

NO. 6D2024-1080

**IN THE SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

CHRISTIAN MARIN,

Appellant

vs.

NEMOURS CHILDREN'S HOSPITAL
A/K/A THE NEMOURS FOUNDATION,

Appellee

On Appeal from the Florida Commission on Human Relations
FCHR Order No. 24-022
Case No. 2023-38313
DOAH Case No. 23-1666

AMICUS CURIAE BRIEF OF THE PACIFIC JUSTICE INSTITUTE IN
SUPPORT OF APPELLANT

Alexander Bumbu
Florida State Bar Number 1024989
PACIFIC JUSTICE INSTITUTE
1021 Ives Dairy Rd.
Bldg. 3, Ste. 115
Miami, FL 33179
Tel: (786) 496-3946 and (954) 682-3168
Email: abumbu@pji.org
No facsimile number

Nicole Myers
Florida State Bar Number 147516
PACIFIC JUSTICE INSTITUTE
P.O. Box 4154
Marietta, GA 30061
Tel. (770) 250-9284
Email: nmyers@pji.org
No facsimile number

Counsel for The Pacific Justice Institute

**STATEMENT OF AMICUS CURIAE'S IDENTITY AND
INTEREST IN THIS CASE**

Amicus curiae The Pacific Justice Institute (“PJI”) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented thousands of clients whose rights have been threatened or violated due to unlawful discrimination, particularly in the areas of religious liberty and employment law. Many of PJI’s cases have involved the right of employees to receive a reasonable religious accommodation from their employers (as in this case). As such, PJI has a strong interest in the development of the law in this area.

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SUMMARY OF THE ARGUMENT

First, while no Florida appellate court has yet addressed an employment discrimination claim involving religious accommodation under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e – 2000e-17; hereafter, “Title VII”) or the Florida Civil Rights Act of 1992 (§§ 760.01 – 760.11 and 509.092, Fla. Stat.; hereafter, “FCRA”), one Florida appellate court addressed an employment discrimination claim involving religious accommodation under a different statute. In *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262 (Fla. 3d DCA 1981), the Third District addressed an employment discrimination claim involving religious accommodation under § 458.22(5), Fla. Stat. (1977).¹ Critically, the court held that the statute implicitly included both 1) an employer’s duty to reasonably accommodate an employee’s religion and 2) the affirmative defense of undue hardship, even though the statute did not explicitly include either provision. *Kenny*, 400 So. 2d at 1264-66. Finally, the court ruled that the employers (an ambulatory center and its parent corporation)

¹ This law is now codified at § 390.0111(8), Fla. Stat. (2022).

violated the statute because they had not shown that granting the plaintiff a reasonable accommodation would have imposed an undue hardship upon them. *Id.* at 1266-67. The reasoning in *Kenny* is persuasive and has implications for this case.

Second, this Court should hold that the FCRA implicitly includes both 1) an employer's duty to reasonably accommodate an employee's religion and 2) the affirmative defense of undue hardship, even though the FCRA does not explicitly include either provision. It should do so for five reasons. First, the reasoning in *Kenny* is persuasive and should be applied to the FCRA. Second, the Florida Supreme Court, every other Florida District Court of Appeals, and the United States Court of Appeals for the Eleventh Circuit have ruled that courts must give the FCRA the same construction as Title VII because the FCRA is patterned after Title VII. Third, Florida appellate courts have concluded that the FCRA's prohibition of handicap discrimination² implicitly includes both 1)

² Today, saying "handicap" (when referring to a person) is considered by some to be outdated and offensive. However, *Amicus* uses the word "handicap" simply because the FCRA uses it. Today, using the word "disability" in place of "handicap" is considered by some to be more acceptable. The federal Americans with Disabilities Act ("ADA") uses the word "disability" instead.

an employer's duty to reasonably accommodate an employee's handicap(s) and 2) the affirmative defense of undue hardship. Fourth, *Amicus's* conclusion regarding an employer's duty to reasonably accommodate an employee's religion is supported by the principle that the FCRA must be liberally construed in favor of victims of employment discrimination. Fifth, other states' appellate courts have concluded that even when their states' equivalents of Title VII do not explicitly include either 1) an employer's duty to reasonably accommodate an employee's religion or 2) the affirmative defense of undue hardship, their states' laws implicitly include both provisions because those laws are patterned after – or are similar to – Title VII.

In light of these considerations, the Court should hold that the FCRA implicitly includes both 1) an employer's duty to reasonably accommodate an employee's religion and 2) the affirmative defense of undue hardship, even though the FCRA does not explicitly include either provision.

ARGUMENT

Kenny Is The Only Florida Appellate Court Decision To Address An Employment Discrimination Claim Involving Religious Accommodation, And It Was Not Under Title VII Or The FCRA.

While many Florida appellate courts have addressed employment discrimination claims under the FCRA and/or Title VII,³ no Florida appellate court has addressed an employment discrimination claim involving religious accommodation under either statute. However, one Florida appellate court has addressed an employment discrimination claim involving religious accommodation under a different statute. In *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262 (Fla. 3d DCA 1981), the Third District addressed an employment discrimination claim involving religious accommodation under § 458.22(5), Fla. Stat. (1977). Critically, the court held that the statute implicitly included both 1) an employer's duty to reasonably accommodate an employee's religion and 2) the affirmative defense of undue hardship, even though the statute did not explicitly include either provision. *Id.* at 1264-66. Finally, the court ruled that the employers violated the

³ Some of them are cited later in this brief.

statute because they had not shown that granting the plaintiff a reasonable accommodation would have imposed an undue hardship upon them. *Id.* at 1266-67. The reasoning in *Kenny* is persuasive and has implications for this case.

In *Kenny*, an employee (a registered nurse) brought an action against her employers (an ambulatory center and its parent corporation) “in which she sought reinstatement to her position as a full-time operating nurse,” damages, and attorney’s fees. *Id.* at 1263. The employers performed abortions, among other procedures. *Id.* The employee objected on religious grounds to participating in abortions. *Id.* At first, another nurse exchanged duties with her. *Id.* Thereafter, the employee was unable to find other employees who were willing to cooperate with her. *Id.* The employers asked the employee to resign when she continued to avoid participating in abortions, but she refused to resign. *Id.* When the employers told another nurse that she would be fired if she failed to assist in performing abortions, the employee advised that nurse that § 458.22(5), Fla. Stat. (1977), provided a right to refuse. *Id.* Subsequently, the employers demoted the employee from full-time

status to part-time on-call status, which subjected the employee to the loss of fringe benefits. *Id.*

The employee brought suit pursuant to § 458.22(5), Fla. Stat. (1977), which prohibited employers who performed abortions from recriminating against employees who refused to participate in abortions due to “moral or religious” reasons and from compelling those employees to participate in abortions.⁴ The employee claimed that by demoting her, the employers violated their duty under the statute to reasonably accommodate her religion. *Id.* The employers

⁴ As quoted in *Kenny*, 400 So. 2d at 1264, the full text of the statute was:

“RIGHT OF REFUSAL. Nothing in this section shall require any hospital or any person to participate in the termination of a pregnancy, nor shall any hospital or any person be liable for such refusal. No person who is a member of, or associated with, the staff of a hospital nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds, shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.”

Critically for the analysis in this brief, the statute did not explicitly impose upon employers a duty to reasonably accommodate an employee’s religion. Nor did it explicitly provide the affirmative defense of undue hardship – or any other affirmative defense.

responded that reasonably accommodating the employee's religion would have imposed an undue hardship upon them. *Id.* Specifically, the employers claimed that "fiscal necessity, combined with the refusal of other nurses to exchange their duties and assignments with those of [the employee], justified [their] actions."⁵ The employee countered that claim.⁶ The trial court agreed with the employers' undue hardship claim and entered judgment in their favor. *Id.* at 1264. The employee appealed.

The interpretation of § 458.22(5), Fla. Stat. (1977), presented a case of first impression. *Id.* Before ruling in the employee's favor, the Third District held that the statute implicitly included both 1) an employer's duty to reasonably accommodate an employee's religion and 2) the affirmative defense of undue hardship, even

⁵ "At trial, [the employers] contended that [the] Ambulatory Centre's audit showed net losses in 1977 and 1978 requiring [them] to reduce fixed costs." *Id.*

⁶ "[The employee] countered that gross revenues increased with the increase in the number of patients and number of procedures. The trial court received evidence that gynecological procedures constituted approximately sixteen percent of the total procedures performed at the Ambulatory Centre during the period in question." *Id.* at 1263-64.

though the statute did not explicitly include either provision. *Id.* at 1264-66. The court took three steps to reach those conclusions.

As its first step, the court pointed out that the text of Title VII (as interpreted by the 1967 EEOC guidelines, by *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63 (1977), and by many lower federal courts)⁷ clearly imposed upon employers a duty to reasonably accommodate an employee's religion unless the employers could prove that doing so would impose an undue hardship upon them. *Id.* at 1264-66.

⁷ The court quoted the following portions of Title VII on pages 1264-65 of its opinion:

42 U.S.C. § 2000e-2(a): "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin."

42 U.S.C. § 2000e(j): "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

As its second step, the court examined the decisions of other states' courts so that it could decide whether to apply what it called the "federal test" to § 458.22(5), Fla. Stat. (1977). *Id.* at 1266. The court observed that many other states' courts concluded that their respective states' laws implicitly included both 1) an employer's duty to reasonably accommodate an employee's religion and 2) the affirmative defense of undue hardship, even though those laws did not explicitly include either provision. *Id.*⁸ Thus, the court concluded that § 458.22(5), Fla. Stat. (1977), implicitly imposed upon employers a duty to reasonably accommodate an employee's religion. *Id.*

As its final step, the court decided what, if any, limit to impose on that duty. *Id.* It identified two options: undue hardship and "the more stringent standard of disallowing discrimination regardless of the cost." *Id.* Its evaluation "impel[led it] to accept the former." *Id.*

Based on these three steps, the court concluded that under § 458.22(5), Fla. Stat. (1977), "an employer must reasonably

⁸ The *Rankins*, *Wondzell*, and *Me. Hum. Rights Comm'n* cases that the court cited are briefly discussed below.

accommodate an employee's religious practices unless he establishes that he would suffer undue hardship.” *Id.*

The court then applied the law to the facts of the case. *Id.* at 1266-67. The court found that the employers violated the statute because, although they made some effort to accommodate the employee, the evidence did not establish that additional accommodation efforts would have imposed an undue hardship upon them. *Id.* Thus, the Third District reversed the trial court’s decision, ordered that the employee be reinstated to her former full-time position, and ordered that the employee be awarded damages. *Id.* at 1267.

Thus, *Kenny* is the only Florida appellate court decision to address an employment discrimination claim involving religious accommodation under *any* statute, and it does so in a persuasive way.

This Court Should Hold That The FCRA Implicitly Includes Both 1) An Employer's Duty To Reasonably Accommodate An Employee's Religion And 2) The Affirmative Defense Of Undue Hardship, Even Though The FCRA Does Not Explicitly Include Either Provision.

This Court should do so for five reasons.

First, the reasoning in *Kenny* is persuasive and should be applied to the FCRA.⁹ *Kenny* has two important – and obvious – implications for this case. The implications are that the FCRA implicitly includes both 1) an employer's duty to reasonably accommodate an employee's religion and 2) the affirmative defense of undue hardship, even though the FCRA does not explicitly include either provision.

Second, the Florida Supreme Court, every other Florida District Court of Appeals, and the United States Court of Appeals for the Eleventh Circuit have ruled that courts must give the FCRA the same construction as Title VII because the FCRA was patterned after Title VII.¹⁰ One major reason that courts cite for this

⁹ The reasoning in *Kenny* is persuasive because it is reinforced by the tsunami of adjacent and on-point case law that *Amicus* discusses below.

¹⁰ *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000), *abrogated in irrelevant part by later amendment to statute, as recognized in Davis v. Big Bend Hospice, Inc.*, 419 So. 3d 272, 274-76 (Fla. 1st DCA 2025); *Palm Beach Cnty. Sch. Bd. v. Wright*, 217

conclusion is the Florida Supreme Court’s declaration in *State v. Jackson*, 650 So. 2d 24, 27 (Fla. 1995), that “a long-standing rule of statutory construction in Florida 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 given to the federal action in the federal courts.”¹¹

Third, Florida appellate courts have concluded that the FCRA’s prohibition of handicap discrimination implicitly includes both 1) an employer’s duty to reasonably accommodate an employee’s handicap(s) and 2) the affirmative defense of undue hardship. *Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 925-27 (Fla. 4th DCA 2007);

So. 3d 163, 164-65 (Fla. 4th DCA 2017) (*en banc*) (collecting cases); *Jackson v. Kleen 1, LLC*, 238 So. 3d 378, 380, and n. 3 (Fla. 3d DCA 2017); *Carsillo v. City of Lake Worth*, 995 So. 2d 1118, 1119, 1121 (Fla. 4th DCA 2008); *Carter v. Health Mgmt. Assocs.*, 989 So. 2d 1258, 1262 (Fla. 2d DCA 2008); *Hinton v. Supervision Int’l, Inc.*, 942 So. 2d 986, 989 (Fla. 5th DCA 2006); *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1030, and n. 3 (Fla. 1st DCA 2002); *Harper v. Blockbuster Ent. Corp.*, 139 F. 3d 1385, 1387, 1389-1390 (11th Cir. 1998).

¹¹ *Palm Beach Cnty. Sch. Bd.*, 217 So. 3d at 164-65; *Carsillo*, 995 So. 2d at 1119, 1121.

McCaw Cellular Commc'ns of Fla., Inc., v. Kwiatek, 763 So. 2d 1063, 1065-67 (Fla. 4th DCA 1999).¹²

Fourth, *Amicus's* conclusion regarding an employer's duty to reasonably accommodate an employee's religion is supported by the principle that the FCRA must "be liberally construed for victims of employment discrimination," which is "the expressed intent of [the Florida] legislature..." *Carsillo*, 995 So. 2d at 1121 (citing § 760.01(3), Fla. Stat. (2015); *Maggio v. Fla. Dep't of Lab. & Employment Security*, 899 So. 2d 1074, 1077, 1080 (Fla. 2005); and *Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So. 2d 891, 894, 897 (Fla. 2002));¹³ See *Joshua*, 768 So. 2d at 435 ("Like Title

¹² The *Byrd* and *McCaw* cases read those provisions into the FCRA's prohibition of handicap discrimination from the ADA's prohibition of disability discrimination because the FCRA's prohibition of handicap discrimination was patterned after the ADA's prohibition of disability discrimination. *Byrd*, 948 So. 2d at 925-27; *McCaw*, 763 So. 2d at 1065-67. Apparently, that is an exception to the general rule that Florida courts give the FCRA the same construction as Title VII. However, that is an exception without a difference in this case because the FCRA's prohibition of religious discrimination was patterned after Title VII's prohibition of religious discrimination.

¹³ On pages 1120-21 of the *Carsillo* decision, the Fourth District concluded that the FCRA's prohibition of sex discrimination includes a prohibition of pregnancy discrimination because the FCRA is patterned after Title VII, even though the FCRA – unlike

VII, [the FCRA] is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature.”). Thus, this Court should hold that the FCRA implicitly includes an employer’s duty to reasonably accommodate an employee’s religion.

Fifth, other states’ appellate courts have concluded that even when their states’ equivalents of Title VII do not explicitly include either 1) an employer’s duty to reasonably accommodate an employee’s religion or 2) the affirmative defense of undue hardship, their states’ laws implicitly include both provisions. These courts have come to this conclusion largely because their states’ laws are patterned after – or are similar to – Title VII, just like the FCRA.

These cases are *Kumar v. Gate Gourmet, Inc.*, 325 P.3d 193, 196-203 (Wash. 2014) (interpreting the Washington Law Against Discrimination (Wash. Rev. Code §§ 49.60.010 – 49.60.540));

Rankins v. Comm’n on Pro. Competence of the Ducor Union Sch. Dist., 593 P.2d 852, 855-56 (Cal. 1979) (interpreting Cal. Const. art. I, § 8); *Wondzell v. Alaska Wood Prods., Inc.*, 601 P.2d 584, 585-86

Title VII – had not been amended to specifically state that pregnancy discrimination qualifies as sex discrimination.

(Alaska 1979) (interpreting Alaska Stat. § 18.80.200); *Me. Hum. Rights Comm’n v. Loc. 1361, United Paperworkers Int’l Union AFL-CIO*, 383 A.2d 369, 374-78 (Me. 1978) (interpreting the Maine Human Rights Act (Me. Rev. Stat., Tit. 5, §§ 4551 – 4634)); *Harmon v. Kaiser Permanente Ins. Co.*, Case No. 2122, 2025 WL 2080740, 2025 Md. App. LEXIS 625, *7 (Md. App. July 24, 2025), *certiorari denied*, *Harmon v. Kaiser Permanente Ins. Co.*, Pet. No. 257, Sept. Term 2025, 2025 WL 3522658, 2025 Md. LEXIS 527 (Md. Nov. 26, 2025) (interpreting the Maryland Fair Employment Practices Act (Md. State Gov. Code §§ 20-601 – 20-611)); and *King v. Iowa C.R. Comm’n*, 334 N.W.2d 598, 602, and n. 1 (Iowa 1983) (interpreting the Iowa Civil Rights Act (Iowa Code §§ 216.1 – 216.22)).¹⁴

CONCLUSION

Kenny is the only Florida appellate court decision to address an employment discrimination claim involving religious accommodation under *any* statute. For the reasons stated above, this Court should hold that the FCRA implicitly includes both 1) an employer’s duty to reasonably accommodate an employee’s religion

¹⁴ The Third District cited the *Rankins*, *Wondzell*, and *Me. Hum. Rights Comm’n* cases on page 1266 of its opinion in *Kenny*.

and 2) the affirmative defense of undue hardship, even though the FCRA does not explicitly include either provision.¹⁵

Respectfully submitted,

/s/ Alexander Bumbu

Alexander Bumbu

Florida State Bar Number 1024989

PACIFIC JUSTICE INSTITUTE

1021 Ives Dairy Rd.

Bldg. 3, Ste. 115

Miami, FL 33179

Tel: (786) 496-3946 and (954) 682-3168

Email: abumbu@pji.org

No facsimile number

/s/ Nicole Myers

Nicole Myers

Florida State Bar Number 147516

PACIFIC JUSTICE INSTITUTE

P.O. Box 4154

Marietta, GA 30061

Tel. (770) 250-9284

¹⁵ *Amicus* points out that the *Kenny, Byrd, McCaw, Kumar, Rankins, Wondzell, Me. Hum. Rights Comm'n, Harmon, and King* cases above concluded that the laws before them implicitly include an employer's duty to reasonably accommodate an employee's religion. *Amicus* does that out of desire. *Amicus* also points out that those cases also concluded that the laws before them implicitly include the affirmative defense of undue hardship. To clarify, *Amicus* does not do that out of desire, but as an observation in service to the Court. It is *Amicus's* understanding that other pro-Appellant *amici curiae* will argue that the FCRA includes an employer's duty to reasonably accommodate an employee's religion, but not the affirmative defense of undue hardship. If so, then *Amicus* would be more than happy if the Court would be persuaded by such an argument.

Email: nmyers@pji.org
No facsimile number

Counsel for The Pacific Justice Institute

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was filed with the Clerk of the Court on January 25, 2026, by using the Florida Courts E-Filing Portal. Accordingly, a copy of the foregoing is being served on this day to all attorneys/interested parties identified on the Portal Electronic Service List, via transmission of the Notice of Electronic Filing generated by the Portal.

/s/ Alexander Bumbu

Alexander Bumbu

CERTIFICATE OF COMPLIANCE FOR COMPUTER-GENERATED BRIEF (Fla. R. App. P. 9.045)

I hereby certify that this brief was prepared using Bookman Old Style 14-point font. I also hereby certify that this brief complies with the word count requirements in the Florida Rules of Appellate Procedure because it contains 3,272 words.

/s/ Alexander Bumbu

Alexander Bumbu