT.
>> SO SHE, YOU SAID SHE CAME BACK, THERE WAS NO JOB FOR HER?
>> THAT'S CORRECT, YOUR HONOR.
>> SO THESE ALLEGATIONS WERE NEVER TESTED BECAUSE AS YOU SAID, THEY WERE DISMISSED AS A MATTER OF LAW BECAUSE THEY SAID THAT THIS WAS NOT DUE TO SEX DISCRIMINATION?
>> THAT'S CORRECT, YOUR HONOR.
>> SO THE IDEA IS, IS THAT, I GUESS THE ARGUMENT IS IS THAT IF A, IF A SCHEME IS TO PROHIBIT A MEDICAL CONDITION THAT CAN ONLY BE A CONDITION THAT A PARTICULAR GENDER HAS, THEY HAVE GOT TO STATE THAT IN THE, IN THE STATUTE?
I MEAN THAT'S THE OTHER ARGUMENT.
THAT THERE HAS -- AND WHAT IS YOUR ANSWER TO THAT?
THAT ALTHOUGH CERTAINLY PREGNANCY CAN ONLY OCCUR RIGHT NOW TO WOMEN, THAT IT'S, THAT'S DIFFERENT THAN FAVORING MEN OVER WOMEN?
IT'S A SEPARATE, IT'S A SEPARATE TYPE OF DISCRIMINATION, PREGNANCY-BASED DISCRIMINATION?
>> WELL, YOUR HONOR, BOTH U.S. SUPREME COURT JURISPRUDENCE, CONGRESS'S AMENDMENT TO TITLE VII WHICH IS THE FEDERAL STATUTE THAT THE FLORIDA CIVIL RIGHTS ACT IS MODELED AFTER HAS NEVER CONSIDERED PREGNANCY DISCRIMINATION TO BE SEPARATE FROM SEX DISCRIMINATION.
IT IS CONSIDERED A SUBSET THERE OFF.
>> THE THIRD DISTRICT OPINION TAKES ISSUE WITH THAT.
THEY SAY THERE WAS A CASE OUT OF

THE SUPREME COURT, I GUESS IT
WAS HOTLY-CONTESTED, YOU KNOW,
WITH DISSENTS THAT SAID THE
FEDERAL CIVIL RIGHTS ACT DIDN'T
SAY PREGNANCY DISCRIMINATION.
NOW YOU SPENT A LOT OF TIME
TALKING ABOUT WHY THAT'S
DIFFERENT BUT I GUESS, LET'S
JUST ASSUME THAT THE U.S.
SUPREME COURT TOOK A SIMILAR
STATUTE AND SAID, IT DOESN'T
COVER PREGNANCY DISCRIMINATION
AND THEN CONGRESS AMENDED THE
STATUTE.
BUT THEIR ARGUMENT IS BECAUSE
FLORIDA DID NOT IT'S SOMEHOW,
THEREFORE, IT MUST REVEAL IT AN
INTENT NOT TO INCLUDE IT.
I FEEL UNCOMFORTABLE FRANKLY
WITH THAT ARGUMENT BECAUSE IT
SEEMS TO ME THAT PREGNANCY
DISCRIMINATION IS GENDER-BASED,
IT IS SEX DISCRIMINATION.
IT WAS --
>> I AGREE, YOUR HONOR.
>> I KNOW YOU WOULD BUT WHAT IS
THE ARGUMENT ABOUT THAT THIS,
SORT OF, TO ME, SOMEWHAT
CONVOLUTED THAT THE U.S. SUPREME
COURT, EVEN THOUGH EVERY OTHER
APPELLATE COURT SAID DIFFERENTLY
FOUND IN SOME CASE THAT, YOU
KNOW, IT DIDN'T INCLUDE
PREGNANCY?
I THINK THOSE WERE INSURANCE
PREMIUMS OR SOMETHING.
AND THEN THERE WAS AN AMENDMENT
BECAUSE FLORIDA DIDN'T THEY MUST
AMEND TO EXCLUDE IT.
THAT SEEMS LIKE A BACKWARDS WAY
TO DO A STATUTORY CONSTRUCTION.
>> I AGREE, YOUR HONOR.
>> I GUESS YOU WOULD.
AND IT IS SORT --
>> CALLED A FAVORABLE QUESTION.
>> YES.
BUT YOUR ANSWER SEEMS TO BE,
THE ONLY WAY THAT YOU
ANSWERED IT AS FAR AS WE RELY
ON THAT CASE IS THAT CASE REALLY

DIDN'T, ISN'T AS BROAD AS THE
THE THIRD DISTRICT OR YOUR
OPPONENTS WOULD MAKE IT.
>> RIGHT.
>> SO WE HAVE, SO WHAT WE HAVE
TO DO TO FIGURE OUT THAT
STATUTORY CONSTRUCTION IS
UNDERSTAND THE U.S. SUPREME
COURT CASE AND UNDERSTAND
WHETHER IT IS AS BROAD AS THE
THIRD DISTRICT GAVE IT CREDIT
FOR?
>> YOUR HONOR, I THINK THE
ANSWER IS WE DON'T HAVE TO GO TO
THAT U.S. SUPREME COURT CASE
WHICH IS GILBERT.
I THINK IT IS PART OF, IT'S PART
OF THE ANALYSIS BUT IT'S NOT THE
PRIMARY PART OF THE ANALYSIS OF
WHAT THIS COURT'S BEING CALLED
ON TO DO.
I BELIEVE IT PROVIDES SUPPORT FOR
THE PRIMARY ANALYSIS.
WHAT DO I MEAN?
THE PRIMARY ANALYSIS FOR THIS
COURT TO FOLLOW, REMEMBER WHAT
WE'RE, WHAT THE ISSUE IS IS,
WHAT DOES BECAUSE OF SEX MEAN?
WHAT DOES IT MEAN TO NOT TO
DISCRIMINATE BECAUSE OF SEX?
THE STATUTE DOES NOT PROVIDE A
DEFINITION OF WHAT SEX IS.
SO IF THERE'S NO STATUTORY
DEFINITION, AND BY THE WAY THERE
IS NO DISCERNIBLE LEGISLATIVE
HISTORY HERE, TO DETERMINE WHAT
DOES IT MEAN NOT TO DISCRIMINATE
BECAUSE OF SEX, THEN WHAT DOES
THIS COURT TYPICALLY DO WHEN
PRESENTED WITH A STATUTE WHERE
THERE IS A TERM THAT NEEDS TO BE
DEFINED, THAT'S NOT DEFINED IN
THE STATUTE AND NOT DEFINED IN
THE LEGISLATIVE HISTORY?
WHAT MY, WHAT MY ESTEEMED
OPPONENT ARGUES, AND I AGREE
WITH HIM, THAT YOU OPEN THE
DICTIONARY.
THAT'S THE FIRST THING THAT YOU DO
IS DETERMINE THE PLAIN MEANING

OF THE LANGUAGE USED BY THE
LEGISLATURE IN THE STATUTE.
YOU OPEN THE DICTIONARY AND LOOK
UP SEX.
AND WHEN YOU DO THAT, WHAT YOU
FIND ARE NUMEROUS DEFINITIONS
FROM, ALL OF THE DICTIONARIES
THAT WE TYPICALLY USE INCLUDING
BLACK'S LAW DICTIONARY,
WEBSTER'S, MIRIAM, JUST ABOUT
EVERY OTHER DICTIONARY YOU CAN
OPEN, WHEN YOU READ THE
DEFINITION OF SEX IT INCLUDES A
DISCUSSION OF THE DIFFERENT
PHYSICAL AND PHYSIOLOGICAL
CHARACTERISTICS OF THE TWO GENDERS
AND THAT, I'M FOCUSING ON
REPRODUCTIVE FUNCTION.
>> THAT IS OBVIOUSLY TRUE BUT IN
THIS CASE THERE WAS NO EVIDENCE
OF THE DISCRIMINATION HAVING TO
DO WITH YOUR CLIENT AS WOMAN.
IT HAD TO DO WITH HER PREGNANCY.
SO WHY ISN'T THAT DIFFERENT?
>> WELL, YOUR HONOR --
>> WHAT THE U.S. SUPREME COURT
FOUND IN GILBERT.
>> SURE, YOUR HONOR, THE ARGUMENT IS
THIS.
FIRST OF ALL WE ARGUE THAT
PREGNANCY AND BEING A WOMAN ARE
INEXTRICABLY LINKED.
YOU CAN'T SEPARATE THE TWO.
IT IS ONLY, THERE ARE ONLY
FEMALES THAT HAVE THE CAPACITY
TO BECOME PREGNANT AND CARRY A
CHILD TO TERM.
>> DO MEN SOMETIMES GET
MATERNITY BENEFITS?
>> I'M SORRY?
>> DO MEN SOMETIMES GET
MATERNITY BENEFITS?
>> MATERNITY BENEFITS, NO, YOUR
HONOR.
>> TIME OFF?
>> UNDER THE FAMILY AND MEDICAL
LEAVE ACT MEN OR FATHERS CAN
TAKE TIME OFF TO ESSENTIALLY,
CALL IT BONDING TIME WITH THE
CHILD THAT HAS, EITHER BEEN BORN

INTO A MARRIAGE
RELATIONSHIP OR THAT HAS BEEN
ADOPTED.
>> SO IF, IF AN EMPLOYER DOES
NOT ALLOW THAT OR TERMINATES
EMPLOYMENT WITH A MALE
ATTEMPTING TO AVAIL THEMSELVES
OF THAT RIGHT, THAT WOULD BE
DISCRIMINATION UNDER THIS
PARTICULAR STATUTE?
>> WELL, IT CERTAINLY WOULD BE,
IT WOULD BE CONSIDERED
INTERFERENCE UNDER THE FAMILY
AND MEDICAL LEAVE ACT BECAUSE
THAT IS A FEDERAL STATUTE THAT
DEALS WITH LEAVE RIGHTS.
SPECIFICALLY LEAVE RIGHTS.
>> WOULD IT BE DISCRIMINATORY
UNDER THE FLORIDA CIVIL RIGHTS
ACT.
>> WOULD IT BE DISCRIMINATORY
FOR AN EMPLOYER TO PREVENT A
MAN FROM TAKING TIME OFF
BECAUSE OF A CHILD BEING
BORN?
>> YES.
>> I DON'T BELIEVE SO, YOUR
HONOR.
>> HOW ABOUT THIS?
THE ANSWER COULD BE, YOU COULD
BRING, YOU MIGHT BE ABLE TO
BRING THE CLAIM, BUT IF, YOU
MIGHT, THE EMPLOYER MIGHT HAVE A
REASON FOR THAT POLICY, THAT IS,
EXEMPTS IT.
SO, YOU KNOW, WHAT STRIKES ME
ABOUT THIS IS THAT, I WAS
THINKING ABOUT THIS, IF YOUR
CLAIM HAD BEEN THAT THEY DIDN'T
GIVE HER ENOUGH MATERNITY LEAVE,
WOULD THAT BE SEX DISCRIMINATION
OR SOMETHING ELSE?
>> WELL, I DON'T WANT TO CONFUSE
THE TWO, THE TWO ISSUES.
WHAT I MEAN BY THAT IS THIS.
THE FAMILY MEDICAL LEAVE ACT
WHICH IS A STATUTE, A FEDERAL
STATUTE THAT, THAT APPLIES NOT
TO ALL EMPLOYERS BUT TO CERTAIN
EMPLOYERS, IS FOCUSED ON

PROVIDING LEAVE RIGHTS UNDER THE CIRCUMSTANCES OF A CHILDBIRTH.
SO THE FLORIDA CIVIL RIGHTS ACT DEALS WITH DISCRIMINATION IN EMPLOYMENT WHICH CAN INCLUDE INCLUDE DISCRIMINATION ON THE BASIS OF PROVISION OF FRINGE BENEFITS LIKE EMPLOYMENT-LIKE LEAVE.
YOU CAN HAVE A CASE ONE AND THE SAME UNDER THE FLORIDA CIVIL RIGHTS ACT, FOR, IN THIS CASE SEX DISCRIMINATION AND UNDER THE FAMILY AND MEDICAL LEAVE ACT BUT OUR FOCUS TODAY ON THE FLORIDA CIVIL RIGHTS ACT AND WHAT IT MEANS TO DISCRIMINATE BECAUSE OF SEX, I WANT TO ANSWER BOTH OF YOUR QUESTIONS IF I MAY ABOUT GILBERT.
I THINK IS VERY IMPORTANT.
BECAUSE YOU BOTH MENTIONED GILBERT.
GILBERT WAS A U.S. SUPREME COURT CASE FROM 1976 THAT WAS IN THE CONTEXT OF AN EMPLOYEE ASSERTING THAT A COMPREHENSIVE HEALTH INSURANCE PLAN SPONSORED BY THE EMPLOYER, THAT COVERED ALL TYPES OF MEDICAL ISSUES THAT WOULD REQUIRE SOME SORT OF LEAVE FROM WORK, EXCEPT PREGNANCY, AND THE EMPLOYEE AND THEIR ATTORNEYS ARGUED, UP THE CHAIN UP TO THE U.S. SUPREME COURT THAT THAT CONSTITUTED DISCRIMINATION PER SE.
AND THAT IS DIFFERENT FROM DISCRIMINATION, OTHER TYPES OF DISCRIMINATION THEORIES.
DISCRIMINATION PER SE IS BASICALLY, LISTEN, HERE'S THIS POLICY THAT EXCLUDE PREGNANCY BENEFITS.
WE DON'T HAVE TO PRESENT ANY OTHER EVIDENCE OTHER THAN THIS.
HERE'S THE POLICY IT EXCLUDES PREGNANCY BENEFITS.
U.S. SUPREME COURT, WE WANT YOU

TO RULE THIS IS DISCRIMINATION
PER SE AND RELIEVE US OF ANY
BURDEN OF INTRODUCING ANY OTHER
EVIDENCE.
ALL THE U.S. SUPREME COURT SAID
IN THAT CASE IS, NO.
WE'RE NOT GOING TO ACCEPT A
DISCRIMINATORY PER SE THEORY
HERE.
WE'RE NOT GOING TO RELIEVE YOU AS
THE PLAINTIFF EMPLOYEE FROM
INTRODUCING EVIDENCE OF EITHER
DISCRIMINATORY INTENT OR
DISCRIMINATORY AFFECT OR IMPACT.
AND THEREFORE THE COURT RULED IN
THAT CASE BECAUSE THE
PLAINTIFF AND THE ATTORNEYS
DID NOT HAVE ANY EVIDENCE OF
DISCRIMINATORY INTENT OR IMPACT
IN THE LOWER COURT, IN THE TRIAL
COURT, FEDERAL DISTRICT COURT.
THEN THEREFORE THEY WERE RULING
IN FAVOR OF THE EMPLOYER.
THE COURT NEVER SAID THAT
PREGNANCY DISCRIMINATION CAN NOT
BE SEX DISCRIMINATION.
THAT WAS NEVER HELD IN THAT
CASE.
>> I WOULD LIKE TO REQUEST THE
QUESTION THAT KIND OF GOES BACK
TO THE FLORIDA LAW.
>> YES, YOUR HONOR.
>> I UNDERSTAND YOUR POINT ABOUT
THE CONNECTION BETWEEN PREGNANCY
AND SEX.
>> YES.
>> BUT WHAT DO WE DO WITH THE
FACT THAT THE FLORIDA
LEGISLATURE AS IN OTHER CONTENT
PROHIBITED PREGNANCY
DISCRIMINATION?
THAT THEY HAVE SINGLED THAT OUT
AS A SEPARATE AND DISCRETE
MATTER FOR, THAT IS BASIS FOR
PROTECTION?
>> YOUR HONOR, YES, MY OPPONENT
RAISED THAT IN HIS BRIEF AND
BROUGHT THE COURT'S ATTENTION TO
WHAT'S KNOWN AS FLORIDA'S FAIR
HOUSING ACT.

THE FAIR HOUSING ACT IS A
STATUTE OF COURSE THAT IS, ONE
CAN ARGUE HOW CLOSE IT IS TO THE
FLORIDA CIVIL RIGHTS ACT AS FAR
AS WHAT IT PROHIBITS BUT
ESSENTIALLY FLORIDA'S --
>> BUT DOES IT REFER TO SEX?
>> IT REFERS TO SEX.
>> AND PREGNANCY?
SEPARATE THINGS.
>> WELL, YOUR HONOR, IT REFERS
TO SEX AND IT REFERS TO MARITAL
STATUS.
THOSE ARE THE TWO PROTECTED
CHARACTERISTICS THAT ARE
ACTUALLY LISTED IN THE STATUTE
AS IMMUTABLE CHARACTERISTICS THAT
WILL BE PROTECTED BY LAW.
IN THAT STATUTE, YOUR HONOR,
THERE ARE ACTUALLY TWO
DEFINITIONS, NOT ONE, OF MARITAL
STATUS.
THERE'S ONE DEFINITION OF
MARITAL STATUS EARLIER IN THE
STATUTE THAT TALKS ABOUT
WHETHER OR NOT A PERSON WHO
FEELS LIKE THEY'RE BEING
DISCRIMINATED AGAINST, AGAIN,
THIS IS THE CONTEXT OF HOUSING
NOW, WHERE IF YOU'RE TRYING TO
GET HOUSING IN ORDER TO STATE A
CLAIM OR STATE A PRIMA FACIE
CASE OF MARITAL STATUS
DISCRIMINATION, YOU HAVE TO SHOW
THAT YOU HAVE A CHILD, UNDER THE
AGE OF 18, THAT IS DOMICILED
WITH YOU.
THAT'S THE ESSENTIAL STATUTORY
PROTECTION.
>> WHAT DOES IT SAY ABOUT
PREGNANCY?
>> LATER IN THE STATUTE THERE'S,
IT IS AN ADD-ON OR A SECOND
DEFINITION.
AND MAY I EXPLAIN?
THE THIS ADD-ON DEFINITION TO
MARITAL STATUS WAS INTENDED TO
BROADEN THE SCOPE OF FAMILIAL
STATUS, IF I'M SAYING MARITAL
STATUS I APOLOGIZE.

I'M MEANING TO SAY FAMILIAL
STATUS.
FAMILIAL STATUS MEANS HAVING A
CHILD, THAT IS THE ESSENTIAL
DEFINITION.
WHAT THE LEGISLATURE AND THE
U.S. CONGRESS RECOGNIZED IS,
SOMETIMES A YOUNG COUPLE OR A
YOUNG PERSON OR A YOUNG WOMAN
MAY NOT YET HAVE A FAMILY AND
THEREFORE CAN NOT STATE A CLAIM
FOR FAMILIAL STATUS
DISCRIMINATION IF THEY'RE BEING
DENIED HOUSING.
THEY MAY INSTEAD BE PREGNANT.
OR, THE OTHER PART OF THAT
SECOND DEFINITION ISN'T JUST
LIMITED TO PREGNANCY.
IT'S ALSO EXTENDED TO EITHER
MALES OR FEMALES WHO ARE IN THE
PROCESS OF ADOPTION.
SO THEREFORE, YOU'RE, THE
LEGISLATURE IN ITS VIEW HAD TO
EXPAND THAT DEFINITION OF
FAMILIAL STATUS BEYOND WHAT IT
REALLY MEANS,
WHICH MEANS TO HAVE A CHILD.
>> IS THERE ANY OTHER CONTEXT
THE LEGISLATURE HAS PROHIBITED
BOTH SEX DISCRIMINATION AND
DISCRIMINATION ON THE BASIS OF
PREGNANCY?
>> THE ONLY OTHER STATUTE THAT
MY OPPONENT MENTIONED IN HIS
BRIEF RELATES TO
LEAVE RIGHTS UNDER THE PUBLIC
EMPLOYER STATUTE.
AND AGAIN, THE LEAVE RIGHTS
STATUTE -- WHICH ORIGINALLY CAME
OUT I WANT TO SAY 1979, 1980,
1981, AROUND THERE -- WAS
ESSENTIALLY A PRECURSOR TO
TODAY'S FAMILY MEDICAL LEAVE
ACT.
IT WAS A NARROWLY-FOCUSED
STATUTE NOT NECESSARILY ON
DISCRIMINATION AND EMPLOYMENT,
BUT THE SUBSECTION WHERE THE
WORD "PREGNANCY" COMES UP DEALS
WITH MATERNITY LEAVE BENEFITS

FOR PUBLIC EMPLOYEES.
AT THAT TIME THERE WERE NO
PROTECTED MATERNITY LEAVE
BENEFITS FOR PRIVATE EMPLOYEES.
THE PUBLIC SECTOR CAME FIRST.
SO IN CRAFTING THE SCHEME TO
PROVIDE MATERNITY RIGHTS FOR
PUBLIC EMPLOYEES, THE
LEGISLATURE ADDED ON IN ADDITION
TO THAT, LISTEN, NOT ONLY ARE WE
NOT GOING TO FIRE YOU IF YOU
HAVE TO TAKE MATERNITY LEAVE,
BUT WE'RE NOT GOING TO FIRE YOU
IF YOU NEED TO TAKE LEAVE AS A
RESULT OF BEING PREGNANT.
SO THAT'S THE CONTEXT THAT THAT
STATUTE CAME, THAT THAT
DEFINITION OR USE OF THE WORD
"PREGNANCY" CAME UP IN.
SO SEX DISCRIMINATION, WE ARE
ARGUING, WOULD ENCOMPASS ANY
SEX-SPECIFIC PHYSICAL OR
PHYSIOLOGICAL CONDITION.
>> OKAY.
COULD WE TEST THE LIMITS OF
THAT?
BECAUSE, OF COURSE, WE ARE
DEALING WITH ONE ISOLATED
CONDITION TODAY.
>> YES.
>> BUT TOMORROW WE'RE GOING TO
BE FACING OTHERS.
HOW, WHERE DOES THIS TAKE US?
I MEAN, FOR EXAMPLE, WITH THOSE
THINGS THAT ARE EXCLUSIVELY
RELATED TO ONE GENDER OR
ANOTHER --
>> YES, YOUR HONOR.
>> -- PROSTATE ISSUES,
MALE/FEMALE, VIAGRA VERSUS BIRTH
CONTROL, BREAST AUGMENTATION,
THIS WHOLE GAMUT, BECAUSE THIS
IS WHAT WE'RE GOING TO BE FACING
IF WE'RE ESTABLISHING A
DEFINITION FOR FLORIDA LAW.
>> YES, YOUR HONOR.
>> WHAT HAPPENS IN THOSE KINDS
OF CASES?
ALL THOSE ARE PROTECTED AS WELL?
>> WELL, YOUR HONOR, OUR

ARGUMENT IS THAT AN EMPLOYER CANNOT DISCRIMINATE, CANNOT TAKE ADVERSE EMPLOYMENT ACTION AGAINST A PERSON BECAUSE OF A SEX-SPECIFIC PHYSICAL OR PHYSIOLOGICAL CONDITION.
IF I MAY GIVE A COUPLE OF OTHER EXAMPLES THAT ARE FOUND IN THE CASE LAW, THE FIFTH CIRCUIT COURT OF APPEALS IN -- WHICH, OF COURSE, IS FEDERAL COURT, TEXAS, LOUISIANA, MISSISSIPPI, USED TO BE FLORIDA, GEORGIA AND ALABAMA AS WELL UNTIL 1981 -- HAS ADDRESSED THE VERY ISSUE THAT YOU'RE RAISING.
ONE IS THE CASE OF HARPER V. -- [INAUDIBLE]
CHEMICAL, 1980, AND THE OTHER IS A CASE THAT CAME OUT DURING THE BRIEFING OF THIS CASE, EEOC V. HOUSTON FUNDING.
AND IN THOSE TWO CASES, YOUR HONOR, IN HARPER THE ISSUE WAS THIS: THE EMPLOYEE HAD GONE OUT ON A MATERNITY LEAVE, PERIOD, THAT THE EMPLOYER HAD PROVIDED. BUT THE EMPLOYER WOULD NOT ALLOW HER TO RETURN TO WORK UNLESS SHE HAD A DOCTOR'S NOTE THAT HER MENSTRUAL CYCLE HAD REENGAGED AFTER THE PREGNANCY PERIOD.
SO SHE ARGUED, WELL, ONLY WOMEN CAN MENSTRUATE, AND IF YOU ARE PREVENTING ME FROM COMING BACK TO WORK AND EARNING MONEY FOR THE SIMPLE FACT, FOR THE SIMPLE FACT THAT I WAS PREGNANT AND FOR A CERTAIN TIME I WASN'T MENSTRUATING AND NOW I'M READY TO COME BACK TO WORK AND YOU'RE PREVENTING ME FROM DOING THAT, THAT VIOLATES THE LAW.
AND THE FIFTH CIRCUIT AGREED WITH THAT.
THE OTHER CASE, THE HOUSTON FUNDING CASE, DEALS WITH LACTATION.
A WOMAN BECAME PREGNANT, AND SHE LACTATED, AND SHE HAD TO EXPRESS

MILK FOR HER CHILD.
AND THE ISSUE IN THAT CASE WAS
DOES THAT CONSTITUTE SEX
DISCRIMINATION.
AND AGAIN THE FIFTH CIRCUIT
FOUND, YES, IT DOES --
>> UNDER STATUTES WITH THE SAME
TERMS THAT WE'RE DEALING WITH
TODAY.
>> IN THESE TWO CASES, THEY WERE
DEALING WITH TITLE VII.
SO IT WAS THE FEDERAL STATUTE
THAT BARS SEX DISCRIMINATION.
AND IN THIS CASE, YOUR HONOR --
I SEE MY TIME IS RUNNING OUT --
BUT IN THIS CASE ALL WE ARE
ASKING IS THAT THIS COURT
DETERMINE THAT ANY SEX-SPECIFIC
PHYSICAL OR PHYSIOLOGICAL
CONDITION THAT COULD BE SINGLED
OUT BY AN EMPLOYER FOR
DISCRIMINATION, THAT'S SEX
DISCRIMINATION.
>> YOUR TIME HAS EXPIRED.
I'LL GIVE YOU AN ADDITIONAL
MINUTE FOR REBUTTAL.
>> THANK YOU, YOUR HONOR.
>> GOOD MORNING.
MAY IT PLEASE THE COURT, ANDREW
RODMAN OF STERNS, WEAVER, MILLER
ON BEHALF OF THE RESPONDENT, THE
CONTINENTAL GROUP.
YOUR HONORS, THE CRUX OF THE
ISSUE BEFORE THIS COURT IS
WHETHER A FEDERAL STATUTE AND A
STATE STATUTE WITH DIFFERENT
STATUTORY LANGUAGE SHOULD BE
INTERPRETED IDENTICALLY WITH
RESPECT TO THE MEANING OF THE
TERM "SEX."
IN ESSENCE, THE PETITIONER IS
ASKING THIS COURT TO JUDICIALLY
AMEND THE FCRA.
>> WELL, THAT'S NOT REALLY THE
CASE.
YOU'RE GOING BACK TO GILBERT.
IF I -- LET'S TAKE GILBERT OUT
OF THE EQUATION.
SEX DISCRIMINATION -- BECAUSE
THIS WOMAN, AGAIN, UNLIKE --

THIS WASN'T ABOUT MATERNITY
LEAVE OR GETTING MEDICATION.
THIS WAS ABOUT THAT SHE ALL OF A
SUDDEN, BECAUSE SHE'S PREGNANT,
CAN'T APPLY FOR -- AND THIS IS
AN ALLEGATION, OBVIOUSLY.
YOU MAY DENY IT, AND IT MAY BE
PROVEN TO BE FALSE.
BUT SHE DIDN'T EVEN GET IN THE
DOOR TO BE ABLE TO PROVE IT.
THE STATUTE IN ADDITION TO
SAYING "INCLUDING SEX
DISCRIMINATION" SAYS "IT SHALL
BE LIBERALLY CONSTRUED,"
CORRECT?
>> CORRECT, YOUR HONOR.
>> THAT ASPECT.
I'M HAVING A HARD TIME
UNDERSTANDING IF YOU'RE -- THE
RULE OF LAW IS THAT IF THEY'RE
GOING TO, EVEN THOUGH ONLY A
WOMAN CAN BECOME PREGNANT, IF
THEY'RE GOING TO WANT TO
PROHIBIT DISCRIMINATION BECAUSE
YOU'RE A WOMAN AND YOU GET
PREGNANT, YOU'VE GOT TO SAY AND
"PREGNANCY-BASED
DISCRIMINATION."
THAT'S -- BECAUSE, TO ME, IT IS
ENCOMPASSED.
PLAIN MEANING, LIBERAL
CONSTRUCTION WITHIN THE MEANING
OF THE TERM.
AND I DON'T, YOU KNOW, I'LL GO
BACK AND LOOK AT GILBERT, BUT I
DON'T KNOW FOR US TO DO A
STATUTORY CONSTRUCTION BASED ON
A CASE OUT OF THE U.S. SUPREME
COURT FROM THE 1970s WHICH HAD
TO DO, AS I UNDERSTAND, WITH
SOMETHING THAT MIGHT BE ENTIRELY
DIFFERENT SEEMS LIKE AN ODD WAY
FOR US TO ENGAGE IN STATUTORY
CONSTRUCTION.
SO CAN WE, LIKE, START -- LET'S
ASSUME NO GILBERT.
TELL ME WHY PREGNANCY
DISCRIMINATION IS NOT
ENCOMPASSED WITHIN THE MEANING
OF THE, PLAIN MEANING AND

LIBERAL CONSTRUCTION OF THE
MEANING "SEX DISCRIMINATION."
>> I APPRECIATE THE QUESTION,
JUSTICE PARIENTE.
I WILL TRY TO PUT GILBERT ASIDE,
BUT I WOULD LIKE TO PULL OUT ONE
SEGMENT OF GILBERT, BECAUSE I
THINK IT'S INSTRUCTIVE TO THIS
QUESTION.
AND THAT IS GILBERT AND THE 1974
U.S. SUPREME COURT DECISION
STATED AS FOLLOWS: THEY
RECOGNIZED THAT WHILE ONLY WOMEN
CAN GET PREGNANT, NOT EVERY
PREGNANCY-BASED CLASSIFICATION
IS NECESSARILY SEX-BASED.
AND I THINK THAT THE BEST WAY TO
REALLY --
>> AND I JUST --
>> OF COURSE.
>> SEE, I AGREE WITH YOU IN THAT
I THINK WHEN YOU GET INTO ISSUES
ABOUT MATERNITY LEAVE, YOU MAY
BE IN A DIFFERENT REALM.
BUT WHAT -- WHY I ASKED WHAT THE
PLEADINGS WERE IN THIS CASE IS
THAT IT DIDN'T HAVE TO DO WITH A
LEAVE POLICY OR SOMETHING WHERE
THEY DIDN'T GET AS MUCH MEDICAL
INSURANCE AS, YOU KNOW, THEY'RE
ASKING FOR SOMETHING, AGAIN,
BREAST AUGMENTATION AND THEY
SAY, WELL, THAT WAS SEX
DISCRIMINATION BECAUSE THE
POLICY DIDN'T INCLUDE IT.
THAT MIGHT BE A DIFFERENT CASE.
WE'RE TALKING ABOUT THAT THIS
WOMAN ALLEGED I WAS GOING ALONG,
DOING MY JOB, DOING IT WELL, AND
I GET PREGNANT, AND NOW THEY
START DISCRIMINATING AGAINST ME
BECAUSE THEY'RE NOT GIVING ME
THE HOURS OR ALLOWING ME TO
APPLY.
SO I DON'T, I THINK THAT THAT'S
WHY IN THIS CASE TO SAY THAT
THAT IS PER SE EXCLUDED AS
OPPOSED TO EXAMINING, YOU KNOW,
LETTING HER GET IN THE DOOR IS
WHAT I'M HAVING TROUBLE WITH.

>> JUSTICE PARIENTE, I THINK THIS IS WHAT IT BOILS DOWN TO. IF YOU LOOK AT THE COMPLAINT THAT WAS FILED IN THE CIRCUIT COURT, THE ONE THAT RESULTED IN THE DISMISSAL ORDER, IT IS ABUNDANTLY CLEAR FROM LOOKING AT THE COMPLAINT THAT MS. DELVA IS TRYING TO CREATE A NEW PROTECTED CLASSIFICATION.
THE COMPLAINT CLEARLY STATES THAT SHE BELIEVES THAT SHE WAS DISCRIMINATED AGAINST BECAUSE OF HER PREGNANCY.
SHE'S TRYING TO CREATE A NINTH PROTECTED CLASSIFICATION --
>> WELL, BUT WHAT -- BUT IF THE ALLEGATION IS I GOT PREGNANT AND NOW I CAN'T, I'M NOT ABLE -- MY EMPLOYER DID NOT ALLOW ME TO EARN EXTRA MONEY AND THAT'S SOLELY BECAUSE I WAS PREGNANT, HOW IS THAT A NEW CLASSIFICATION?
>> I DON'T BELIEVE THAT THAT IS THE ALLEGATION, YOUR HONOR, THAT MY EMPLOYER IS NOT ALLOWING ME TO EARN EXTRA MONEY BECAUSE OF MY PREGNANCY OR BECAUSE I WAS PREGNANT.
IT'S OUR POSITION THAT THAT IS NOT COVERED BY THE FCRA.
>> WELL, I REALIZE YOU THINK THAT, BUT I'M ASKING YOU WHY WOULD IT BE THAT NOT WITHIN THE PLAIN MEANING AND LIBERAL CONSTRUCTION OF SEX -- I MEAN, YOU KNOW, IF THIS WAS DEFENDED ON ITS MERITS AND WE FOUND THAT, NO, THIS WAS A POLICY THAT THEY DID BECAUSE THEY WERE CONCERNED THAT, YOU KNOW, SHE WAS HAVING OTHER MEDICAL ISSUES OR THERE WAS SOME OTHER REASON --
>> OF COURSE.
>> -- YOU KNOW, THEN WE HAVE A RECORD TO SAY, NO, THAT WASN'T SEX DISCRIMINATION.
>> SURE.
>> THAT WAS, THEY HAD A LOGICAL

REASON FOR TREATING HER
DIFFERENTLY.
BUT WE DON'T KNOW THAT.
>> UNDERSTOOD, YOUR HONOR.
I THINK AT THE END OF THE DAY
THIS BOILS DOWN TO LEGISLATIVE
INTENT.
WHAT YOU HAD HERE WAS YOU HAD
THE GILBERT DECISION IN 1976.
TWO YEARS LATER YOU HAD THE U.S.
CONGRESS WHICH, IN ESSENCE,
DISAGREED WITH GILBERT AND SAID
WE BELIEVE THAT SEX DOES EQUAL
PREGNANCY.
THAT WAS 1978.
FROM THAT POINT FORWARD OVER THE
LAST 35 YEARS, THERE HAS BEEN
DEAFENING SILENCE FROM THE
FLORIDA LEGISLATURE.
>> MAYBE BECAUSE IT'S CLEAR TO
ANYBODY LOOKING AT IT THAT IF
YOU'RE BEING DISCRIMINATED
AGAINST BECAUSE YOU'RE PREGNANT,
THAT IS SEX DISCRIMINATION IN
THE EYES -- I WOULD SAY,
CERTAINLY, ALL THE WOMEN LOOKING
AT THAT WOULD CERTAINLY THINK
SO.
>> SURE.
>> YOU KNOW?
I APPRECIATE THAT OTHERS MAY
PERHAPS DISAGREE, BUT I THINK
THAT IT IS, MOST RESPECTFULLY, A
LUDICROUS ARGUMENT.
>> AND I WOULD SUGGEST, YOUR
HONOR, THAT WE LOOK AT THE
TIMELINE FOR A MOMENT.
BECAUSE I THINK THAT IS --
>> BUT LET ME MAKE ANOTHER POINT
HERE.
ISN'T IT SOMEWHAT PROBLEMATIC
FOR US TO INFER A GREAT DEAL
FROM THE FACT THAT THE
LEGISLATURE HAS FAILED TO ACT?
I MEAN, THE LEGISLATURE
EXPRESSES ITS INTENTION BY
PASSING BILLS.
AND SO FAR AS I KNOW OF, THAT'S
THE ONLY WAY THE LEGISLATURE CAN
EXPRESS AN INTENTION, PASSING A

LAW.
AND THE FACT THAT THEY DIDN'T COME IN AND AMEND THE FLORIDA STATUTE AFTER THIS INTERPRETATION OF THE FEDERAL STATUTE BY THE U.S. SUPREME COURT, I MEAN, IT'S ALL -- THE HISTORY'S VERY INTERESTING, BUT I -- WHY ARE WE JUSTIFIED IN INFERRING ANYTHING FROM THAT LACK OF ACTION BY THE FLORIDA LEGISLATURE?
>> JUSTICE CANADY, I WOULD SUGGEST THAT THERE IS A CONSTITUTIONAL ISSUE AT PLAY, AND THAT IS THIS: THE O'LAUGHLIN COURT, WHICH WAS A 1991 DECISION FROM THE FIRST DCA, ESSENTIALLY HELD THAT ENACTMENT OF A FEDERAL STATUTE DOES NOT TRICKLE DOWN TO THE STATE LEVEL WITHOUT CORRESPONDING STATE ACTION.
AND I KNOW THAT THERE'S BEEN SOME DISAGREEMENT WITH THE PETITIONER IN THIS CASE OVER WHAT DOES O'LAUGHLIN REALLY MEAN --
>> WELL, BUT O'LAUGHLIN, I MEAN, THAT'S KIND OF OUT THERE IN TERMS OF THE PREEMPTION ANALYSIS.
I MEAN, I HAVE NEVER HEARD OF ANYTHING LIKE THAT, AND I DON'T THINK ANYBODY ELSE HAS.
DO YOU THINK THAT PREEMPTION ANALYSIS IN O'LAUGHLIN WAS CORRECT?
>> I THINK THERE ARE TROUBLING ASPECTS.
WHAT I THINK IS INSTRUCTIVE, YOUR HONOR, IS THAT O'LAUGHLIN RECOGNIZED THAT AFTER ENACTMENT OF THE PDA IN 1978 THERE WAS NO CORRESPONDING LEGISLATIVE ACTION IN FLORIDA.
AND THEN IN 2007 THE FIRST DCA IN WINN-DIXIE V. ROEDICK -- THE 2007 OPINION -- EXPLAINED, ESSENTIALLY, WHAT THEY MEANT.
AND THEY WERE DEALING WITH THE

ATTORNEYS' FEE PROVISION UNDER
FCRA AT THAT POINT.
BUT IN EXPLAINING THE ATTORNEYS'
FEE PROVISION, THEY CITED BACK
TO THE O'LAUGHLIN DECISION AND
SAID WHEN THERE IS U.S.
CONGRESSIONAL ACTION, IF THERE
HAD BEEN AMENDMENTS TO TITLE
VII, IT DOES NOT TRICKLE DOWN TO
THE STATE LEVEL.
PETITIONER'S ESSENTIALLY SAYING
TO THIS COURT IT'S AS IF THE
FLORIDA LEGISLATURE CAN SAY
WE'LL ENACT A STATUTE, WHATEVER
HAPPENS AT THE FEDERAL LEVEL,
LET IT TRICKLE DOWN.
THAT'S FINE.
I WOULD SUGGEST --
>> BUT THAT'S ONE ARGUMENT.
BUT THAT'S A DIFFERENT QUESTION
THAN WHAT THE TEXT OF THAT
STATUTE THAT WAS ENACTED AND NOT
AMENDED BY THE FLORIDA
LEGISLATURE MEANS.
AND SO THAT'S WHERE I THINK
YOU'RE, IF I HEAR SOME OF WHAT
MY COLLEAGUES ARE ASKING, THAT'S
THE WEAK POINT HERE OF HOW YOU
CAN SEPARATE PREGNANCY,
DISCRIMINATION ON THE BASIS OF
PREGNANCY FROM DISCRIMINATION ON
THE BASIS OF SEX.
YOU'VE GOT SOME ARGUMENTS ABOUT
OTHER THINGS THE LEGISLATURE
SAID ELSEWHERE --
>> SURE.
YOUR HONOR, LET ME TRY TO GIVE
YOU AN EXAMPLE, AND I THINK
PERHAPS THIS WILL SHOW WHERE
WE'RE COMING FROM.
IF I'M AN EMPLOYER AND I HAVE
TWO FEMALE APPLICANTS IN FRONT
OF ME, ONE FEMALE'S PREGNANT,
ONE FEMALE IS NOT PREGNANT, I
DECIDE TO HIRE THE NONPREGNANT
FEMALE.
NOW, THE PREGNANT FEMALE SUES
ME.
SHE SAYS IT'S PREGNANCY
DISCRIMINATION BECAUSE SHE

REALLY THINKS SHE WAS
DISCRIMINATED AGAINST ON THE
BASIS OF HER SEX.
MY RESPONSE AS THE EMPLOYER IS
IT CAN'T BE BECAUSE OF YOUR SEX,
GENDER.
I HIRED ANOTHER FEMALE.
SO THERE ARE CERTAIN
CIRCUMSTANCES WHERE MAKING A
DECISION BASED UPON PREGNANCY IS
NOT NECESSARILY --
>> WELL, BUT THE ARGUMENT, I
MEAN, THE FACT THAT AN EMPLOYER
FIRES SOMEBODY BASED ON SEXUAL
DISCRIMINATION DOES NOT, IS NOT
NECESSARILY NEGATED BY THE FACT
THAT THEY HIRE A WOMAN AS A
REPLACEMENT.
IS THAT THE LAW?
THAT BECAUSE YOU CAN, YOU CAN
DISCRIMINATE AGAINST SOMEONE ON
SOME BASIS AS LONG AS YOU HIRE
SOMEONE THAT FITS THAT SAME
CATEGORY TO REPLACE THEM?
YOU CAN'T --
>> I BELIEVE, YOUR HONOR, THAT
UNDER THE LAW THAT THE PREGNANT
WOMAN WHO WOULD BE SUING ME FOR
NOT HIRING ME BECAUSE OF HER
PREGNANCY, IT WOULD BE INCUMBENT
UPON HER TO ESTABLISH THAT
SIMILARLY-SITUATED PEOPLE WERE
TREATED DIFFERENTLY.
SHE WOULD NOT BE ABLE TO
ESTABLISH THAT, AND I DO NOT
BELIEVE SHE WOULD BE ABLE TO
PROCEED WITH HER CASE.
>> WAIT, BUT YOU'RE -- SEE,
THAT'S DIFFERENT, WHETHER SHE
CAN GET IN THE DOOR.
SHE ALLEGES SOMETHING UNDER
PREGNANCY -- THAT SHE DID NOT
GET THIS JOB -- AND YOU HAVE
PROOF THEN THAT, NO, THEY DIDN'T
DISCRIMINATE, THEY HIRE WOMEN
ALL THE TIME.
YOU MAY HAVE A DIFFERENT CASE.
BUT WE'RE TALKING ABOUT WHETHER
YOU CAN AT LEAST STATE A CAUSE
OF ACTION.

AND YOU MAY HAVE A REASON FOR
HAVING TREATED HER DIFFERENTLY
THAT IS VALID AND
NONDISCRIMINATORY, BUT THAT'S
PART OF WHAT HAPPENS ONCE YOU
GET INTO THE COURTHOUSE DOOR.
YOU MAY EVEN WIN ON A SUMMARY
JUDGMENT FOR OTHER REASONS.
BUT I DON'T SEE HOW THAT
ESTABLISHES THAT, YOU KNOW, ARE
YOU SAYING THEN THAT SAY THERE'S
A MALE AND A FEMALE, AND THOSE
WERE THE TWO PEOPLE HIRED, AND
SHE DOESN'T GET HIRED BUT THE
MALE DOES, THAT SHE -- AND SHE'S
PREGNANT -- THAT SHE CAN ALLEGE
THAT WAS SEX-BASED
DISCRIMINATION?
>> SHE WOULD HAVE TO SHOW THAT,
SHE WOULD HAVE TO PROVE THAT
THERE WAS AN INVIDIOUS INTENT TO
USE THE GILBERT LANGUAGE, THAT
IT WAS SEX-BASED, GENDER-BASED.
>> SO IN THE STATE OF FLORIDA
UNDER THIS LIBERAL CONSTRUCTION,
YOU'RE SAYING EMPLOYERS CAN
DISCRIMINATE AGAINST WOMEN BASED
SOLELY ON THEIR PREGNANCY?
>> I WOULD --
>> IS THAT WHAT YOU'RE SAYING?
>> NO, I WOULD --
>> WELL, I THINK --
>> I WOULD REPHRASE THAT A
LITTLE BIT, WITH ALL DUE
RESPECT, YOUR HONOR.
IT'S NOT BECAUSE OF SEX.
THEY CANNOT STATE A CAUSE OF
ACTION IF THEY'RE SAYING IT WAS
BASED UPON THEIR PREGNANCY, AND
I THINK THAT'S A CRITICAL
DISTINCTION.
AND TO GO BACK TO A POINT THAT
JUSTICE CANADY RAISED WITH
RESPECT TO WE'RE TAKING THIS
FROM AN ANGLE THAT THE
LEGISLATURE DIDN'T ACT --
>> CAN THERE BE PREGNANCY
WITHOUT SEX?
>> I'M SORRY, YOUR HONOR?
>> I'LL WITHDRAW THE QUESTION.

>> OKAY.
I'M SORRY, I DIDN'T HEAR YOU,
YOUR HONOR.
>> THAT'S QUITE ALL RIGHT.
>> I WOULD LIKE TO GO BACK TO A
POINT THAT JUSTICE CANADY RAISED
THAT WE'RE ATTACKING THIS, IF
YOU WILL, FROM A POSITION OF
THERE HAS BEEN NO LEGISLATIVE
ACTION.
AND TO A CERTAIN EXTENT, YOUR
HONOR, YOU ARE RIGHT.
BUT I THINK THAT'S INSTRUCTIVE
IN TRYING TO ASCERTAIN THE
FLORIDA LEGISLATURE'S INTENT.
BECAUSE WHAT WE HAVE HERE IS A
TIMELINE OF 35 OR SO YEARS WHERE
AT SEVERAL DIFFERENT POINTS IN
THE TIMELINE YOU WOULD HAVE
EXPECTED THE FLORIDA LEGISLATURE
TO ACT.
FOR EXAMPLE --
>> WE JUST, CAN WE JUST GO BACK
TO THIS?
I HAVE, AND FOLLOWING UP WITH
WHAT JUSTICE CANADY IS SAYING,
WHERE THE STATE ENACTED THIS
LEGISLATION -- THEY, THE FLORIDA
LEGISLATURE -- IN WHAT YEAR?
>> 1969, YOUR HONOR.
WITHOUT EVEN PROTECTING SEX
DISCRIMINATION.
>> OKAY.
AND WHEN WAS SEX
DISCRIMINATION --
>> 1972, YOUR HONOR.
>> ALL RIGHT.
'72, JUST ABOUT WHEN I GOT OUT
OF LAW SCHOOL.
SO I DON'T UNDERSTAND THOUGH, DO
YOU THINK THE LEGISLATURE SITS
THERE AND LOOKS TO SEE WHAT THE
DECISIONS OF THE UNITED STATES
SUPREME COURT ARE SUBSEQUENTLY
TO SAY, UH-OH, WE BETTER AMEND
TO CLARIFY THAT WHAT OUR
ORIGINAL INTENT WAS IS SEX
DISCRIMINATION, IS SEX
DISCRIMINATION, AND IT SHALL BE
LIBERALLY CONSTRUED?

>> I THINK THAT GIVEN THE, UM, CONTROVERSY SURROUNDING THE GILBERT DECISION AND THEN THE SUBSEQUENT FEDERAL ENACTMENT OF THE PDA WHICH IS, ESSENTIALLY, REVERSING THE SUPREME COURT IN GILBERT THAT, YES, THE FLORIDA LEGISLATURE IS CHARGED WITH KNOWING THAT.
AND NOT ONLY THAT, YOUR HONOR, WHEN THE FLORIDA LEGISLATURE AMENDED THE FLORIDA CIVIL RIGHTS ACT IN 1992 WHICH WAS ONE YEAR AFTER O'LAUGHLIN, THEY'RE CHARGED WITH KNOWING THAT AS WELL.
>> AND WHAT DID THEY DO IN 1992?
>> IN 1992, YOUR HONOR, WHAT THE FLORIDA LEGISLATURE DID IS HIGHLY INSTRUCTIVE, BECAUSE THEY LOOKED AT THE ATTORNEYS' FEE PROVISION OF THE FLORIDA CIVIL RIGHTS ACT, AND THEY ADDED IN A SENTENCE TO THE ATTORNEYS' FEE PROVISION THAT SAID ATTORNEYS' FEES SHALL BE CALCULATED IN A MANNER CONSISTENT WITH TITLE VII DECISIONAL CASE LAW.
THAT WAS AT LEAST THE MAJOR PART OF THE 1992 AMENDMENT.
THEY DIDN'T BOTHER PUTTING A GENERAL STATEMENT UP FRONT SAYING THAT THE ENTIRE STATUTE SHOULD BE CONSTRUED IN A MANNER CONSISTENT WITH TITLE VII, THEY LIMITED IT TO ATTORNEYS' FEES.
SO I THINK THAT IS HIGHLY PERSUASIVE.
AND IT'S AT THAT POINT IN TIME, WELL, MUCH EARLIER THAN THAT YOU WOULD HAVE EXPECTED THE FLORIDA LEGISLATURE TO ACT.
BECAUSE IN 1977, WHICH WAS ONE YEAR AFTER ENACTMENT OF THE PREGNANCY DISCRIMINATION ACT, YOU CERTAINLY WOULD HAVE EXPECTED THAT TO BE ON THE RADAR OF THE FLORIDA LEGISLATURE.
WHAT DOES THE FLORIDA LEGISLATURE DO?

THEY ADD THREE NEW PROTECTED CLASSES, HANDICAP, AGE AND MARITAL STATUS ONE YEAR AFTER ENACTMENT OF THE PDA AT A TIME WHEN STATES AROUND THE COUNTRY WERE BEGINNING TO AMEND THEIR OWN STATE CIVIL RIGHTS STATUTES TO PROTECT PREGNANCY.
>> GO BACK TO O'LAUGHLIN.
WHEN WAS THAT DECIDED?
>> 1991, YOUR HONOR.
>> WHAT WAS THE BOTTOM LINE HOLDING THERE?
>> THERE WAS DISAGREEMENT --
[LAUGHTER]
BETWEEN THE SIDES AS TO WHAT THE BOTTOM LINE HOLDING IS, YOUR HONOR.
I WOULD HOLD THAT O'LAUGHLIN, I WOULD STATE THAT IT HELD THERE IS NO CAUSE OF ACTION FOR PREGNANCY DISCRIMINATION UNDER THE FCRA.
YOU THEN CAN GET TO THE --
>> BUT THAT'S, THE OPINION DID NOT STOP THERE.
IT WENT ON.
>> CORRECT.
AND THEN THERE'S AN ISSUE, YOUR HONOR, AS TO WHAT DID THIS WHOLE PREEMPTION ARGUMENT MEAN.
I WOULD SUBMIT THAT YOU DON'T GET --
>> WHO WON THE CASE?
>> I'M SORRY?
>> WHO WON THE CASE?
>> THE PLAINTIFF WON THE CASE.
HOWEVER --
>> THE PREGNANT WOMAN?
>> IT IS HIGHLY UNCLEAR, WHETHER SHE WON ON A TITLE VII THEORY OR ON AN FCRA THEORY.
>> WELL, I THINK SHE WON BECAUSE THAT COURT HAD CONFLATED THE TWO.
UNDER THEIR PREEMPTION ANALYSIS, THEY WROTE THE FEDERAL LAW INTO THE STATE LAW, AND THAT'S WHY SHE WON, ISN'T THAT CORRECT?
>> I THINK THERE WAS SOME OF

THAT, BUT I THINK THAT'S IMPORTANT AND INSTRUCTIVE FOR OUR SIDE OF THE --
>> REGARDLESS OF THE MERITS OF THAT OPINION, WHICH WE MIGHT ALL QUESTION, THAT'S PART OF THE BACKDROP ALSO FOR WHAT THE FLORIDA LEGISLATURE'S LOOKING AT, ISN'T IT?
IF WE'RE GOING TO FOCUS ON THAT --
>> WELL, I WOULD ABSOLUTELY AGREE WITH YOU.
BUT THE --
>> BUT THE WHOLE THING HAS TO BE PART OF IT.
>> BECAUSE YOU GET TO THE PREEMPTION ARGUMENT IN O'LAUGHLIN, YOU NECESSARILY HAVE HELD THERE'S NO STATE CAUSE OF ACTION.
YOU DON'T GET TO PREEMPTION, I WOULD SUBMIT.
SO THE FLORIDA LEGISLATURE THE FOLLOWING YEAR IN 1992, KNOWS THIS HAPPENED TO O'LAUGHLIN, AND IF YOU LOOK AT --
>> BUT UNDER THE BOTTOM LINE IN O'LAUGHLIN, IT DOESN'T MATTER BECAUSE THE STATE HAS TO APPLY THE FEDERAL LAW ACCORDING TO THE --
>> AND IN THIS CASE MS. DELVA HAD A FEDERAL CAUSE OF WHICH SHE PURSUED AND DISMISSED.
THERE IS A FEDERAL CAUSE OF ACTION, AND NOBODY DISPUTES THAT.
IN ONE OF THE CASES THAT MS. DELVA CITES IN HER BRIEF, HER REPLY BRIEF, I BELIEVE, IT'S THE GLASS V. CAPTAIN CATANO CASE.
IN THAT CASE THEY CITED, EVEN RECOGNIZED THAT THE CAUSES OF ACTION IN O'LAUGHLIN WERE BOTH FCRA AND TITLE VII CAUSES OF ACTION, SO IT IS ENTIRELY UNCLEAR WHAT THE CAUSE OF ACTION FOUND IN O'LAUGHLIN.

BUT I THINK FOR PURPOSES OF WHY WE'RE HERE TODAY, THEY GOT TO THE PREEMPTION ARGUMENT BECAUSE THEY HELD THERE WAS NO CAUSE OF ACTION UNDER THE FCRA, AND THAT'S WHAT THE FLORIDA LEGISLATURE IS CHARGED WITH KNOWING THE FOLLOWING YEAR WHEN THEY DON'T SAY ANYTHING ABOUT THE PROTECTED CLASSES, BUT THEY TIE THE ATTORNEYS' FEE DECISION TO TITLE VII DECISIONAL CASE LAW.
SO THAT'S WHERE WE, THAT'S WHERE THIS WHOLE ISSUE BOILS DOWN TO IN TERMS OF THE LEGISLATIVE INTENT.
AND I WOULD ALSO STATE, AGAIN, THAT THE FLORIDA LEGISLATURE WHEN THEY INITIALLY ENACTED THE FLORIDA CIVIL RIGHTS ACT IN 1969, DID NOT EVEN COVER SEX. NEVER MIND PREGNANCY, DIDN'T COVER SEX.
SO THERE IS NO UNIFIED INTENT WITH RESPECT TO SEX DISCRIMINATION BETWEEN TITLE VII AND THE FCRA.
IT MAY WELL BE PATTERNED AFTER IT, BUT CERTAINLY NOT WITH REGARD TO SEX DISCRIMINATION.
>> SO THAT SEEMS TO SUGGEST THAT IT'S THEN UP TO THIS COURT LOOKING AT THE PLAIN LANGUAGE AND LIBERAL CONSTRUCTION TO GIVE IT ITS PLAIN AND ORDINARY MEANING.
>> AND I WOULD SUBMIT, YOUR HONOR, THAT THE PLAIN AND ORDINARY MEANING OF THE TERM "SEX" DOES NOT INCLUDE PREGNANCY.
IF YOU'RE FILLING OUT APPLICATIONS, FILLING OUT FORMS, SOMEBODY ASKS YOU WHAT'S YOUR SEX, I WOULD SUBMIT NOBODY'S EVER GOING TO RESPOND TO THOSE QUESTIONS, "I'M PREGNANT." IT'S GOING TO BE "MALE" OR "FEMALE."

THAT'S GOING TO BE THE ANSWER.
AND I BELIEVE, YOUR HONOR, THAT
THAT WAS THE REASONING IMPLIED
IN THE --
>> AND IF THE EMPLOYER ASKS ON
THE APPLICATION AND "ARE YOU
CURRENTLY PREGNANT" AND THE
PERSON DOESN'T GET THE JOB
BECAUSE OF THAT, YOU DON'T THINK
THEY CAN SUE SAYING THAT THAT
WAS AN, YOU KNOW, THAT THEY WERE
DISCRIMINATING ON THE BASIS OF
SEX?
>> NOT UNDER STATE LAW, YOUR
HONOR.
THAT IS OUR POSITION.
>> YOU'RE OUT OF TIME.
REBUTTAL?
>> THANK YOU, YOUR HONORS.
>> WELL, YOUR HONORS, I ONLY
HAVE A MINUTE.
SO VERY BRIEFLY, JUSTICE CANADY,
YOU WERE TALKING WITH MY
OPPONENT ABOUT THE O' LAUGHLIN
CASE.
IF STATE LAW HAD BEEN PREEMPTED
IN THE MANNER IN WHICH MY
OPPONENT IS ADVOCATING TODAY,
WHAT WOULD HAVE HAPPENED WAS THE
FIRST DCA WOULD HAVE HELD THAT
STATE LAW WAS PREEMPTED BY
FEDERAL LAW, REVERSED THE LOWER
TRIBUNAL'S FINDING AND DISMISSED
THE CASE.
AND ALLOWED THE PLAINTIFF TO GO
BRING A FEDERAL CLAIM IF THAT
WAS THE ONLY CLAIM AVAILABLE.
>> DID YOU BRING A FEDERAL CLAIM
IN THIS CASE?
>> THERE WAS A FEDERAL CLAIM
BROUGHT, YOUR HONOR.
I BELIEVE IT WAS AFTER THE STATE
CLAIM WAS ORIGINALLY BROUGHT.
BUT THEN THAT CLAIM WAS
DISMISSED.
>> THE FEDERAL CLAIM WAS
DISMISSED?
>> THE FEDERAL CLAIM WAS
DISMISSED VOLUNTARILY.
>> VOLUNTARILY?

>> YES.
THAT CLAIM WAS DISMISSED.
AND, AGAIN, IT IS, IT'S VERY COMMON IN EMPLOYMENT DISCRIMINATION TO BRING CLAIMS UNDER BOTH STATE AND FEDERAL LAW.
IT'S, IT'S JUST EXTREMELY COMMON.
THERE'S DIFFERENT REMEDIES THAT ARE AVAILABLE UNDER STATE LAW AS OPPOSED TO FEDERAL LAW.
BUT IN ANY EVENT, THE O'LAUGHLIN CASE, AS JUSTICE CANADY POINTED OUT, IF THERE HAD REALLY BEEN PREEMPTION, THERE WOULD HAVE BEEN NO WAY FOR THE PLAINTIFF TO MAINTAIN A CLAIM AND MAINTAIN ITS VICTORY IN THE LOWER TRIBUNAL.
YOUR HONORS, I BELIEVE THAT THIS CASE -- THERE'S TWO CASES THAT REALLY ARE ALL THE COURT NEEDS TO REACH THE CORRECT CONCLUSION.
GLASS V. CAPTAIN CATANA, WHICH IS A RECENT CASE FROM THE MIDDLE DISTRICT OF FLORIDA, TALKS ABOUT THE DICTIONARY DEFINITION AND THE PLAIN MEANING OF THE WORD "SEX."
COLORADO CIVIL RIGHTS COMMISSION V. TRAVELERS INSURANCE COMPANY, 25-YEAR-OLD COLORADO SUPREME COURT OPINION, EXACTLY ON ALL FOURS WITH THE ISSUE PRESENTED WITH THIS CASE FINDING THAT SEX DISCRIMINATION --
>> AND THEN THERE'S THE MASSACHUSETTS SUPREME COURT.
>> I'M SORRY, YOUR HONOR?
>> MASSACHUSETTS --
>> AND MASSACHUSETTS AS WELL EVEN BEFORE THE PREGNANCY DISCRIMINATION ACT WAS ENACTED.
THANK YOU, YOUR HONORS.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT WILL BE IN RECESS FOR TEN MINUTES.
>> ALL RISE.