CHAPTER 13

State Human Affairs Commission

**SECTION 1‑13‑10.** Short title.

This chapter shall be known as the “South Carolina Human Affairs Law.”

HISTORY: 1962 Code Section 1‑360.21; 1972 (57) 2651.

RESEARCH REFERENCES

ALR Library

157 ALR, Federal 1 , When is Supervisor’s Hostile Environment Sexual Harassment Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A.Ss 2000e et Seq) Imputable to Employer.

11 ALR 6th 447 , Liability of Employer, Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress‑Age Discrimination.

51 ALR 5th 1 , Application of State Law to Age Discrimination in Employment.

85 ALR 5th 353 , Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding.

94 ALR 5th 1 , When is Supervisor’s or Coemployee’s Hostile Environment Sexual Harassment Imputable to Employer Under State Law.

Encyclopedias

33 Am. Jur. Trials 257, Sexual Harassment on the Job.

S.C. Jur. Attorney Fees Section 23, State Law.

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 2:42, South Carolina.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

LAW REVIEW AND JOURNAL COMMENTARIES

Sullivan and Zimmer, The South Carolina Human Affairs Law: Two Steps Forward, One Step Back? 27 S.C. L. Rev. 1.

NOTES OF DECISIONS

In general 1

1. In general

Standards applicable to lawsuits under Title VII are the same as standards applicable to lawsuits under Section 1981 and lawsuits under the South Carolina Human Affairs Law (SCHAL). El‑Reedy v. Abacus Technology Corporation, 2017, 2017 WL 3446910. Civil Rights 1118

The analytical framework for considering employment discrimination claims under the South Carolina Human Affairs Law (SCHAL) is the same as that for Title VII. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1103

Exhaustion of remedies under this Act is a prerequisite to seeking relief in federal forum for alleged employment discrimination practice. Settles v. Pinkerton, Inc. (D.C.S.C. 1979) 482 F.Supp. 461.

**SECTION 1‑13‑20.** Declaration of policy.

This chapter is an expression of the concern of the State for the promotion of harmony and the betterment of human affairs. The General Assembly declares the practice of discrimination against an individual because of race, religion, color, sex, age, national origin, or disability as a matter of state concern and declares that this discrimination is unlawful and in conflict with the ideals of South Carolina and the nation, as this discrimination interferes with opportunities of the individual to receive employment and to develop according to the individual’s own ability and is degrading to human dignity. The General Assembly further declares that to alleviate these problems a state agency is created which shall seek to eliminate and prevent discrimination because of race, religion, color, sex, age, national origin, or disability.

HISTORY: 1962 Code Section 1‑360.22; 1972 (57) 2651; 1979 Act No. 24, Section 1; 1996 Act No. 426, Section 2.

CROSS REFERENCES

Criminal offenses against civil rights, see Sections 16‑5‑60 to 16‑5‑110.

Provisions regarding discrimination against teachers, see Sections 59‑25‑710 et seq.

LIBRARY REFERENCES

Westlaw Key Number Searches: 78k1007; 78k1101; 78k1705.

Civil Rights 1007, 1101, 1705.

C.J.S. Civil Rights Sections 2 to 5, 7 to 9, 11 to 13, 18, 22, 26 to 27, 30 to 31, 33 to 34, 37, 41 to 42, 44, 67, 188 to 189.

C.J.S. Civil Rights Sections 2 to 5, 7 to 9, 11 to 13, 18, 22, 26 to 27, 30 to 31, 33 to 34, 37, 41 to 42, 44, 67, 188 to 189.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Negligence Section 32, Intentional/Malicious Acts of Servant.

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 21:58, South Carolina.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

Attorney General’s Opinions

The Alcoholic Beverage Control Commission is authorized to revoke or suspend a license issued by it if proven that the licensee is discriminating on the basis of race in the operation of the licensed establishment. 1989 Op Atty Gen, No. 89‑89, p 237.

**SECTION 1‑13‑30.** Definitions.

The following words and phrases used herein shall be construed as follows:

(a) “Commission” means the State Human Affairs Commission.

(b) “National origin” includes ancestry.

(c) “Age” means at least forty years.

(d) “Person” means individuals, labor unions and organizations, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint‑stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, other legal or commercial entities located in part or in whole in the State or doing business in the State, the State and any of its agencies and departments or local subdivisions of state agencies and departments; and municipalities, counties, special purpose districts, school districts and other local governments.

(e) “Employer” means any person who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include an Indian tribe or a bona fide private membership club other than a labor organization.

(f) “Employment agency” means any person regularly undertaking to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(g) “Labor organization” means any agent of a labor organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council which is subordinate to a national or international labor organization.

(h) “Employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in this State, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy‑making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of the State or any of its agencies, departments, local subdivisions, or political subdivisions of the State, local government, or local governmental agencies.

(i) “Complainant” means an individual alleging to have been aggrieved by an employment practice which is unlawful under this chapter.

(j) “Respondent” means a person against whom a charge of violation has been filed.

(k) The term “religion” means 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.

(l) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment‑related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in item (3) of subsection (h) of Section 1‑13‑80 shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion. Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion. This subsection shall not apply to any fringe benefit fund or insurance program which was in effect on October 31, 1978, until April 30, 1979. Until after October 31, 1979 or, if there was an applicable collective bargaining agreement in effect on October 31, 1978, until the termination of that agreement, no person who, on October 31, 1978, was providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation of the provisions of this chapter relating to sex discrimination in employment shall, in order to come into compliance with such provisions, reduce the benefits or the compensation provided any employee on October 31, 1978, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: Provided, That where the costs of such benefits on October 31, 1978 are apportioned between employers and employees, the payments or contributions required to comply with the provisions of this chapter relating to sex discrimination in employment may be made by employers and employees in the same proportion: And provided, further, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with the provisions of this chapter relating to sex discrimination in employment.

(M) “Covered entity” means an employer, employment agency, labor organization, or joint labor‑management committee.

(N) “Disability” means with respect to an individual:

(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual;

(2) a record of an impairment; or

(3) being regarded as having an impairment.

The definition of “disability” must be interpreted in a manner consistent with federal regulations promulgated pursuant to the Americans with Disabilities Act of 1990, as amended, Public Law 101‑336.

(O) “Auxiliary aids and services” means:

(1) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) acquisition or modification of equipment or devices; and

(4) other similar services and actions.

(P) “Direct threat” means a significant risk to the health or safety of the employee or of others that cannot be eliminated by reasonable accommodation.

(Q) “Illegal use of drugs” means the use of drugs, the possession and distribution of which is unlawful under Chapter 53, Title 44. This term does not include the use of a drug taken under supervision by a licensed health care professional or other lawful uses. Nothing in this chapter prohibits a covered entity from requiring employees to conform to drug‑free workplace laws and regulations or from establishing and enforcing rules, policies, or guidelines concerning use of alcohol or illegal drugs in the workplace.

(R) “Drug” means a controlled substance as defined in Section 44‑53‑10.

(S) “Qualified individual with a disability” means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. For the purposes of this chapter, consideration must be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description must be considered evidence of the essential functions of the job. “Qualified individual with a disability” does not include an employee or applicant who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of the use.

(T) “Reasonable accommodation” may include:

(1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(2) job restructuring, part‑time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(U) “Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) the nature and cost of the accommodation needed under this chapter;

(2) the overall financial resources of the facility involved in the provision of the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of the accommodation upon the operation of the facility;

(3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and

(4) the type of operation of the covered entity, including the composition, structure, and functions of the workforce of the entity, the geographic separateness and the administrative or fiscal relationship of the facility in question to the covered entity.

HISTORY: 1962 Code Section 1‑360.23; 1972 (57) 2651; 1973 (58) 698; 1979 Act No. 24, Section 2; 1988 Act No. 663, Section 1; 1996 Act No. 426, Section 3.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Labor Relations Section 47, Function.

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 4:57, South Carolina.

Employment Coordinator Employment Practices Section 5:52, South Carolina.

Employment Coordinator Employment Practices Section 7:53, South Carolina.

Employment Coordinator Employment Practices Section 8:54, South Carolina.

Employment Coordinator Employment Practices Section 20:68, South Carolina.

Employment Coordinator Employment Practices Section 9:118, South Carolina.

Employment Coordinator Employment Practices Section 20:133, South Carolina.

Employment Coordinator Employment Practices Section 20:204, South Carolina.

Employment Coordinator Employment Practices Section 20:254, South Carolina.

Employment Coordinator Employment Practices Section 44:204, South Carolina.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

NOTES OF DECISIONS

In general 1

1. In general

Fellow employee whom plaintiff alleged sexually harassed while both were sales agents for company, was not “employer” within meaning of Human Affairs Law, Sections 1‑13‑10 et seq., which makes it unlawful for employer to discriminate against individual because of sex, courts having generally held that to be employer for purposes of this legislation one must be an officer, director, or supervisor of an employer or otherwise involved in managerial decisions, and defendant in instant case submitted an uncontradicted affidavit by manager of office where both parties worked stating that defendant worked in a nonmanagerial, nonsupervisory capacity and had no supervisory authority over plaintiff, accordingly plaintiff could not maintain claim against defendant under statute. Smith v. Prudential Financial Services, Inc., 1990, 739 F.Supp. 1042.

**SECTION 1‑13‑40.** Creation of South Carolina Commission on Human Affairs.

(a) There is hereby created in the executive department the South Carolina Human Affairs Commission, to encourage fair treatment for, and to eliminate and prevent discrimination against, any member of a group protected by this chapter, and to foster mutual understanding and respect among all people in this State.

(b) The commission shall consist of a member from each congressional district appointed by the Governor, with the advice and consent of the Senate, and two members at large appointed by the Governor. Each member shall serve for a term of three years and until their successors are appointed and qualify. Vacancies must be filled in the manner of the original appointment for the unexpired term.

(c) No member of the Commission shall serve more than two consecutive terms. A member having served two consecutive terms shall be eligible for reappointment one year after the expiration of his second term.

(d) The Governor shall appoint one of the at large members to serve as chairman and may appoint any member to serve as vice‑chairman, each to serve a term of one year. In the absence of appointment of a vice‑chairman, the members may elect one of their number to fill that office. The Commission may elect other officers from among its members as necessary, except that the Commissioner may be elected to serve as secretary.

(e) The Commission shall meet at such times and in such places as it may determine.

(f) A quorum for transacting business shall consist of a majority of the membership as constituted at the time of a meeting.

(g) Each member shall be entitled to one vote on each issue presented, a majority of the votes cast determining the issue. Votes may be cast only in person. Voting may be by secret ballot or by voice vote.

(h) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission.

(i) Members of the Commission shall be entitled to such per diem, mileage and subsistence as is provided for by law for boards, committees and commissions.

(j) The Commission shall render each year to the Governor and to the General Assembly a written report of its activities and of its recommendations.

HISTORY: 1962 Code Section 1‑360.24; 1972 (57) 2651; 1979 Act No. 24, Section 3; 1983 Act No. 80, Sections 1‑3; 1991 Act No. 248, Section 6; 2012 Act No. 279, Section 1, eff June 26, 2012.

Editor’s Note

2012 Act No. 279, Section 33, provides as follows:

“Due to the congressional redistricting, any person elected or appointed to serve, or serving, as a member of any board, commission, or committee to represent a congressional district, whose residency is transferred to another district by a change in the composition of the district, may serve, or continue to serve, the term of office for which he was elected or appointed; however, the appointing or electing authority shall appoint or elect an additional member on that board, commission, or committee from the district which loses a resident member as a result of the transfer to serve until the term of the transferred member expires. When a vacancy occurs in the district to which a member has been transferred, the vacancy must not be filled until the full term of the transferred member expires. Further, the inability to hold an election or to make an appointment due to judicial review of the congressional districts does not constitute a vacancy.”

Effect of Amendment

The 2012 amendment rewrote subsection (b).

LIBRARY REFERENCES

Westlaw Key Number Search: 78k1705.

Civil Rights 1705.

C.J.S. Civil Rights Sections 188 to 189.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Labor Relations Section 46, Authority.

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 83:270, Basic Organization, Powers, and Duties.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

**SECTION 1‑13‑50.** Commissioner and personnel.

(a) The Commission shall recommend to the Governor a person who shall be employed as Commissioner and shall, with the approval of the Governor, employ such person who shall be subject to dismissal by the Commission with the approval of the Governor. The Commissioner shall be the chief administrative officer of the Commission, and shall perform such duties as are incident to such office or are required of him by the Commission.

(b) The Commissioner shall receive such compensation as may be provided by law.

(c) The Commissioner shall recommend to the Commission, and with its approval, employ attorneys, secretaries, clerks, investigators and conciliators for the expeditious discharge of the Commission’s duties.

HISTORY: 1962 Code Section 1‑360.25; 1972 (57) 2651; 1973 (58) 698.

LIBRARY REFERENCES

Westlaw Key Number Search: 78k1705.

Civil Rights 1705.

C.J.S. Civil Rights Sections 188 to 189.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Labor Relations Section 46, Authority.

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 83:270, Basic Organization, Powers, and Duties.

**SECTION 1‑13‑60.** Duties of chairman and vice‑chairman.

The chairman shall be the presiding officer at meetings of the Commission and shall promote the orderly transaction of its business. In the chairman’s absence, or his inability to act, the vice‑chairman or if no vice‑chairman has been appointed or elected a commissioner designated by the chairman shall act in his stead.

HISTORY: 1962 Code Section 1‑360.26; 1972 (57) 2651.

LIBRARY REFERENCES

Westlaw Key Number Search: 78k1705.

Civil Rights 1705.

C.J.S. Civil Rights Sections 188 to 189.

RESEARCH REFERENCES

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 83:270, Basic Organization, Powers, and Duties.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

**SECTION 1‑13‑70.** Powers of Commission.

The Commission shall have the power:

(a) To establish and maintain its principal office in the city of Columbia and such other offices within the State as it may deem necessary.

(b) To adopt bylaws.

(c) To promulgate, in accordance with the provisions of this chapter, regulations including, but not limited to, regulations requiring the posting of notices prepared or approved by the Commission and the submission of equal employment opportunity plans and reports by any state agency or department or local subdivisions of a state agency or department, according to a format and schedule approved by the Commission.

(d) To formulate policies to effectuate the purposes of this chapter and to make recommendations to appropriate parties in furtherance of such policies.

(e) To obtain and utilize upon request the services of all governmental departments and agencies.

(f) To create or recognize advisory agencies and conciliation councils, local, regional, or statewide, as will aid in effectuating the purposes of this chapter and of Section 3 of Article I of the Constitution of this State. The commission may empower these agencies and councils to study problems of discrimination in all or specific fields of human affairs or in specific instances of discrimination because of race, religion, color, sex, age, national origin, or disability and to foster through community effort, or otherwise, goodwill, cooperation, and conciliation among the groups and elements of the population of the State. These agencies and councils also may make recommendations to the commission for the development of policies and procedures in general and in specific instances and for programs of formal or informal education which the commission may in turn recommend to the appropriate state agency. These advisory agencies and conciliation councils, as far as practicable, must be composed of representative citizens.

(g) To seek the understanding and cooperation of or to enter into agreement with any existing or later‑created councils, agencies, commissions, task forces, institutions or organizations, public or private, which are, in the judgment of the Commission, dedicated to the promotion of human rights and affairs.

(h) To issue publications and results of investigations and research as in its judgment will tend to promote goodwill and the betterment of human affairs.

(i) To require from any state agency or department or local subdivisions of a state agency or department such reports and information at such times as it may deem reasonably necessary to effectuate the purposes of this chapter.

(j) To prepare and distribute copies of this chapter, of any regulations promulgated pursuant to subsection (c) of this section, of policies formulated pursuant to subsection (d) of this section or of any other materials effectuating the purposes of this chapter; to make the chapter available to the public and to require the chapter to be posted in places conspicuous to employees of state agencies or departments or local subdivisions of a state agency or department and to applicants for employment therewith.

(k) To cooperate with the United States Equal Employment Opportunity Commission created by the Civil Rights Act of 1964 (78 Stat. 241) in order to achieve the purposes of that act and with other Federal, State and local agencies and departments.

(l) To accept reimbursement pursuant to section 709(b) of the Civil Rights Act of 1964 (78 Stat. 241) for services rendered to the United States Equal Employment Opportunity Commission.

(m) To accept gifts or bequests, grants or other donations, public or private.

(n) To investigate problems in human affairs in the State and in connection therewith, to hold hearings, to request the attendance of persons who shall give testimony, to receive for the record of any such hearing written statements, documents, exhibits and other items pertinent to the subject matter of any such hearing, and following any such investigation or hearing to issue such report and recommendations as in its opinion will assist in effectuating the purposes of this chapter.

(o) To receive and resolve complaints in accordance with the provisions of Section 1‑13‑90.

(p) Pursuant to subsections (e) and (i), if a person fails to permit access, or otherwise refuses to cooperate, the Commission may request an order of a court of competent jurisdiction requiring access and other related good faith compliance.

(q) To furnish technical assistance requested by persons subject to this chapter to assist them in their compliance with this chapter, the regulations promulgated hereunder, a conciliation agreement or an order issued thereunder.

(r) To petition for an order of a court of competent jurisdiction requiring compliance with an order issued by the Commission pursuant to the procedure set forth in item (16) of subsection (c) of Section 1‑13‑90; provided, that a complainant, respondent or intervenor aggrieved by an order of the Commission is entitled to judicial review. The procedure for compliance, enforcement or review shall be as set forth in item (19) of subsection (c) of Section 1‑13‑90.

(s) To institute proceedings in a court of competent jurisdiction, for cause shown, to prevent or restrain any person from violating any provision of this chapter.

(t) To contract with persons and organizations to perform services as it may deem reasonably necessary to effectuate the purposes of this chapter and to accept reimbursement for services rendered pursuant to the contract.

(u) To make contractual agreements, within the scope and authority of this chapter, with any agency of the federal government, which agreements may include provisions under which the Federal Equal Employment Opportunity Commission shall refrain from processing a charge in South Carolina in any class specified in such agreements.

(v) To perform the functions specified in this chapter.

HISTORY: 1962 Code Section 1‑360.27; 1972 (57) 2651; 1973 (58) 698; 1979 Act No. 24 Sections 4‑7; 1996 Act No. 426, Section 4.

LIBRARY REFERENCES

Westlaw Key Number Search: 78k1707.

Civil Rights 1707.

C.J.S. Civil Rights Sections 188 to 189.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Labor Relations Section 46, Authority.

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 92:68, South Carolina.

Employment Coordinator Employment Practices Section 83:270, Basic Organization, Powers, and Duties.

Employment Coordinator Employment Practices Section 83:271, Rule Making.

Employment Coordinator Employment Practices Section 83:272, Interagency Cooperation.

Employment Coordinator Employment Practices Section 83:273, Technical Assistance.

Employment Coordinator Employment Practices Section 83:274, Research and Education Projects.

Employment Coordinator Employment Practices Section 83:276, Advisory Committees.

Employment Coordinator Employment Practices Section 89:282, Basic FEP Statute Procedures; Charge Processing.

Employment Coordinator Employment Practices Section 92:118, South Carolina.

Employment Coordinator Employment Practices Section 111:192, Enforcing Administrative Subpoena.

Employment Coordinator Employment Practices Section 111:193, Review and Enforcement of Commission Decisions.

Employment Coordinator Employment Practices Section 111:194, Enforcing Private Rights.

Attorney General’s Opinions

The State Human Affairs Commission could not likely be held liable for failure to enforce certain statutory duties if there has been no appropriations covering the costs of enforcement by the Commission. S.C. Op.Atty.Gen. (Nov. 16, 2010) 2010 WL 4982609.

The South Carolina State Human Affairs Commission does have the authority to enter into a letter of cooperation with the United States Treasury Department providing for its conducting compliance reviews (investigation of complaints received by the Office of Revenue Sharing alleging discrimination in the use of general revenue sharing funds in the State of South Carolina by recipient governments, their secondary recipients or their contractors) on the behalf of the Office of Revenue Sharing. 1974‑75 Op Atty Gen, No 4120, p 194.

The State Human Affairs Commission has authority to contract with legal aid agencies to provide legal services to the elderly poor in civil cases involving the existence of or potential for discrimination. 1974‑75 Op Atty Gen, No 4067, p 145.

The State Human Affairs Commission has authority to contract with Legal Aid Agencies to provide legal services to the elderly poor in civil cases involving the existence of or potential for discrimination. 1974‑75 Op Atty Gen, No 4165, p 227.

**SECTION 1‑13‑80.** Unlawful employment practices; exceptions.

(A) It is an unlawful employment practice for an employer:

(1) to fail or refuse to hire, bar, discharge from employment or otherwise discriminate against an individual with respect to the individual’s compensation or terms, conditions, or privileges of employment because of the individual’s race, religion, color, sex, age, national origin, or disability;

(2) to limit, segregate, or classify employees or applicants for employment in a way which would deprive or tend to deprive an individual of employment opportunities, or otherwise adversely affect the individual’s status as an employee, because of the individual’s race, color, religion, sex, age, national origin, or disability;

(3) to reduce the wage rate of an employee in order to comply with the provisions of this chapter relating to age.

(B) It is an unlawful employment practice for an employment agency to fail or refuse to refer for employment or otherwise to discriminate against an individual because of the individual’s race, color, religion, sex, age, national origin, or disability, or to classify or refer for employment an individual on the basis of the individual’s race, color, religion, sex, age, national origin, or disability.

(C) It is an unlawful employment practice for a labor organization:

(1) to exclude or to expel from its membership or otherwise to discriminate against an individual because of the individual’s race, color, religion, sex, age, national origin, or disability;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment an individual in a way which would deprive or tend to deprive an individual of employment opportunities or would limit employment opportunities or otherwise adversely affect the individual’s status as an employee or as an applicant for employment because of the individual’s race, color, religion, sex, age, national origin, or disability;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(D) It is an unlawful employment practice for a covered entity:

(1) to exclude or otherwise deny equal jobs or benefits to a qualified individual because of a known disability of an individual with whom the qualified individual is known to have a relationship or association;

(2) to fail or make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operations of the business of the covered entity; or to deny employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if the denial is based on the need of the covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(3) to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity;

(4) to fail to select and administer tests concerning employment in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of the employee or applicant, except where the skills are the factors that the test purports to measure.

(E) It is an unlawful employment practice for an employer, labor organization, or joint labor‑management committee controlling apprenticeship or other training or retraining, including on‑the‑job training programs, to discriminate against an individual because of the individual’s race, color, religion, sex, national origin, or disability in admission to or employment in a program established to provide apprenticeship or other training.

(F) It is an unlawful employment practice for an employer to discriminate against an employee or applicant for employment, for an employment agency, or joint labor‑management committee controlling apprenticeship or other training or retraining, including on‑the‑job training programs, to discriminate against an individual or for a labor organization to discriminate against a member or applicant for membership because the individual has opposed a practice made an unlawful employment practice by this chapter or because the individual has made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under this chapter.

(G) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor‑management committee controlling apprenticeship or other training or retraining, including on‑the‑job training programs, to print or publish or cause to be printed or published a notice or advertisement relating to employment by the employer or membership in or a classification or referral for employment by the labor organization or relating to a classification or referral for employment by the employment agency or relating to admission to or employment in a program established to provide apprenticeship or other training by the joint labor‑management committee indicating a preference, limitation, specification, or discrimination based on race, color, religion, sex, national origin, or disability, except that the notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

(H) It is unlawful for an employer, labor organization, or employment agency to print or publish or cause to be printed or published a notice or advertisement relating to employment by the employer or membership in or a classification or referral for employment by the labor organization or relating to a classification or referral for employment by the employment agency indicating a preference, limitation, specification, or discrimination based on age.

(I) Notwithstanding any other provision of this chapter:

(1) It is not an unlawful employment practice for an employer to employ employees, for an employment agency to classify or refer for employment an individual, for a labor organization to classify its membership or to classify or refer for employment an individual, or for an employer, labor organization, or joint labor‑management committee controlling apprenticeship or other training or retraining programs to admit or employ an individual in a program on the basis of the individual’s religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

(2) It is not an unlawful employment practice for a party subject to the provisions of this section to compile or assemble information as may be required pursuant to Section 1‑13‑70(i) or Federal Equal Employment Opportunity Commission or federal contract compliance requirements or pursuant to another law not inconsistent with this chapter.

(3) It is not an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system or a system which measures earnings by quantity or quality of production or to employees who work in different locations if the differences are not the result of an intention to discriminate because of race, religion, color, sex, national origin, or disability; nor is it an unlawful employment practice for an employer to give and to act upon the results of a professionally developed ability test if the test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, national origin, or disability. It is not an unlawful employment practice under this chapter for an employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of the employer if the differentiation is authorized by Section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(4) Nothing contained in this chapter applies to a business or enterprise on or near an Indian reservation with respect to a publicly announced employment practice of the business or enterprise under which a preferential treatment is given to an individual because the individual is an Indian living on or near a reservation.

(5) This chapter does not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by the corporation, association, educational institution, or society of its activities. It is not an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(6) Nothing contained in this chapter may be interpreted to require an employer, employment agency, labor organization, or joint labor‑management committee subject to this chapter to grant preferential treatment to an individual or to a group because of race, color, religion, sex, national origin, or disability of the individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of a race, color, religion, sex, national origin, or disability employed by an employer, referred or classified for employment by an employment agency or labor organization admitted to membership or classified by a labor organization, or admitted to, or employed in, an apprenticeship or other training program in comparison with the total number or percentage of persons of the race, color, religion, sex, national origin, or disability in a community, state, section, or other area or in the available work force in a community, state, section, or other area.

(7) It is not unlawful for an employer, employment agency, or labor organization:

(i) to take an action otherwise prohibited under this chapter where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age;

(ii) to observe the terms of a bona fide seniority system or a bona fide employee benefit plan such as retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter except that no employee benefit plan may excuse the failure to hire an individual.

Notwithstanding the provisions of subitem (ii), no seniority system or employee benefit plan may require or permit the involuntary retirement of an individual covered by the provisions of this chapter relating to age because of the age of the individual; however, employees covered by a collective bargaining agreement which was in effect on June 30, 1986, and which would otherwise be prohibited by the provisions of this subitem, this subitem takes effect upon the termination of the agreement or on January 1, 1990, whichever occurs first.

(8) Nothing in this chapter may be construed to prohibit compulsory retirement of an employee who has attained sixty‑five years of age and who, for the two‑year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if the employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings, or deferred compensation plan or a combination of these plans of the employer of the employee which equals in aggregate at least forty‑four thousand dollars.

(9) In applying subsection (I)(8), the retirement benefit test, if a retirement benefit is in a form other than a straight life annuity with no ancillary benefits or if employees contribute to a plan or make rollover contributions, the benefit must be adjusted in accordance with regulations prescribed by the commissioner so that the benefit is the equivalent of a straight life annuity with no ancillary benefits under a plan to which employees do not contribute and under which no rollover contributions are made.

(10) Nothing in this chapter relating to age discrimination in employment may be construed to prohibit compulsory retirement of an employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an institution of higher education. This item is effective until December 31, 1993.

(11) It is an unlawful employment practice for a person to forcibly resist, prevent, impede, or interfere with the commission or any of its members or representatives in the lawful performance of duty under this chapter.

(12) It is not unlawful for an employer which is the State, a political subdivision of the State, an agency or instrumentality of the State or of a political subdivision of the State, or an interstate agency to fail or refuse to hire or to discharge an individual because of the individual’s age if the action is taken:

(i) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable law on March 3, 1983;

(ii) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

This item is effective until December 31, 1993.

The term “firefighter” means an employee the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

The term “law enforcement officer” means an employee the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this item, “detention” includes the duties of employees assigned to guard individuals incarcerated in a penal institution.

Nothing contained in items (8), (10), and (12) may override Sections 9‑1‑1530 and 9‑1‑1537.

(13) It is not an unlawful employment practice for a private employer to give preference in employment to a veteran. This preference is also extended to the veteran’s spouse if the veteran has a service‑connected permanent and total disability. A private employer who gives a preference in employment provided by this item does not violate any other provision of this chapter by virtue of giving the preference. For purposes of this item, “veteran” has the same meaning as provided in Section 25‑11‑40.

HISTORY: 1962 Code Section 1‑360.28; 1972 (57) 2651; 1979 Act No. 24, Section 8; 1988 Act No. 663, Section 2; 1996 Act No. 426, Section 5; 2014 Act No. 210 (H.4922), Section 1, eff June 2, 2014.

Effect of Amendment

2014 Act No. 210, Section 1, added subsection (I)(13), relating to veteran employment preference.

CROSS REFERENCES

Criminal offenses against civil rights, see Sections 16‑5‑60 to 16‑5‑110.

Mandatory retirement age for magistrates, notwithstanding provisions of this section, see Section 22‑1‑25.

Provisions regarding discrimination against teachers, see Sections 59‑25‑710 et seq.

State Employee Grievance Procedure Act of 1982, see Sections 8‑17‑310 et seq.

Federal Aspects

Employment discrimination, discrimination occurs each time discriminatory compensation is paid, see 42 U.S.C.A. Section 2000.

Federal Equal Employment Opportunity Commission, see 42 U.S.C.A. Sections 2000e‑4 et seq.

LIBRARY REFERENCES

Westlaw Key Number Searches: 78k1101 to 78k1263; 78k1217.

Civil Rights 1101 to 1263, 1217.

C.J.S. Civil Rights Sections 11, 22, 25 to 31, 33 to 37, 39 to 43, 46 to 50, 53 to 67, 88, 102 to 104, 107, 122, 144, 219 to 220.

RESEARCH REFERENCES

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94 ALR 711 , Anticipation of Defense Involving Federal Constitution or Statute as Supporting Federal Jurisdiction Under Statute Conferring Such Jurisdiction Over Causes of Action Arising Under Federal Constitution or Statute.

Encyclopedias

135 Am. Jur. Proof of Facts 3d 183, Prosecution or Defense of Action Alleging Employment Discrimination on Basis of Religion.

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Forms

South Carolina Litigation Forms and Analysis Section 3:34 , Employment Discrimination (Race).

Treatises and Practice Aids

54 Causes of Action 2d 365, Cause of Action for Supervisor Sexual Harassment Under Title VII (42 U.S.C.A. Section 2000e) With Ellerth/Faragher Affirmative Defenses.

69 Causes of Action 2d 235, Cause of Action for Supervisor Racial Harassment Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. Sections 2000e et seq.).

72 Causes of Action 2d 1, Cause of Action for Religious Discrimination Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. Sections 2000e et seq.) Based on Employer’s Enforcement of Grooming Policy.

73 Causes of Action 2d 315, Cause of Action for Religious Discrimination Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. Sections 2000e et seq.) Based on Employer’s Enforcement of Dress Code.

Employment Coordinator Employment Practices Section 3:50, South Carolina.

Employment Coordinator Employment Practices Section 4:57, South Carolina.

Employment Coordinator Employment Practices Section 5:52, South Carolina.

Employment Coordinator Employment Practices Section 7:53, South Carolina.

Employment Coordinator Employment Practices Section 8:54, South Carolina.

Employment Coordinator Employment Practices Section 10:82, South Carolina.

Employment Coordinator Employment Practices Section 11:41, South Carolina.

Employment Coordinator Employment Practices Section 13:31, South Carolina.

Employment Coordinator Employment Practices Section 15:47, South Carolina.

Employment Coordinator Employment Practices Section 16:27, South Carolina.

Employment Coordinator Employment Practices Section 17:40, South Carolina.

Employment Coordinator Employment Practices Section 21:58, South Carolina.

Employment Coordinator Employment Practices Section 39:85, South Carolina.

Employment Coordinator Employment Practices Section 43:46, South Carolina.

Employment Coordinator Employment Practices Section 52:65, South Carolina.

Employment Coordinator Employment Practices Section 66:48, South Carolina.

Employment Coordinator Employment Practices Section 67:51, South Carolina.

Employment Coordinator Employment Practices Section 67:86, South Carolina.

Employment Coordinator Employment Practices Section 9:118, South Carolina.

Employment Coordinator Employment Practices Section 20:291, South Carolina.

Employment Coordinator Employment Practices Section 43:103, South Carolina.

Employment Coordinator Employment Practices Section 44:119, South Carolina.

Employment Coordinator Employment Practices Section 44:164, South Carolina.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

United States Supreme Court Annotations

Age discrimination in employment, mixed motives jury instruction, see Gross v. FBL Financial Services, Inc., 2009, 129 S.Ct. 2343, 557 U.S. 167, 174 L.Ed.2d 119, on remand 588 F.3d 614.

Age discrimination in employment, public disability retirement plan, imputation of additional years based on pension status, see Kentucky Retirement Systems v. E.E.O.C., 2008, 128 S.Ct. 2361, 554 U.S. 135, 171 L.Ed.2d 322.

Age discrimination in employment act, federal sector provision, retaliation claims, see Gomez‑Perez v. Potter, 2008, 128 S.Ct. 1931, 553 U.S. 474, 170 L.Ed.2d 887, on remand 533 F.3d 19.

Civil rights, employment, age discrimination, EEOC filing requirements, charge under the ADEA, see Federal Exp. Corp. v. Holowecki, 2008, 128 S.Ct. 1147, 552 U.S. 389, 170 L.Ed.2d 10.

Civil rights, employment discrimination, opposition clause of anti‑retaliation provision, employee who spoke out about discrimination during internal investigation of coworker’s complaints, see Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 2009, 129 S.Ct. 846, 555 U.S. 271, 172 L.Ed.2d 650, on remand 2009 WL 3348233.

Civil rights, sex and pregnancy discrimination, pension benefits, accrual rule applied prior to Pregnancy Discrimination Act, retirement credit for pregnancy leave less than credit for other medical leave, see AT & T Corp. v. Hulteen, 2009, 129 S.Ct. 1962, 556 U.S. 701, 173 L.Ed.2d 898.

Discrimination, Employer is not vicariously liable under Title VII if “supervisor” is not empowered to take tangible employment actions against victim, see Vance v. Ball State University, 2013, 133 S.Ct. 2434, 186 L.Ed.2d 565. Civil Rights 1528

Discrimination, employer’s motive to avoid religious accommodation supports Title VII liability, even without actual knowledge that job applicant’s practice is religious, see E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 2015, 135 S.Ct. 2028, 192 L.Ed.2d 35. Civil Rights 1159, 1162(1)

Discrimination, pregnant worker may show disparate treatment under the Pregnancy Discrimination Act through application of the McDonnell Douglas framework, see Young v. United Parcel Service, Inc., 2015, 135 S.Ct. 1338, 191 L.Ed.2d 279, on remand 2015 WL 2058940. Civil Rights 1176, 1537, 1540

Discrimination, Title VII permits limited judicial review of whether EEOC has fulfilled its duty to attempt conciliation prior to suit, see Mach Mining, LLC v. E.E.O.C., 2015, 135 S.Ct. 1645, 191 L.Ed.2d 607. Civil Rights 1510

Discrimination, Title VII retaliation claims must be proved according to traditional principles of but‑for causation, see University of Texas Southwestern Medical Center v. Nassar, 2013, 133 S.Ct. 2517, 186 L.Ed.2d 503, on remand 537 Fed.Appx. 525, 2013 WL 3943554. Civil Rights 1252

Due process, fair trial, jury selection, good faith error in denial of peremptory challenge, see Rivera v. Illinois, U.S.Ill.2009, 129 S.Ct. 1446, 556 U.S. 148, 173 L.Ed.2d 320.

Employment, age discrimination, disparate impact claim, burden of persuasion to prove reasonable factors other than age defense, see Meacham v. Knolls Atomic Power Laboratory, 2008, 128 S.Ct. 2395, 554 U.S. 84, 171 L.Ed.2d 283, on remand 305 Fed.Appx. 748, 2009 WL 33609.

Employment, fair labor standards, companionship services exemption from minimum wage and maximum hours rules, third party companionship services, see Long Island Care at Home, Ltd. v. Coke, 2007, 127 S.Ct. 2339, 551 U.S. 158, 168 L.Ed.2d 54.

Employment discrimination, disparate pay, discriminatory act triggering time limit for filing Equal Employment Opportunity Commission charge, see Ledbetter v. Goodyear Tire & Rubber Co., Inc., 2007, 127 S.Ct. 2162, 550 U.S. 618, 167 L.Ed.2d 982, overturned due to legislative action.

Employment discrimination, disparate treatment prohibition, failure to certify promotional exam, belief that results could have disparate impact on minority firefighters, see Ricci v. DeStefano, 2009, 129 S.Ct. 2658, 557 U.S. 557, 174 L.Ed.2d 490.

Employment discrimination, Title VII of the Civil Rights Act, unlawful retaliation, act of retaliation, standard for judging harm, aggrieved person, see Thompson v. North American Stainless, LP, 2011, 131 S.Ct. 863, 562 U.S. 170, 178 L.Ed.2d 694.

Fair Labor Standards Act, anti‑retaliation, rule of lenity, see Kasten v. Saint‑Gobain Performance Plastics Corp., 2011, 131 S.Ct. 1325, 563 U.S. 1, 179 L.Ed.2d 379, on remand 424 Fed.Appx. 564, 2011 WL 2064845.

Leaves, state employee could not sue employer for violation of federal Family and Medical Leave Act’s self‑care provision, see Coleman v. Court of Appeals of Maryland, 2012, 132 S.Ct. 1327, 566 U.S. 30, 182 L.Ed.2d 296. Constitutional Law 4863; Labor and Employment 383; States 191.2(1)

Title VII, class‑wide relief, disparate‑impact claims, intent, interpretation of statute, see Lewis v. City of Chicago, Ill., 2010, 130 S.Ct. 2191, 560 U.S. 205, 176 L.Ed.2d 967, on remand 643 F.3d 201.

Attorney General’s Opinions

General Assembly has mandated that magistrate must retire not later than end of fiscal year of his 72nd birthday. However, General Assembly did authorize magistrate in office as of effective date of Section 22‑1‑25 and who has reached 72 years of age prior to July 1, 1993, to continue to serve until June 30, 1994. 1993 Op Atty Gen No. 93‑49.

NOTES OF DECISIONS

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1. In general

A job applicant’s request for a religious accommodation, or the employer’s certainty that the religious practice exists, may make it easier to infer that the applicant’s need for a religious accommodation was a motivating factor in the prospective employer’s adverse decision, in a Title VII disparate treatment case, but is not a necessary condition of liability. E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 2015, 135 S.Ct. 2028, 192 L.Ed.2d 35. Civil Rights 1159; Civil Rights 1162(1)

Equal Employment Opportunity Commission (EEOC) manual provision, stating that causation element of Title VII claim is satisfied if there is credible direct evidence that retaliation was a motive for the challenged action, and second provision asserting that lessened causation standard is necessary to prevent proven retaliation from going unpunished, lacked persuasive force that was necessary precondition to deference to agency decision under Skidmore, in action presenting issue whether but‑for causation was required for proving retaliation under Title VII, since first manual provision failed to address interplay among Title VII’s status‑based discrimination provision, antiretaliation provision, and motivating‑factor provision, and reasoning of second manual provision was circular. University of Texas Southwestern Medical Center v. Nassar, 2013, 133 S.Ct. 2517, 186 L.Ed.2d 503, on remand 537 Fed.Appx. 525, 2013 WL 3943554. Administrative Law and Procedure 438(15); Civil Rights 1504

Assuming that a harasser is not a supervisor, a Title VII plaintiff can still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place; evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant. Vance v. Ball State University, 2013, 133 S.Ct. 2434, 186 L.Ed.2d 565. Civil Rights 1149

Co‑worker who allegedly harassed African‑American state university employee was not employee’s supervisor for purposes of employer’s vicarious liability under Title VII, although employee referred to the co‑worker as a “supervisor” in some of the complaints she filed and co‑worker’s job description stated that she supervised other employees, where there was no evidence that co‑worker directed employee’s day‑to‑day activities, other than sometimes handing her a list of daily tasks prepared by others. Vance v. Ball State University, 2013, 133 S.Ct. 2434, 186 L.Ed.2d 565. Civil Rights 1528

District manager’s actions in failing to address female employee’s report that manager was sexually harassing her did not amount to official act precipitating employee’s alleged constructive discharge, and thus, employer was entitled to assert affirmative defense that employer exercised reasonable care to prevent alleged harassment, in employee’s sexual harassment claim under the South Carolina Human Affairs Law. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1123; Civil Rights 1189

When the constructive discharge claim arises in the context of a hostile work environment lawsuit, under the South Carolina Human Affairs Law, the plaintiff must show working conditions so intolerable that a reasonable person would have felt compelled to resign. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1123

Under the “constructive discharge doctrine,” an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes, in a sexual harassment claim under the South Carolina Human Affairs Law. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1123

Changes in female employee’s work schedule, assignment of unpleasant tasks by supervisor, and supervisor’s alleged verbal and physical abuse did not constitute “tangible employment actions,” as would bar employer from asserting an affirmative defense that employer exercised reasonable care to prevent alleged harassment, in sexual harassment claim under the South Carolina Human Affairs Law, since the alleged conduct did not create a significant change in employee’s status. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1189

A “tangible employment action,” as required to bar employer from invoking affirmative defense that employer exercised reasonable care to prevent alleged harassment to bar imputation of vicarious liability, in sexual harassment claim under the South Carolina Human Affairs Law, constitutes a significant change in employment status. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1189; Civil Rights 1736

Terminated 65‑year‑old employee, who allegedly had been diagnosed with multiple sclerosis, failed to show that allegedly comparable employee was treated differently, as would support her claim that employer’s reason for terminating her, namely, that employee had received multiple warnings for inappropriate behavior, was pretext for discrimination in violation of the ADA or ADEA; both employees were terminated following two written warnings within a 12‑month period after guest and employee complaints were filed against them, and regional manager only responded with formal warnings when the complaints rose to an actionable level. Palomino v. Concord Hospitality Enterprises Co., 2015, 126 F.Supp.3d 647. Civil Rights 1210; Civil Rights 1222

Sixty‑five‑year old employee, who allegedly had been diagnosed with multiple sclerosis, failed to show that employer exhibited a sudden change in attitude against her, as would support her claim that employer’s reason for terminating her, namely, that employee had received multiple warnings for inappropriate behavior, was pretext for discrimination in violation of the ADA or ADEA; throughout employee’s employment, there had been oral complaints made by guests and co‑workers that warranted counseling, and fact that formal, written warnings were issued signified that complaints had ultimately risen to a serious and actionable level, not a sudden change in attitude. Palomino v. Concord Hospitality Enterprises Co., 2015, 126 F.Supp.3d 647. Civil Rights 1209; Civil Rights 1221

Employer did not deviate from its normal practices by issuing warning of inappropriate behavior to 65‑year‑old employee, who allegedly had been diagnosed with multiple sclerosis, and subsequently terminating employee purportedly based on multiple warnings, allegedly without considering her side of the story, as would show that employer’s proffered reason for termination was pretext for age or disability discrimination; there was no indication that employer was required to interview employee prior to issuing her a warning or that it failed to follow company policy and its customary practices. Palomino v. Concord Hospitality Enterprises Co., 2015, 126 F.Supp.3d 647. Civil Rights 1209; Civil Rights 1221

Employer’s policy or practice of not interviewing co‑workers prior to issuing a warning to an employee did not indicate an intent to discriminate on the basis of age or disability, and thus did not support claim by 65‑year‑old employee who allegedly had been diagnosed with multiple sclerosis that employer’s proffered reason for her termination, namely, that employee had received multiple warnings for inappropriate behavior, was pretext for discrimination in violation of the ADA or ADEA. Palomino v. Concord Hospitality Enterprises Co., 2015, 126 F.Supp.3d 647. Civil Rights 1209; Civil Rights 1221

Employer articulated a legitimate, nondiscriminatory reason under the ADA and ADEA for terminating 65‑year‑old employee who allegedly had been diagnosed with multiple sclerosis, namely, that employee had been counseled for her tone and behavior prior to her first formal warning and that she received two written warnings within a 12‑month period, which authorized termination under company policy. Palomino v. Concord Hospitality Enterprises Co., 2015, 126 F.Supp.3d 647. Civil Rights 1204; Civil Rights 1220

African‑American male employee allegedly discharged based on his race and gender was precluded from maintaining tort action against employer for wrongful discharge in violation of South Carolina public policy, where Title VII existed as a statutory remedy for employee’s claims of wrongful discharge based on race and gender. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Labor and Employment 852

Employee did not show that employer’s proffered legitimate, nonretaliatory reasons for his discharge, namely, failure to meet employer’s performance and behavior standards, were pretext for retaliation under Title VII. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1251

Employee did not show that he would not have been fired but for his allegedly protected activity consisting of letter to manager describing disagreement with subordinate and transfer request, as required to support retaliation claim under Title VII, where employer presented abundant evidence that employee’s discharge was based on his failure to meet employer’s performance and behavior standards. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1252

Employee did not show that his termination was causally connected to his allegedly protected activity consisting of transfer request or letter to manager describing employee’s disagreement with subordinate, as required to support retaliation claim under Title VII. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1252

Employee’s request for transfer and letter to manager describing disagreement between himself and subordinate did not constitute protected activity, and thus, did not support retaliation claim against employer under Title VII; letter contained no allegations of discrimination and no evidence showed that employee alerted employer that his transfer request was based on alleged discriminatory conduct. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1244

African‑American male employee did not identify any particular employment practice by employer that caused disparate impact, as required to support prima facie disparate‑impact claim under Title VII. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1140

African‑American male employee did not show any basis for imputing liability for white female employee’s alleged abuse to employer in Title VII action alleging hostile work environment based on race and gender, where white employee worked under African‑American employee’s management, African‑American employee failed to demonstrate that he was subjected to hostile work environment by managers, and provided no allegation that any supervisory employee made race or gender‑based derogatory comments, and manager took corrective measures when African‑American employee complained about white employee’s conduct by discussing issue with her. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1149; Civil Rights 1189; Civil Rights 1528

White employee’s racially derogatory comments were not sufficiently severe or pervasive to create abusive working environment, as required to support African‑American employee’s claim against employer for racially hostile work environment under Title VII; although white employee used term “nigger” seven times, “black monkey” three times, and “stupid black mother‑fucker” on one occasion, such comments were isolated and sporadic, and did not involve physically threatening behavior. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1147

Letters from African‑American male employee and white female employee to management did not describe comparably serious complaints requiring comparable response or discipline, and thus, white employee was not viable comparator in African‑American employee’s Title VII action against employer alleging race and gender discrimination arising from his termination; while employees had same manager and were subject to same standards, African‑American employee’s letter discussed disagreement between himself and white employee, but made no reference to discrimination, and white employee’s letter discussed several specific instances of alleged inappropriate conduct to include sexual language and behavior. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1138; Civil Rights 1179

Decision by replacement worker, a black male, to leave employer to pursue another job opportunity after only 12 days of employment did not show that employer’s hiring of worker following African‑American employee’s discharge was calculated to disguise an act of race discrimination against employee under Title VII. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1137

African‑American male employee did not establish that employer filled his position with someone outside his protected classes after his discharge, as required to support prima facie case of discriminatory discharge based on race and gender under Title VII, where first hire after employee’s discharge was a black male. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1122; Civil Rights 1179

African‑American male employee failed to show that he was performing at level that met his employer’s legitimate expectations at time of his discharge, as required to support prima facie case of discriminatory discharge based on race and gender under Title VII, where employer asserted that employee violated employer’s inappropriate behavior policy by inappropriately touching female coworkers, and that employee failed to meet employer’s performance expectations, and, while employee questioned employer’s rating system, nothing in record showed that supervisor did not genuinely believe employee’s performance to be lacking at time of his discharge. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1122; Civil Rights 1179

African‑American male employee failed to demonstrate that employer’s failure to approve relocation costs to effect his transfer constituted adverse employment action, as required to support claims against employer for race and gender discrimination under Title VII; employee failed to provide evidence to demonstrate that his inability to transfer caused any significant detrimental effect on him, such as reduced pay or lower rank. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1136; Civil Rights 1179

White employee’s racially derogatory statements did not constitute direct evidence of racial discrimination by employer against African‑American employee under Title VII; African‑American employee presented no evidence that offensive remarks by white employee had any connection to any allegedly adverse action taken by supervisors. Addison v. CMH Homes, Inc., 2014, 47 F.Supp.3d 404, appeal dismissed. Civil Rights 1544

African American state employees’ being assigned to supervisor who had previously used racial epithets toward one of them, as well as one employee’s being involuntarily transferred and two others’ being verbally intimidated, did not constitute materially adverse conduct, as required to be an adverse employment action for employees’ Title VII retaliation claims against state agency. Harrison v. South Carolina Dept. of Mental Health, 2014, 47 F.Supp.3d 388, vacated and remanded 641 Fed.Appx. 202, 2015 WL 4081226. Civil Rights 1249(1); Public Employment 281; States 53

State agency’s not increasing salaries for African American employees and not promoting them because they received raises earlier in the year and because positions at issue were transfers as part of a reorganization did not constitute pretext for race discrimination, as would violate Title VII. Harrison v. South Carolina Dept. of Mental Health, 2014, 47 F.Supp.3d 388, vacated and remanded 641 Fed.Appx. 202, 2015 WL 4081226. Civil Rights 1137

African American state employees’ being denied “substantially exceeds” performance ratings, individual who formerly harassed one employee becoming supervisor of two employees, and another employee’s being involuntarily reassigned were not adverse employment actions, as required for employees’ Title VII disparate treatment claims against state agency; employees’ performance ratings were satisfactory and harassment was approximately 20 years prior to individual’s becoming supervisor of employees. Harrison v. South Carolina Dept. of Mental Health, 2014, 47 F.Supp.3d 388, vacated and remanded 641 Fed.Appx. 202, 2015 WL 4081226. Civil Rights 1138

Positions to which state agency reassigned two supervisors as part of reorganization were not open, but were lateral transfers, and therefore, agency’s allegedly failing to promote African‑American employees to those positions was not race discrimination in violation of Title VII; supervisors retained their existing pay and grade levels. Harrison v. South Carolina Dept. of Mental Health, 2014, 47 F.Supp.3d 388, vacated and remanded 641 Fed.Appx. 202, 2015 WL 4081226. Civil Rights 1135

State agency’s decision not to give pay raises to African American employees was not motivated by race, as would violate Title VII, where other African American employees were given salary increases and employees had received a salary adjustment earlier as a result of a settlement. Harrison v. South Carolina Dept. of Mental Health, 2014, 47 F.Supp.3d 388, vacated and remanded 641 Fed.Appx. 202, 2015 WL 4081226. Civil Rights 1136

African‑American employee failed to establish that he was performing his job satisfactorily at time of his discharge, as required to support prima facie case of race discrimination against restaurant employer under Title VII and Section 1981; employee refused to accept assignment as unit manager prior to his discharge. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1122

There was no evidence that African‑American employee was subjected to any disciplinary action or was discharged because of his race, as required to support prima facie case of race discrimination against restaurant employer under Title VII and Section 1981; employee’s transfer from one restaurant to another did not result in reduction in pay, transfer was approved and made by African‑American supervisors, employee’s complaint about salaries of two other African‑American manager trainees was not evidence of discrimination, and employee’s insubordination and refusing to report to assigned restaurant led to his discharge. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1122; Civil Rights 1135; Civil Rights 1138

Fact that African‑American employee did not get along with his subordinates and believed they disrespected him was not evidence of an adverse employment action for purposes of establishing a prima facie case of race discrimination against restaurant employer under Title VII and Section 1981. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1120

African‑American employee failed to produce sufficient evidence to establish that conduct he complained of was based on his race, as required to support claim for racially hostile work environment against restaurant employer under Section 1981; there was no evidence, other than employee’s self‑serving and conclusory suppositions, that race had anything to do with events to which he testified, including white supervisor’s alleged accusation that employee was taking money from cash register, there was no evidence of any racial comments being made by supervisor or any other employees, or of any racial animus on part of these employees. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1147

African‑American employee established prima facie case of retaliation against restaurant employer under Title VII; employee engaged in protected activity when he complained to supervisor about allegedly discriminatory treatment, employee was subjected to adverse employment action when he was discharged, and there was sufficient evidence, considered in light most favorable to employee, that his transfer from one restaurant to another was result of complaining about treatment. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1247

Restaurant employer proffered legitimate, nondiscriminatory reasons for transferring and discharging African‑American employee in Title VII retaliation action by stating that it transferred employee so he could be closer to where he lived after employee complained about his commute, and that employer discharged employee after he refused to report to job assignment. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1247

There was no evidence that restaurant employer’s proffered legitimate, nonretaliatory reasons for transferring and discharging African‑American employee, namely that transfer would allow employee to work closer to where he lived, and that discharge followed employee’s refusal to report to new job assignment, were pretext for retaliation for employee’s previous discrimination complaint; further, transfer was a promotion, as he was placed in unit manager status, which made him eligible for bonuses. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1251

The analytical framework for considering employment discrimination claims under the South Carolina Human Affairs Law (SCHAL) is the same as that for Title VII. Ferguson v. Waffle House, Inc., 2014, 18 F.Supp.3d 705. Civil Rights 1103

One year limitations period applicable to Title VI employment discrimination claims arising in South Carolina began to run when university denied tenure to employee, not when university issued its final ruling on her grievance appeal, since all of plaintiff’s factual allegations centered around denial of tenure and Title VI did not require plaintiff to exhaust her administrative remedies before filing suit. Martin v. Clemson University, 2009, 654 F.Supp.2d 410. Limitation Of Actions 58(1); Limitation Of Actions 105(1)

One year limitations period applicable to Title IX employment discrimination claims arising in South Carolina began to run when university denied tenure to employee, not when university issued its final ruling on her grievance appeal, since all of plaintiff’s factual allegations centered around denial of tenure and Title IX did not require plaintiff to exhaust her administrative remedies before filing suit. Martin v. Clemson University, 2009, 654 F.Supp.2d 410. Limitation Of Actions 58(1); Limitation Of Actions 105(1)

Limitations period applicable to South Carolina Human Affairs Law, that proscribed not only discrimination in employment because of sex, but also because of race, color and national origin, applied to Title VI employment discrimination claims arising in South Carolina. Martin v. Clemson University, 2009, 654 F.Supp.2d 410. Federal Courts 3034(5)

Limitations period applicable to South Carolina Human Affairs Law, that proscribed not only discrimination in employment because of sex, but also because of race, color and national origin, applied to Title IX employment discrimination claims arising in South Carolina. Martin v. Clemson University, 2009, 654 F.Supp.2d 410. Federal Courts 3034(5)

Enactment of South Carolina Human Affairs Law (Code Section 1‑13‑80) does not amount to waiver of State’s constitutional immunity afforded by Eleventh Amendment nor consent by state to be sued in District Court on cause of action for alleged age discrimination in employment. Coffin v. South Carolina Dept. of Social Services (D.C.S.C. 1983) 562 F.Supp. 579. Federal Courts 2375(2)

Federal court has no jurisdiction over case alleging employment discrimination based upon race where plaintiff has not exhausted available state remedies; where South Carolina State Human Affairs Commission gained power to investigate and grant relief from private acts of discrimination subsequent to plaintiff’s filing of form complaint with Commission, plaintiff is obligated to return to Commission and exhaust state remedies. Settles v. Pinkerton, Inc. (D.C.S.C. 1979) 482 F.Supp. 461.

Terminated employee’s proposed amended complaint failed to allege or otherwise demonstrate that he exhausted administrative remedies prior to filing suit, as required to assert claims against employer alleging wrongful termination on basis of age and religion in violation of Title VII of Civil Rights Act, the Age Discrimination in Employment Act (AGE), and the South Carolina Human Affairs Law (SCHAL), and, thus, proposed amendment was futile. Kramer v. Omnicare ESC, LLC, 2015, 307 F.R.D. 459. Civil Rights 1532; Civil Rights 1740

Department of Mental Health’s (DMH) failure to promote three African‑American maintenance employees or to consider them for supervisory positions filled by white supervisors was not based on Title VII race discrimination or retaliation for employees’ prior employment discrimination suit against DMH, where supervisory positions were not open, as white supervisors were merely laterally transferred to new supervisory roles necessitated by restructuring of physical plant services department, and employees had not applied for supervisor position in plumbing unit. Harrison v. South Carolina Dept. of Mental Health (C.A.4 (S.C.) 2015) 641 Fed.Appx. 202, 2015 WL 4081226. Civil Rights 1138; Civil Rights 1249(1); Public Employment 258(2); Public Employment 281

African‑American administrative assistant with county magistrate’s office was not meeting the legitimate expectations of her employer at the time she was fired, as required to support her claim for discrimination, based on race, in violation of Title VII when she was terminated from her position and replaced with a Caucasian employee; administrative assistant was on notice that the county expected her not to divulge information regarding bench warrants, in that she had been previously reprimanded for doing so, but despite that notice, she divulged to her friend information regarding an outstanding bench warrant issued for friend’s son. McZeke v. Horry County (C.A.4 (S.C.) 2015) 609 Fed.Appx. 140, 2015 WL 1951382. Civil Rights 1128

Title IX retaliation action brought against school district by former basketball coach was governed by one‑year limitations period provided by South Carolina’s State Human Affairs Law, rather than two‑year limitations period applicable to personal injury actions in South Carolina. Moore v. Greenwood School Dist. No. 52 (C.A.4 (S.C.) 2006) 195 Fed.Appx. 140, 2006 WL 2385268, Unreported. Civil Rights 1383

Federal courts do not have exclusive jurisdiction over civil actions brought under Title VII of Civil Rights Act of 1964 (42 USCA Sections 2000e et seq.). Yellow Freight System, Inc. v. Donnelly, U.S.Ill.1990, 110 S.Ct. 1566, 494 U.S. 820, 108 L.Ed.2d 834. Courts 489(1)

Employer shown to have considered gender in making employment decision was properly required, in federal civil rights action, to prove by preponderance of evidence that decision would have been same absent such consideration. Price Waterhouse v. Hopkins, U.S.Dist.Col.1989, 109 S.Ct. 1775, 490 U.S. 228, 104 L.Ed.2d 268, on remand.

2. Pregnancy

An individual pregnant worker claiming pregnancy discrimination in violation of Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA) who seeks to show disparate treatment through indirect evidence may do so through application of the McDonnell Douglas framework applicable to Title VII discriminatory treatment cases. Young v. United Parcel Service, Inc., 2015, 135 S.Ct. 1338, 191 L.Ed.2d 279, on remand 2015 WL 2058940. Civil Rights 1537; Civil Rights 1540

The McDonnell Douglas framework applicable to Title VII discriminatory treatment employment discrimination cases requires a plaintiff to make out a prima facie case of discrimination, but it is not intended to be an inflexible rule; rather, an individual may establish a prima facie case by showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under Title VII. Young v. United Parcel Service, Inc., 2015, 135 S.Ct. 1338, 191 L.Ed.2d 279, on remand 2015 WL 2058940. Civil Rights 1545

3. Conciliation

In order for the Equal Employment Opportunity Commission (EEOC) to satisfy its statutory obligation to attempt conciliation with an employer, as a prerequisite for EEOC to bring a Title VII action against the employer for unlawful employment discrimination, the EEOC must tell the employer about the claim, essentially, what practice has harmed which person or class, and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. Mach Mining, LLC v. E.E.O.C., 2015, 135 S.Ct. 1645, 191 L.Ed.2d 607. Civil Rights 1515

Letters sent by Equal Employment Opportunity Commission (EEOC) to employer, notifying employer that conciliation process would begin and subsequently notifying employer that conciliation attempt had occurred and had failed, were insufficient to show that EEOC had satisfied its statutory obligation to attempt conciliation with employer, as a prerequisite for EEOC to bring a Title VII action against the employer for sex discrimination in hiring; EEOC was required to produce a sworn affidavit stating that it had performed its obligations but that its efforts had failed. Mach Mining, LLC v. E.E.O.C., 2015, 135 S.Ct. 1645, 191 L.Ed.2d 607. Civil Rights 1510

4. Parties

Mandate rule precluded district court from revisiting question of predominance in employees’ Title VII class action against employer alleging discriminatory job promotion practices, despite United States Supreme Court’s subsequent decision in Wal‑Mart Stores, Inc. v. Dukes, which provided sufficiently significant change in governing legal standard to permit limited reexamination of whether class satisfied commonality requirement, where Wal‑Mart did not change, nor purport to change, predominance analysis, Court of Appeals had previously ruled that “putative class satisfied both the predominance and superiority requirements” for class certification, and district court cited no new facts or legal precedent to justify revisiting that determination once underlying question of commonality was resolved. Brown v. Nucor Corp. (C.A.4 (S.C.) 2015) 785 F.3d 895. Federal Courts 3796

In determining whether black employees satisfied commonality requirement for class certification in their Title VII action against employer alleging discriminatory job promotion practices, it was appropriate to treat plant at which they worked as single entity, even though employees’ evidence of discrimination disproportionately concerned single department, where declarants described frequent instances of alleged promotions discrimination in other departments, numerous complaints of discrimination were made to plant’s general manager, bidding for promotions was plant‑wide, and originating and destination department heads were both required to approve promotions. Brown v. Nucor Corp. (C.A.4 (S.C.) 2015) 785 F.3d 895. Federal Civil Procedure 184.10

Black employees satisfied commonality requirement for class certification in their Title VII action against employer alleging discriminatory job promotion practices, where litigation concerned approximately 100 class members in single steel plant, class members shared common spaces, were in regular physical contact with other departments, could apply for promotions in other departments, and were subject to same plant‑wide policies and practices, employees’ experts developed reasonably reliable alternative benchmark to extrapolate promotions data for period during which actual bidding information was unavailable, which showed statistical disparity in promotions was statistically significant at 2.54 standard deviations from what would have been expected if race were neutral factor, and employees provided substantial evidence of unadulterated, consciously articulated, odious racism throughout plant, including affirmative actions by supervisors and widespread attitude of permissiveness of racial hostility. Brown v. Nucor Corp. (C.A.4 (S.C.) 2015) 785 F.3d 895. Federal Civil Procedure 184.10

5. Summary judgment

Genuine issue of material fact remained as to whether three African‑American maintenance employees were deprived of pay raises awarded to every other employee holding same title as they did or whether they received those raises in form of pay adjustments as part of settlement of their prior race discrimination suit against employer Department of Mental Health (DMH), thus precluding summary judgment on employees’ claims against DMH for retaliation in violation of Title VII. Harrison v. South Carolina Dept. of Mental Health (C.A.4 (S.C.) 2015) 641 Fed.Appx. 202, 2015 WL 4081226. Federal Civil Procedure 2497.1

Genuine issue of material fact remained as to whether three African‑American maintenance employees were paid less than both their white and black comparators after pay raises were awarded to every other employee holding same title as they did following settlement of their prior race discrimination suit against employer Department of Mental Health (DMH), thus precluding summary judgment on employees’ claims against DMH for retaliation in violation of Title VII. Harrison v. South Carolina Dept. of Mental Health (C.A.4 (S.C.) 2015) 641 Fed.Appx. 202, 2015 WL 4081226. Federal Civil Procedure 2497.1

6. Federal courts

Face of female employee’s complaint against employer, which alleged, inter alia, wrongful discharge and sexual harassment, did not present federal question, and thus district court lacked federal question jurisdiction over removed action; employee’s claims were cognizable under South Carolina Human Affairs Law (SCHAL), employee did not cite any federal statute in her complaint, and employee expressed her intent to pursue remedies under South Carolina law only. Morgan v. Suite 12, Inc., 2016, 188 F.Supp.3d 559. Removal of Cases 19(5); Removal of Cases 25(1)

7. Constructive discharge

Employee’s allegations sufficiently alleged that she was subjected to intolerable work conditions that compelled her to resign, due to discriminatory conduct related to her race, national origin, religion, and color, as required to state a constructive discharge claim under Title VII, Section 1981, and the South Carolina Human Affairs Law (SCHAL), notwithstanding fact that she worked for two weeks after giving resignation notice; employee, who was of Egyptian descent, a member of the Arabic race, and practiced the Islam religion, alleged that coworkers made several derogatory comments about Muslims, that a coworker compared her to a terrorist’s wife, and that after meeting with a supervisor in which she was verbally reprimanded for being disruptive in a meeting for expressing her feelings about a coworker’s comments about Arabs not being hard workers, she was fearful that she would be terminated and submitted her resignation. El‑Reedy v. Abacus Technology Corporation, 2017, 2017 WL 3446910. Civil Rights 1123

**SECTION 1‑13‑85.** Medical examinations and inquiries.

(A) The prohibition against unlawful employment practices set forth in Section 1‑13‑80 (a) through (d) includes the prohibition against conducting medical examinations and inquiries except as provided for in this section.

(B) Except as provided in subsection (C), a covered entity must not conduct a medical examination or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or severity of the disability. A covered entity may make preemployment inquiries into the ability of an applicant to perform job‑related functions.

(C) A covered entity may require a medical examination after an offer of employment has been made to a job applicant and before the commencement of the employment duties of the applicant, and may condition an offer of employment on the results of the examination, if:

(1) all entering employees are subjected to the examination regardless of disability;

(2) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:

(a) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(b) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment;

(c) government officials investigating compliance with this chapter must be provided relevant information on request; and

(3) the results of the examination are used only in accordance with this chapter.

(D) For purposes of this chapter, drug and alcohol exams, tests, or screens may not be considered a medical examination.

(E)(1) A covered entity may not require a medical examination and may not make inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of the disability, unless the examination or inquiry is shown to be job‑related and consistent with business necessity.

(2) A covered entity may conduct voluntary medical examinations including voluntary medical histories which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job‑related functions.

(3) Information obtained under subsection (E)(2) regarding the medical condition or history of an employee is subject to the requirements of subsection (C)(2) and (3).

(F)(1) It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and the performance cannot be accomplished by reasonable accommodation, as required under this title.

(2) The term “qualification standards” may include a requirement that an individual may not pose a direct threat to the safety of that individual or of other individuals in the workplace.

(3) This chapter may not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on of its activities by the corporation, association, educational institution, or society. Under this chapter, a religious organization may require that all applicants and employees conform to the religious tenets of the organization.

(4) If an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services pursuant to the requirements of the Americans with Disabilities Act of 1990, Public Law 101‑336, and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign the individual to a job involving food handling.

Nothing in this chapter may be construed to preempt, modify, or amend a state, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others and which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

HISTORY: 1996 Act No. 426, Section 1.

NOTES OF DECISIONS

Construction and application 1

1. Construction and application

Female former employee would not be judicially estopped from pursuing her sexual harassment claim against former employer under the South Carolina Human Affairs Law because the medical expenses she claimed employer was liable for were discharged in employee’s personal bankruptcy; even if employee could not recover discharged medical expenses in sexual harassment lawsuit, she was free to argue that employer was liable for medical expenses that were incurred post‑bankruptcy, and there was no showing that employee acted in bad faith. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Estoppel 68(2)

**SECTION 1‑13‑90.** Complaints, investigations, hearings and orders.

(a) Any person shall complain in writing under oath or affirmation to the Commission within one hundred eighty days after the alleged discriminatory practice occurred. The Commissioner, his employees or agents, shall assist complainants in reducing verbal complaints to writing and shall assist in setting forth such information as may be required by the Commission. The Commission shall serve a copy of the complaint upon the respondent within ten days after the complaint is received by the Commission, except that if the Commission determines for good cause that such service will impede its investigation of the complaint, it shall serve notice of the complaint, including the date, place, and circumstances of the alleged unlawful employment practice upon the respondent within ten days after the complaint is received by the Commission.

(b) Any complainant who is a member of the Commission shall be disqualified from participation except as the complainant in the processing and resolution of the complaint.

(c) For complaints asserting expressly or in substance a violation by a state agency or department or local subdivisions of a state agency or department of Section 1‑13‑80 the procedure shall be as follows:

(1) The Commissioner shall assign one or more of his employees or agents to investigate the complaint, in which case one shall be designated the investigator in charge of the complaint. Information gathered during an investigation under this subsection shall not be made public by the Commission, its officers or employees, except for information made public as a result of being offered or received into evidence in an action brought under this subsection.

(2) The Chairman of the Commission or, upon the request of the Chairman, the Commissioner shall designate a member of the Commission to supervise the processing of the complaint.

(3) The complaint may be resolved at any time before a hearing by conference, conciliation and persuasion with the complainant and the respondent, such resolution to be embodied in a conciliation agreement, which shall include an agreement by the respondent to refrain from committing unlawful discriminatory practices in the future, and which may contain such further provisions as are agreed upon by the complainant and the respondent. No conciliation agreement shall be deemed an effective resolution by the Commission unless the supervisory commission member shall have reviewed and approved the terms thereof. Positions taken by a witness in connection with such efforts toward conciliation shall not be made public or used against the interest of the witness in a subsequent proceeding.

(4) In undertaking its investigation of a complaint the Commission shall have the authority:

(i) To issue a subpoena or subpoena duces tecum and thereby compel attendance of witnesses or production for examination of books, papers, and records, whenever it is deemed necessary to compel the attendance of witnesses, or the production for examination of any books, payrolls, personnel records, correspondence, documents, papers or any other evidence relating to any matter under investigation or in question before the Commission. The power may be exercised only by the joint action by the Chairman of the Commission and the Commissioner.

(ii) To require any party or witness to answer interrogatories at any time after the complaint is filed.

(iii) To take depositions of witnesses including any party pursuant to a complaint or investigation made by the Commission.

(iv) Pursuant to subitems (i), (ii), (iii), above, if a person fails to permit access, fails to comply with a subpoena, refuses to have his or her deposition taken, refuses to answer interrogatories, or otherwise refuses to allow discovery, the Commission may request an order of a court of competent jurisdiction requiring discovery and other related good faith compliance.

(5) If not sooner resolved, the investigator shall upon completion of his investigation submit to the supervisory commission member a statement of the facts disclosed by his investigation and recommend either that the complaint be dismissed or that a panel of commission members be designated to hear the complaint. The supervisory commission member, after review of the case file and the statement and recommendation of the investigator shall issue an order either of dismissal or for a hearing, which order shall not be subject to judicial or other further review.

(6) If the order be of dismissal, the supervisory commission member shall mail a copy of the order to the complainant and the respondent at their last known addresses.

(7) If the order be for a hearing, the supervisory commission member shall annex thereto a notice and a copy of the complaint and require the respondent to answer the complaint at a hearing at a time and place specified in the notice and shall serve upon the respondent a copy of the order, the complaint, and the notice.

(8) At any time before a hearing a complaint may be amended by the supervisory commission member upon the request of the investigator or of the complainant or of the respondent. Complaints may be amended during a hearing only upon a majority vote of the panel of commission members for such hearing.

(9) Upon request by any party, the Commissioner shall issue appropriate subpoenaes or subpoenaes duces tecum to any witnesses or other custodians of documents desired to be present at the hearing, or at prehearing depositions, unless the Commissioner determines that issuance of the subpoenaes or subpoenaes duces tecum would be unreasonable or unduly burdensome.

(10) Upon notification by any party that any party or witness has failed to permit access, failed to comply with a subpoena or subpoena duces tecum, refused to have his or her deposition taken, refused to answer interrogatories, or otherwise refused to allow discovery, the Commission, shall, upon notice to the party or witness, apply to a court of competent jurisdiction for an order requiring discovery and other good faith compliance unless the Commission determines that the discovery would be unreasonably or unduly burdensome.

(11) Upon request by the supervisory commission member, the Chairman of the Commission shall designate a panel of three members of the Commission to sit as the Commission to hear the complaint; provided, that no member of the Commission shall be a member of a panel to hear a complaint for which he has been a supervisory commission member.

(12) At any hearing held pursuant to this subsection, the case in support of the complaint shall be presented before the panel by one or more of the commission’s employees or agents, and, with consent of the panel, by legal representatives of the complaining party; provided, that endeavors at conciliation by the investigator shall not be received into evidence nor otherwise made known to the members of the panel.

(13) The respondent shall submit a written answer to the complaint and appear at such hearing in person or by counsel and may submit evidence. The respondent shall have the power reasonably and fairly to amend his answer.

(14) The complainant shall be permitted to be present and submit evidence.

(15) Proceedings under this section shall be subject to the Administrative Procedures Act, Sections 1‑23‑310 through 1‑23‑400 of the Code of Laws of South Carolina, 1976, as amended, and in case of conflict between the provisions of this chapter and the Administrative Procedures Act, the Administrative Procedures Act shall govern. A recording of the proceedings shall be made, which may be subsequently transcribed upon request and payment of a reasonable fee by the complainant or the respondent. The fee shall be set by the Commission or upon motion of the panel, in which case copies of such transcription shall be made available to the complainant or the respondent upon request and payment of a reasonable fee to be set by the Commission.

(16) If upon all the evidence at the hearing the panel shall find that the respondent has engaged in any unlawful discriminatory practice, it shall state its findings of fact and serve upon the respondent in the name of the Commission an opinion and order requiring that such unlawful discriminatory practice be discontinued and requiring such other action including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay to the persons aggrieved by such practice as, in the judgment of the panel, will effectuate the purposes of this chapter. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. The Commission may retain jurisdiction of any such case until it is satisfied of compliance by the respondent with its order.

(17) If upon all the evidence at the hearing the panel shall find that the respondent has not engaged in any such unlawful discriminatory practice, the panel shall state its findings of fact and serve upon the complainant and the respondent an opinion and order dismissing the complaint as to the respondent.

(18) A copy of the opinion and order of the Commission shall be delivered in all cases to the Attorney General and to such other public officers as the Commission deems proper. Copies of the opinion and order shall be available to the public for inspection upon request, and copies shall be made available to any person upon payment of a reasonable fee set by the Commission.

(19)(i) If an application for review is made to the commission within fourteen days from the date the order of the commission is given, the commission, for good cause shown, shall review the order and evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the order.

(ii) The order of the commission, as provided in item (16) of subsection (c) of this section, if not reviewed in due time, or an order of the commission upon review, as provided for in subitem (i) of item (19) of this subsection, is conclusive and binding as to all questions of fact unless clearly erroneous in view of the reliable, probative, and substantive evidence in the whole record. Either party to the dispute, within thirty days after receipt of notice to be sent by registered mail of the order may appeal the decision of the commission to the Administrative Law Court as provided in Sections 1‑23‑380(B) and 1‑23‑600(D). In case of an appeal from the decision of the commission, the appeal operates as a supersedeas for thirty days only, unless otherwise ordered by the administrative law judge, and the respondent is required to comply with the order involved in the appeal or certification until the questions at issue are fully determined in accordance with the provisions of this chapter.

(iii) The commission may institute a proceeding for enforcement of its order of item (16) of subsection (c) of this section, or its amended order of subitem (i) of item (19) of this subsection after thirty days from the date of the order, by filing a notice of appeal in the court of common pleas of the county in which the hearing occurred, or where a person required in the order to cease and desist from a practice which is the subject of the commission’s order, or to take other affirmative action, resides, or transacts business.

If no appeal pursuant to subitem (ii) of item (19) of this subsection is initiated, the commission may obtain a decree of the court for enforcement of its order upon a showing that a copy of the petition for enforcement was served upon the party subject to the dictates of the commission’s order.

(d) For complaints asserting expressly or in substance a violation of Section 1‑13‑80 by employers, employment agencies or labor organizations, including municipalities, counties, special purpose districts, school districts, and local governments, but not including employers, employment agencies or labor organizations covered by Section 1‑13‑90(c), the procedure shall be as follows:

(1) The Commissioner shall assign one or more of his employees or agents to investigate the complaint, in which case one shall be designated the investigator in charge of the complaint.

(2) The Commission shall institute an investigation by its employees to ascertain the facts relating to such alleged unlawful employment practice. In its investigation of a charge filed under this chapter, the Commission or its designated employees shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated that relates to unlawful employment practices covered by this chapter and is relevant to the charge under investigation. If any persons fail to permit access to such evidence, the Commission may issue a subpoena duces tecum and thereby compel the production for examination and copying of such evidence. If any person fails to comply with a subpoena issued under this chapter, the Commission may request an order of a court of competent jurisdiction requiring compliance with the subpoena. The person against whom an order of court is sought shall be given at least four days’ notice of the time and place of the court hearing and may appear and oppose the granting of any order. Any person may, after giving the Commission at least four days’ notice, move before a court of competent jurisdiction for an order quashing any subpoena issued under this subsection. Information gathered during an investigation under this subsection shall not be made public by the Commission, its officers or employees, except for information made public as a result of being offered or received into evidence in an action brought under this subsection.

(3) The complaint may be resolved at any time by conference, conciliation and persuasion with the complainant and the party complained of, such resolution to be embodied in a conciliation agreement, which may include an agreement by the respondent to refrain from committing unlawful discriminatory practices in the future, and which may contain such further provisions as are agreed upon by the complainant and the party complained of. Nothing said or done during and as part of such informal endeavors may be made public by the Commission or used as evidence in a subsequent proceeding.

(4) If not sooner resolved, the investigator shall upon completion of his investigation submit to the Commissioner a statement of the facts disclosed by his investigation and recommend either that the complaint be dismissed or that the Commission bring an action in equity in circuit court against the respondent. The Commissioner, after a review of the case file and the statement and recommendation of the investigator, may issue an order either to dismiss the charge or to bring an action in equity in circuit court against the respondent, which order shall not be subject to judicial or other further review.

(5) If the order be of dismissal, the Commissioner shall mail a copy of the order to the complainant and to the respondent at their last known addresses.

(6) If a charge filed with the commission by a complainant pursuant to this chapter is dismissed by the commission, or if within one hundred eighty days from the filing of the charge the commission has not filed an action under this chapter or entered into a conciliation agreement to which the complainant is a party, the complainant may bring an action in equity against the respondent in circuit court. The action must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant’s charge is dismissed, whichever occurs earlier, except that this period may be extended by written consent of the respondent.

(7) If within thirty days after issuance of its determination the Commission is unable to secure from the respondent a conciliation agreement acceptable to the Commission, or if the Commission determines after investigation that the respondent has violated the terms of a conciliation agreement, the Commission may bring an action in equity against the respondent in circuit court. Such action shall be brought within one year from the date of the violation alleged, except that this period may be extended by written consent of the respondent.

(8) No action may be brought under this chapter by a complainant if an action based on the same charge has been brought by the Commission, and no action may be brought under this chapter by the Commission if an action based on the same charge has been brought by the complainant. No action may be brought under this chapter if an action alleging essentially the same facts and seeking relief for the same complainant has been brought in any federal court. Any action brought under this chapter shall be promptly dismissed if an action alleging essentially the same facts and seeking relief for the same complainant is brought in any federal court.

(9) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement of hiring of employees, with or without back pay payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Unemployment compensation, interim earnings, or amount earnable with reasonable diligence, by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, of the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, age or national origin in violation of this chapter, or discrimination in violation of subsection (e) of Section 1‑13‑80.

(e) For complaints of the existence or occurrence of a practice asserted to be discriminatory on the basis of race, religion, color, age, sex, national origin, or disability, other than those discriminatory practices declared unlawful by Section 1‑13‑80, or of any other dispute regarding human affairs, the procedure of the commission is as follows:

The commissioner shall assign one or more of the commission’s employees or agents who may resolve the complaint by conference, conciliation, and persuasion with the complainant and the respondent, the resolution to be embodied in a conciliation agreement which shall include such provisions as are agreed upon by the complainant and the respondent. If the employee or agent is unable after reasonable efforts to resolve the complaint, the employee or agent shall withdraw from the matter and not participate further and the commission file of the complaint must be closed. If the complainant and the respondent thereafter resolve the complaint and submit a record of the resolution to the commission, the record must be entered into the commission file of the complaint.

(f) If in the course of processing any complaint under the procedure set forth in (e) above sufficient facts shall appear warranting the processing of the complaint under the procedure provided by subsection (c) or (d) of this section upon notice to the complainant and to the respondent, such other procedure shall thereafter be followed for the processing of the complaint.

(g) The Commission shall establish such rules as may be necessary to govern, expedite and effectuate the procedures prescribed in this section.

HISTORY: 1962 Code Section 1‑360.29; 1972 (57) 2651; 1973 (58) 698; 1979 Act No. 24 Section 9; 1990 Act No. 333, Section 1; 1996 Act No. 426, Section 6; 2006 Act No. 387, Section 1, eff July 1, 2006.

Editor’s Note

2006 Act No. 387, Section 53, provides as follows:

“This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.”

2006 Act No. 387, Section 57, provides as follows:

“This act takes effect on July 1, 2006, and applies to any actions pending on or after the effective date of the act. No pending or vested right, civil action, special proceeding, or appeal of a final administrative decision exists under the former law as of the effective date of this act, except for appeals of Department of Health and Environmental Control Ocean and Coastal Resource Management and Environmental Quality Control permits that are before the Administrative Law Court on the effective date of this act and petitions for judicial review that are pending before the circuit court. For those actions only, the department shall hear appeals from the administrative law judges and the circuit court shall hear pending petitions for judicial review in accordance with the former law. Thereafter, any appeal of those actions shall proceed as provided in this act for review. For all other actions pending on the effective date of this act, the action proceeds as provided in this act for review.”

Effect of Amendment

The 2006 amendment, subparagraph (c)(19)(ii), in the second sentence substituted “Administrative Law Court as provided in Sections 1‑23‑380(B) and 1‑23‑600(D)” for “court of common pleas of the county in which the hearing occurred, or in which the respondent resides or has his principal office”, and in the third sentence substituted “administrative law judge” for “court”; in subparagraph (c)(19)(iii), substituted “date” for “day” and”notice of appeal” for “petition”; and made nonsubstantive changes throughout.

CROSS REFERENCES

Procedure for hearing as provided in subsection (c) of this section, see S.C. Code of Regulations R. 65‑8.

Investigation and production of evidence, Human Affairs Law, see S.C. Code of Regulations R. 65‑3.

LIBRARY REFERENCES

Westlaw Key Number Searches: 78k1709 to 78k1711.

Civil Rights 1709 to 1711.

C.J.S. Civil Rights Sections 188 to 189, 196.

RESEARCH REFERENCES

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S.C. Jur. Labor Relations Section 47, Function.

S.C. Jur. Labor Relations Section 48, Relationship to Other Agencies.

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South Carolina Litigation Forms and Analysis Section 3:34 , Employment Discrimination (Race).

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 80:41, South Carolina.

Employment Coordinator Employment Practices Section 82:72, South Carolina; FEP Statute.

Employment Coordinator Employment Practices Section 83:271, Rule Making.

Employment Coordinator Employment Practices Section 89:282, Basic FEP Statute Procedures; Charge Processing.

Employment Coordinator Employment Practices Section 89:283, Proceedings Against Private and Local Governmental Respondents.

Employment Coordinator Employment Practices Section 89:284, Proceedings Against State Agencies.

Employment Coordinator Employment Practices Section 89:285, Proceedings Involving Practices Not Expressly Unlawful Under FEP Statute.

Employment Coordinator Employment Practices Section 111:192, Enforcing Administrative Subpoena.

Employment Coordinator Employment Practices Section 111:193, Review and Enforcement of Commission Decisions.

Employment Coordinator Employment Practices Section 111:194, Enforcing Private Rights.

Guide to Employment Law and Regulation 2d Section 61:6, Antidiscrimination Law.

LAW REVIEW AND JOURNAL COMMENTARIES

1982 Survey: Human affairs law; investigation by Commission does not give rise to justiciable controversy. 35 S.C. L. Rev. 11, Autumn 1983.

Attorney General’s Opinions

The South Carolina State Human Affairs Commission does have the authority to enter into a letter of cooperation with the United States Treasury Department providing for its conducting compliance reviews (investigation of complaints received by the Office of Revenue Sharing alleging discrimination in the use of general revenue sharing funds in the State of South Carolina by recipient governments, their secondary recipients or their contractors) on the behalf of the Office of Revenue Sharing. 1974‑75 Op Atty Gen, No 4129, p 194.

As a general principle, the administrative procedures requirements of the Administrative Procedures Act are applicable to hearings conducted before the State Human Affairs Commission; notwithstanding the foregoing, the State Human Affairs Commission is not bound to follow the rules of evidence in hearings conducted before it. 1978 Op Atty Gen, No 78‑159, p 190.

NOTES OF DECISIONS

In general 1

1. In general

While the parties’ titles may not be dispositive, the harasser’s formal rank vis‑a‑vis that of the victim in the particular employment hierarchy, is of critical and sometimes decisive evidentiary importance in determining whether employer is subject to vicarious liability for the harasser’s conduct, in sexual harassment claim under the South Carolina Human Affairs Law. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1736

Supervisory status, for purpose of determining employer’s vicarious liability for alleged sexual harassment, under the South Carolina Human Affairs Law, is not determined solely by the ability to take tangible employment actions. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1736

In determining whether the employer was subject to vicarious liability for alleged sexual harassment under the South Carolina Human Affairs Law, the key factor is whether, as a practical matter, the harasser’s employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere coworker would not. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1736

Store manager who allegedly sexually harassed female employee, the assistant store manager, was a “supervisor,” so that employer was subject to vicarious liability for the alleged sexual harassment, in employee’s claim under the South Carolina Human Affairs Law; manager’s title showed that he had significant authority over employee, manager was usually the highest ranking employee in the store, and manager had ability to and did change employee’s schedule and impose unpleasant duties on employee. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1736

If the plaintiff was sexually harassed by a coworker rather than a supervisor, the employer is not vicariously liable under the South Carolina Human Affairs Law and can be held accountable only if the plaintiff proves that the employer itself was negligent in failing to take effective action to stop harassment about which it knew or should have known. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1189; Civil Rights 1736

If the plaintiff’s sexual harassment claim under the South Carolina Human Affairs Law is based on the actions of her supervisor, the employer is subject to vicarious liability. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1736

Whether and under what standard an employer may be held liable for sexual harassment under the South Carolina Human Affairs Law depends on whether the harasser was a supervisor or merely a coworker and on whether the plaintiff suffered a tangible employment action. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1736

Genuine issues of material fact as to whether female former employee was subjected to offending conduct that was unwelcome, was based on her sex, and was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment precluded summary judgment, in employee’s sexual harassment claim against employer under the South Carolina Human Affairs Law. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Federal Civil Procedure 2497.1

To proceed on a sexual harassment hostile work environment claim, under the South Carolina Human Affairs Law, a plaintiff must show that the offending conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1185

Female former employee would not be judicially estopped from pursuing her sexual harassment claim against former employer under the South Carolina Human Affairs Law because she failed to disclose the existence of the lawsuit in her personal bankruptcy filings, where employee did not conceal or deny owning the asset, employee disclosed the possibility of her potential sexual harassment claim in her initial filings, and even if she should have supplemented her bankruptcy pleadings after she actually commenced the lawsuit, she did not act in bad faith. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Bankruptcy 2154.1; Estoppel 68(2)

The 120‑day limitations period for filing a sexual harassment lawsuit under the South Carolina Human Affairs Law could only be triggered by a dismissal of the administrative claim by the South Carolina Human Affairs Commission (SHAC), not a dismissal by the Equal Employment Opportunity Commission (EEOC), or by SHAC’s preliminary decision to allow the EEOC to take the investigatory lead. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1732

Female employee’s written sexual harassment charge was actually filed with South Carolina State Human Affairs Commission (SHAC), as required to administratively exhaust her claim against her employer for sexual harassment, under the South Carolina Human Affairs Law, even though the employee did not directly file the charge with the SHAC, but with the Equal Employment Opportunity Commission (EEOC), where the EEOC transmitted the charge to the SHAC within the statutory 180‑day period after the alleged harassment occurred. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1708; Civil Rights 1715

To invoke the affirmative defense to prevent vicarious liability for supervisor’s sexual harassment, under the South Carolina Human Affairs Law, the employer must act reasonably, and thus any sexual harassment policy adopted by the employer must be both reasonably designed and reasonably effectual. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1189; Civil Rights 1736

An employer’s intent, as required to show constructive discharge in hostile work environment claim, can be proved by inference through evidence showing that the employer failed to act in the face of known intolerable conditions, or that the employee’s resignation was the reasonably foreseeable consequence of the employer’s conduct. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Civil Rights 1744

Genuine issues of material fact as to whether female employee was constructively discharged and whether employer acted reasonably to prevent and correct promptly the alleged sexual harassment perpetrated by employee’s manager precluded summary judgment on issue of whether employer was vicariously liable for alleged sexual harassment, in employee’s claim under the South Carolina Human Affairs Law. Whitten v. Fred’s, Inc. (C.A.4 (S.C.) 2010) 601 F.3d 231, on remand 2010 WL 2757005. Federal Civil Procedure 2497.1

Employee’s Title VII employment discrimination claims and her claim for violation of the South Carolina Human Affairs Law could proceed in the District Court simultaneously, until such time as employee’s Title VII claims survive a motion for summary judgment, even though South Carolina law prohibited dual relief, since alternative pleading was permitted pursuant to the federal rules of civil procedure. Gleaton v. Monumental Life Ins. Co., 2010, 719 F.Supp.2d 623. Federal Civil Procedure 675.1

Federal court has no jurisdiction over case alleging employment discrimination based upon race where plaintiff has not exhausted available state remedies; where South Carolina State Human Affairs Commission gained power to investigate and grant relief from private acts of discrimination subsequent to plaintiff’s filing of form complaint with Commission, plaintiff is obligated to return to Commission and exhaust state remedies. Settles v. Pinkerton, Inc. (D.C.S.C. 1979) 482 F.Supp. 461.

In an action brought by a sheriff for declaratory and injunctive relief against the South Carolina Commissioner on Human Affairs seeking to terminate an investigation of the sheriff concerning alleged sexual and racial discrimination in the appointment of deputy sheriffs, the trial court properly granted a demurrer to the complaint where the sheriff was subject to no irreparable harm since the present Human Affairs Law does not provide for any order of the Commissioner compelling the sheriff to hire a successful charging party and the mere fact that the Commissioner was engaged in investigating the sheriff did not establish any direct harm to the latter other than inconvenience. Under the Human Affairs Law, the final step in the investigation, even if adverse to the sheriff (a determination that there was reasonable cause to believe that the employer had discriminated unlawfully against the applicant) would be lifeless, could fix no obligation or impose any liability, and would have no determinative consequences, or be binding on the employer; consequently, due process considerations do not attach when only these investigative non‑adjudicatory powers of an agency are utilized. The Commissioner’s investigation of the sheriff could terminate in a number of ways, thereby rendering moot the preliminary issues raised by him prior to their becoming ripe for adjudication. Orr v. Clyburn (S.C. 1982) 277 S.C. 536, 290 S.E.2d 804.

**SECTION 1‑13‑100.** Construction and application of chapter.

Nothing in this chapter may be construed to create a cause of action other than those specifically described in Section 1‑13‑90 of this chapter. Nothing in this chapter may be construed to create a cause of action against a person not covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. Section 2000e et seq., if the cause of action arises from discrimination on the basis of race, color, religion, sex, or national origin. Nothing in this chapter may be construed to create a cause of action against a person not covered by the Age Discrimination in Employment Act of 1967, as amended, 29 U. S. C. Section 621 et seq., if the cause of action arises from discrimination on the basis of age. Nothing in this chapter may be construed to create a cause of action against a person not covered by the Americans with Disabilities Act of 1990, as amended, Public Law 101‑336.

HISTORY: 1962 Code Section 1‑360.30; 1972 (57) 2651; 1979 Act No. 24, Section 10; 1996 Act No. 426, Section 7.

CROSS REFERENCES

Criminal offenses against civil rights, see Sections 16‑5‑60 to 16‑5‑110.

Provisions regarding discrimination against teachers, see Sections 59‑25‑710 et seq.

Federal Aspects

Age Discrimination in Employment Act of 1967, see 29 U.S.C.A. Sections 621 et seq.

Title VII of the Civil Rights Act of 1964, see 42 U.S.C.A. Sections 2000e et seq.

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Civil Rights 1101 to 1263.

C.J.S. Civil Rights Sections 11, 22, 25 to 31, 33 to 37, 39 to 43, 46 to 50, 53 to 67, 88, 102 to 104, 107, 122, 144, 219 to 220.

NOTES OF DECISIONS

In general 1

1. In general

SC Code Section 1‑13‑100 specifies that Human Affairs Law creates no cause of action which would not attach to employer under Title VII of Civil Rights Act of 1964 (42 USCA Section 2000e et seq.), thus, Title VII cases which interpret provisions or procedures essentially identical to those of Human Affairs Law are certainly persuasive if not controlling in construing Human Affairs Law. Orr v. Clyburn (S.C. 1982) 277 S.C. 536, 290 S.E.2d 804. Civil Rights 1104

**SECTION 1‑13‑110.** Affirmative action plans by State agencies; approval by Commission; action by General Assembly.

Each State agency shall develop an Affirmative Action Plan to assure equitable employment for members of minorities (race and sex) and shall present such Plans to the Human Affairs Commission. On or before February 1 of each year, the Human Affairs Commission shall submit a report to the General Assembly concerning the status of the Affirmative Action Plans of all State agencies. If any Affirmative Action Plans have been disapproved, the report shall contain the reasons for such disapproval. If the General Assembly takes no action within sixty (60) days on those Plans which have been disapproved, the action of the Human Affairs Commission shall be final.

HISTORY: 1978 Act No. 644, Part II, Section 3A.

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Civil Rights 1236.

C.J.S. Civil Rights Sections 64 to 65.

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157 ALR, Federal 1 , When is Supervisor’s Hostile Environment Sexual Harassment Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A.Ss 2000e et Seq) Imputable to Employer.

85 ALR 5th 353 , Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding.

94 ALR 5th 1 , When is Supervisor’s or Coemployee’s Hostile Environment Sexual Harassment Imputable to Employer Under State Law.

Encyclopedias

33 Am. Jur. Trials 257, Sexual Harassment on the Job.

S.C. Jur. Attorney Fees Section 23, State Law.

Treatises and Practice Aids

Employment Coordinator Employment Practices Section 68:114, South Carolina.

NOTES OF DECISIONS

In general 1

1. In general

Municipality’s minority business utilization “set‑aside” plan which, by ordinance, requires non‑minority‑owned prime contractors awarded city construction contracts to subcontract at least 30 percent of dollar amount of contract to one or more minority business enterprises violates equal protection clause of Fourteenth Amendment because, inter alia, random inclusion of racial groups which may never have suffered from discrimination in city’s construction industry suggests city’s purpose as not to remedy past discrimination, and 30 percent set‑aside is not narrowly tailored to remedy effects of any prior alleged discrimination. City of Richmond v. J.A. Croson Co., 1989, 109 S.Ct. 706, 488 U.S. 469, 102 L.Ed.2d 854. Municipal Corporations 356; Public Contracts 129