

 Risk Management Services

Employment Liability 101
September 2019

Risk Management Services


 Municipal Association of South Carolina


 Risk Management Services

South Carolina Municipal Insurance Trust

- SCMIT
- Worker’s compensation pool for South Carolina municipal employees
- Created in December 1983
- 126 cities, towns and utilities

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 Risk Management Services

South Carolina Municipal Insurance and Risk Financing Fund

- SCMIRF
- Property and Liability pool for South Carolina cities and towns
- Created in October 1, 1990
- 123 cities and towns

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Creating a Professional and Harassment-Free Work Environment



Session Objectives

- Defining Harassment
- Steps to Prevent Harassment
- Employer Liability
- Workplace Etiquette
- Policies to Consider





Today's Social Climate

FOP

What Are You Dealing With?

- Harassment
- Discrimination
- Inappropriate Behavior

FOP

Defining Harassment and Discrimination

Discrimination, harassment, and unfair treatment in the workplace by anyone because of:


- Race
- Color
- Religion
- Sex (including gender identity, transgender status, and sexual orientation)
- Pregnancy
- National origin
- Age (40 or older)
- Disability
- Genetic information
- Being denied reasonable workplace accommodations for disability or religious beliefs

FOP

Sexual Orientation/Gender Identity Harassment

Examples of sexual orientation and gender identity harassment that either interferes with an individual's employment or creates a hostile work environment include:

- Stating or implying, in a negative manner, that an employee is gay, lesbian, bi-sexual, transgender or gender non-conforming
- Making jokes about gay, lesbian, bi-sexual, transgender, or gender non-conforming individuals
- Inquiring into the sexual practices of gay, lesbian, bi-sexual, transgender or gender non-conforming individuals as a group



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Sexual Orientation/Gender Identity Harassment

- Derogatory or slang comments about gay, lesbian, bi-sexual, transgender or gender non-conforming individuals
- Repeatedly expressing negative opinions about gay, lesbian, bi-sexual, transgender or gender non-conforming individuals


Any harassing activity that is directed toward an employee due to the employee's sexual orientation or gender identity, or that is negative about differing sexual orientations or gender identity, can constitute sexual harassment



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Defining Inappropriate Behavior


An employee's conduct that interferes or disrupts another employee's ability to effectively perform their job. The behavior may be deemed to be offensive, unwelcome or hurtful. Inappropriate behavior can be a violation of company policies and procedures, but is **generally** not considered illegal.



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Steps to Prevent Harassment and Discrimination

- Establish a culture that is free from Harassment and Discrimination
- Start at the Top – employees emulate behavior from Leadership
- Have an Open Door policy
- Have a written Non-Harassment and Non-Discrimination policy:
 - Zero tolerance policy for workplace harassment and discrimination
 - Address individuals within and outside of organization
 - Provide examples of unacceptable behavior
 - Offer reporting options with at least 2 channels
 - No retaliation



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Steps to Prevent Harassment and Discrimination

- Address and investigate any and all concerns, regardless of position
- Discuss policies and expectations in new hire orientation
- Discuss policies and expectations openly in meetings
- Train all employees
- Provide specialized training to supervisors and managers
- Provide periodic refresher training to all employees (12-18 months)
- Stop the harassment
- Remedy any adverse actions
- Discipline/terminate, as appropriate



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Employer Responsibility and Liability

- Employers have a responsibility to provide a safe working environment free of harassment and hostility
- Employers have a responsibility to respond and investigate any and all allegations, and take prompt and appropriate corrective action
- No longer acceptable for supervisors to ignore inappropriate behavior that is observed or otherwise known
- When you, as a supervisor, have knowledge, the organization has knowledge and appropriate action has to be taken
- You must take action even if it is not your direct employee
- Employers are liable when they know about the harassment and fail to take prompt and appropriate corrective action

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What is Workplace Etiquette?

- Workplace etiquette means the socially acceptable ways that we interact with one another and behave in our workplace
- Acceptable standards of communication and interaction in the workplace may vary from one workplace to another, however, some behaviors are universally acceptable or universally not acceptable
- A lot of workplace etiquette has to do with common courtesy, making your workplace a comfortable place that is conducive to productivity and success for ALL employees



Workplace Etiquette Non-Negotiables

- Violations of Company policy, practice, or procedure
- Anything that makes another person feel intimidated, uncomfortable, uneasy, or afraid


NOT NEGOTIABLE

Behaviors Included in Workplace Etiquette

- Social norms for your workplace
- The way you relate to your co-workers
- The way you relate to customers
- Your behaviors while at work
- Appearance
- Communications – phone and email expectations
- Addressing distractions - texting, talking, social media
- What else?

Policies to Consider to Support Etiquette


- Employee Handbook – create or update
- Social Media
- Computer/internet, equipment use
- Code of Conduct/Code of Ethics
- Drug and Substance Abuse
- Absence/Attendance expectations
- General Safety
- Vacation, Sick



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Politics in the Workplace


- General rule of thumb – keep politics out of the office to avoid issues and minimize liability
- Employers do have the right to forbid use of company email and equipment



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Steps to Encourage a Professional Workplace


- Establish required policies, procedures and practices to encourage a professional workplace
- Walk the Talk
- Build Trust
- Provide positive Communication
- Provide feedback
- Set proper expectations
- Identify creative ideas for recognition
- Encourage teamwork
- Help employees find meaning in their work – connect the dots
- Have fun!



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questions?

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Thank you for your time and participation!

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Employee Liability Training

Title VII – Nuts & Bolts

September 24-26, 2019


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Title VII – Nuts & Bolts


- [42 U.S.C. § 2000e-2 – Unlawful Employment Practices](#)
- [42 U.S.C. § 2000e-3 – Other Unlawful Employment Practices \[Retaliation\]](#)
- [42 U.S.C. § 2000e-5 – Enforcement Provisions \[Charges, Relief\]](#)
- [42 U.S.C. § 1981a - Damages in cases of intentional discrimination in employment](#)



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Title VII – Nuts & Bolts

- [42 U.S.C. § 2000e-2\(a\) – Unlawful Employment Practices](#)
 - It shall be an unlawful employment practice for an employer--
 - (1) to fail or refuse to **hire or to discharge** any individual, or otherwise to discriminate against any individual with respect to his **compensation, terms, conditions, or privileges** of employment, because of such **individual's race, color, religion, sex, or national origin**; or
 - (2) to **limit, segregate, or classify** his employees or applicants ... in any way which would deprive or tend to deprive any individual of employment opportunities ... because of such individual's race, color, religion, sex, or national origin.



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- 42 U.S.C. § 2000e-3(a) – Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings [Retaliation]
- It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ...
- **because he has opposed any practice** made an unlawful employment practice by this subchapter, or
- because he has made a charge, testified, assisted, **or participated in any manner** in an investigation, proceeding, or hearing under this subchapter.



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Basics of Title VII


- 42 U.S.C. § 2000e-5(e) – Enforcement Provisions: Time for Filing
- (1) A charge under this section shall be filed within **one hundred and eighty days** after the alleged unlawful employment practice occurred and notice of the charge ... shall be served upon the person against whom such charge is made within ten days thereafter,
- *except that in a case [where] the person aggrieved has initially instituted proceedings with a **State or local agency** with authority to grant or seek relief from such practice ... such charge shall be filed by or on behalf of the person aggrieved **within three hundred days** after the alleged unlawful employment practice occurred...*



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Title VII – Nuts & Bolts


- 42 U.S.C. § 2000e-5(g) – Enforcement Provisions: Relief
- (1) 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 or 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**. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.



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- 42 U.S.C. § 2000e-5(g) – Enforcement Provisions: Relief in Mixed Motive Cases
- (2)(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--
 - (i) may grant **declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs** demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
 - (ii) shall **not** award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).



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- 42 U.S.C. § 2000e-5(k) – Enforcement Provisions: Attorney's Fees
- In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
- "One Way Ratchet" Rule – "A plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was **frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.**" *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) .



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Title VII – Nuts & Bolts


- 42 U.S.C. § 1981a – Damages in Cases of Intentional Discrimination in Employment
- (a) **Right of recovery**
- (1) **Civil rights**
- In an action brought by a complaining party under section 706 [42 U.S.C. § 2000e-5] against a respondent who engaged in unlawful intentional discrimination prohibited under section 703 [42 U.S.C. § 2000e-2], 704 [42 U.S.C. § 2000e-3] or 717 of the Act, and provided that the complaining party cannot recover under § 1981 of this title, the complaining party may recover **compensatory and punitive damages as allowed in subsection (b) of this section**, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.



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- 42 U.S.C. § 1981a – Damages in Cases of Intentional Discrimination in Employment
- **(b)(1) Determination of punitive damages**
- A complaining party may recover **punitive damages** under this section against a respondent (**other than a government, government agency or political subdivision**) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with **malice or with reckless indifference** to the federally protected rights of an aggrieved individual.
- **(b)(2) Exclusions from compensatory damages**
- Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000-5(g)].



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- 42 U.S.C. § 1981a – Damages in Cases of Intentional Discrimination in Employment
- **(b)(3) Limitations**
- The sum of the amount of **compensatory** damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, **and the amount of punitive damages** awarded under this section, **shall not exceed**, for each complaining party—
 - **(A)** in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;
 - **(B)** ... more than 100 and fewer than 201 employees ... \$100,000; and
 - **(C)** ... more than 200 and fewer than 501 employees ... \$200,000; and
 - **(D)** ... more than 500 employees ... \$300,000.



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Title VII – Retaliation

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 - **because he has opposed any practice** made an unlawful employment practice by this subchapter, or
 - because he has **made a charge, testified, assisted, or participated in any manner** in an investigation, proceeding, or hearing under this subchapter.



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Title VII – Retaliation


- Proof Schemes
- To prevail on a retaliation claim under these statutes, a plaintiff may offer **direct evidence** of retaliation.
- More often, however, plaintiffs proceed under **indirect evidence**, the three-step *McDonnell Douglas* proof scheme. Under this procedure, the plaintiff must first establish a *prima facie* case by a preponderance of the evidence that shows:
 - the plaintiff engaged in a “**protected activity**,”
 - the employer **discriminated** against the plaintiff, and,
 - there is a **causal link** between the protected activity and the discrimination.
- *Baqir v. Principi*, 434 F.3d 733, 747 (4th Cir. 2006).



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- Proof Schemes
- If the employee makes a prima facie case, the employer must articulate a **legitimate, non-discriminatory reason** (LNDR) for its action.
- The employee must then prove that the employer’s LNDR is a **pretext** for unlawful retaliation.




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Title VII – Retaliation

- What is a “protected activity” in a Title VII retaliation case?


- **The “Opposition” Clause**
 - The employee must oppose practices that are unlawful under Title VII, or must **oppose practices that the employee “reasonably believes” are unlawful under Title VII**. However, “opposition” to employment practices that the employee merely believes are somehow unfair, but not unlawful under Title VII, is not protected. *EEOC v. Navy Federal Credit Union*, 424 F.3d 397, 406-407 (4th Cir. 2005); *McNair v. Computer Data Sys., Inc.*, 172 F.3d 863 (4th Cir. 1999).

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Title VII – Retaliation

- What is a “protected activity” in a Title VII retaliation case?


- **The “Opposition” Clause**
 - *Crosby v. City of Waltherboro*, 444 F.Supp.2d 559, 564 (D.S.C. 2006) (speculation to co-worker that sexual harassment may have taken place, and recommending that the co-worker seek legal counsel, was not protected “opposition” activity).

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Title VII – Retaliation


- What is a “protected activity” in a Title VII retaliation case?

- The U.S. Supreme Court also recently defined the “opposition” clause to protect an employee who spoke out about sexual harassment, not on her own initiative, but in answering questions during employer’s investigation of coworker’s complaints. *Crawford v. Metropolitan Gov’t of Nashville*, 555 U.S. ---, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009).
- “Opposition” need not be “voluntary.”

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Title VII – Retaliation


- What is a “protected activity” in a Title VII retaliation case?
 - “Opposition” does NOT cover photocopying an employer’s confidential documents and sending them to a former co-worker, since the employer “had a reasonable and significant interest in preventing the dissemination of confidential personnel documents.”
 - Also does NOT offer no protection where the employee “lodged frequent, voluminous, and sometimes specious complaints and engaged in antagonistic behavior toward her superiors.” *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253, 1259 (10th Cir. 1999).



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- What is a “protected activity” in a Title VII retaliation case?
 - To determine whether conduct is protected opposition activity “[w]e **balance** the purpose of the Act to protect persons engaging reasonably in activities opposing ... discrimination, against Congress’ equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.” *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir.1998).



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Title VII – Retaliation


- What is a “protected activity” in a Title VII retaliation case?
 - **The “Participation” Clause**
 - Scope of protection for activity falling under the participation clause is **broader** than that falling under the opposition clause, since activities falling under the participation clause are “essential to the machinery set up by Title VII.”



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Title VII – Retaliation


- What is a “protected activity” in a Title VII retaliation case?
- **The “Participation” Clause**
 - Even where a plaintiff testifies in a trial or deposition in an “unreasonable” manner, the participation clause requires no balancing test. *Glover v. SLED*, 170 F.3d 411, 414 (4th Cir. 1999).
 - “A straightforward reading of the statute’s unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action.”



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Title VII – Retaliation


- What is a “protected activity” in a Title VII retaliation case?
- **The “Participation” Clause**
 - Even protects an employee who admitted to harassing another employee, where he was fired for his admissions in his deposition testimony taken in a Title VII proceeding brought by the harasser’s victim. *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997).
 - “Your deposition was the most damning to Dillard’s case, and you no longer have a place here at Dillard Paper Company.”



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- What is a “discriminatory act” in a Title VII retaliation case?
- *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).
- A plaintiff must show that he or she suffered retaliation that a reasonable employee would have found to be “**materially adverse**,” including actions beyond those concerning the terms and conditions of employment, such that the actions “**well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.**”
- **BROADER** than “adverse action” in a § 2000e-2 case.



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- What is a “causal link” in a Title VII retaliation case?
- Direct Evidence – it still works.
- Indirect Evidence –
 - Time
 - But how long?
 - Plaintiff must also show that the employer knew that the plaintiff engaged in the protected activity prior to taking discriminatory action.



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Title VII – Promotions & Hiring

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Title VII – Hiring and Promotion


- Title VII Basics - Prima facie case of discriminatory failure to hire
- Plaintiff must first show that
 - (1) she is a member of a protected class;
 - (2) she applied for the position in question;
 - (3) she was qualified for the position; and
 - (4) she was rejected for the position in favor of someone outside the protected class **under circumstances** giving rise to an inference of unlawful discrimination.
- *Mackey v. Shalala*, 360 F.3d 463, 468 (4th Cir. 2004).



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Title VII – Hiring and Promotion


- Title VII Basics - Prima facie case of discriminatory failure to promote
- Plaintiff must first show that
 - (1) he is a member of a protected group;
 - (2) he applied for the position in question (unless futile);
 - (3) he was qualified for the position; and
 - (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination.
- *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 268 (4th Cir. 2005).



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Title VII – Hiring and Promotion

- Defenses to the prima facie case of discriminatory failure to hire or promote
- You didn't apply as required.
- You didn't meet minimum qualifications.
- Another person from the same protected category was selected.
- The position was not filled.
- There were "no circumstances" giving rise to an inference of unlawful discrimination.
- IDENTITY OF DECISION-MAKERS - impact on later discrimination actions



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Title VII – Hiring and Promotion


- Legitimate Non-Discriminatory Reasons for Failure to Hire or Promote
- WE SELECTED A BETTER CANDIDATE



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Title VII – Hiring and Promotion


- ▶ Legitimate Non-Discriminatory Reasons for Failure to Hire or Promote – Rebutting Pretext
- ▶ Plaintiff's self-assessment of his qualifications relative to those of his competitors does not matter. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 268 (4th Cir. 2005).
- ▶ “[A]bsent evidence of retaliatory motive, we leave to the employer’s discretion the method of evaluating an employee’s job performance.” *Beall v. Abbott Labs.*, 130 F.3d 614, 620 (4th Cir. 1997).



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- ▶ Legitimate Non-Discriminatory Reasons for Failure to Hire or Promote – Rebutting Pretext
- ▶ Plaintiff’s argument that her “extensive training, knowledge and experience” and the “subjective nature of the interview scores” are “insufficient to cast doubt on the validity of the interview scores, or the sincerity of City in claiming reliance thereupon” where “the relevant question is *not* what experience, knowledge and skills Hall possesses, as an absolute matter, but whether she was more qualified for the various positions relative to the successful candidates who were hired based on their superior interview scores.
- ▶ *Hall v. City of Chicago*, 52 Fed. Appx. 259, 263-264 (7th Cir. 2002)



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- ▶ Legitimate Non-Discriminatory Reasons for Failure to Hire or Promote – Rebutting Pretext
- ▶ “[I]t is not within our authority to dictate the factors that employers must weigh in making a promotion.” *Hux v. City of Newport News, Va.*, 451 F.3d 311, 318 (4th Cir. 2006).
- ▶ Favoritism, pre-selection and cronyism – not themselves evidence of unlawful discrimination. *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989).
- ▶ Retaliation not based on a protected category. *Lightner v. City of Wilmington, N.C.*, 545 F.3d 260, 262 (4th Cir. 2008).



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Title VII – Hiring and Promotion

- Evidentiary Matters
- **Following your policy on hiring and promotion.**
- Who is conducting your screening?
- Who is conducting your interviews?
- Who is making the selections?
- What records are being kept?
 - Interview notes – **WHAT DO YOU WRITE DOWN?**
 - Resumes and applications
- Post-Decision –
 - Who is communicating the decision to applicants?

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Title VII – Hiring and Promotion

- Evidentiary Matters
- **HOW CAN YOU SHOW THAT YOU PICKED THE BEST CANDIDATE?**
- Think about –
 - Your records
 - Your witnesses

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- *Hunnicuttt v. SCDOR*, 2010 WL 1344352 (D.S.C. March 31, 2010) (Anderson).
- Hunnicutt interviewed for promotion, then deployed for two weeks with SCNG.
- Another candidate selected while he was on duty – he claims he was much better qualified.
- **SCDOR provides unrefuted evidence that it would have selected successful candidate regardless of Hunnicutt's military status.**
- Court refuses to act as "super-personnel department," deferred to SCDOR judgment re: promotion.

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- ▶ *Robinson v. South Carolina Dep't of Corrections*, 2015 WL 5116880 (D.S.C. Aug. 31, 2015)
- ▶ PRIMA FACIE CASE: "Robinson testified that she has **no evidence, other than her own opinion**, that the panelists favored Barrett over Robinson based on her race or gender."
- ▶ PRETEXT: Although Robinson demonstrates that she was a highly qualified candidate for the three positions for which she applied, **she fails to present evidence to show that Stevenson, Bright, and Barrett were not also highly qualified.**


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Title VII – Hiring and Promotion

- ▶ *Jeffries v. Westinghouse Elec. Co., LLC*, 2016 WL 791031 (D.S.C. Mar. 1, 2016) (Childs)
- ▶ Lewis Cromer also sues entities OTHER than state agencies.
- ▶ Claimant believes another candidate was selected for discriminatory reasons.
- ▶ "...what essentially can be summarized as Plaintiff's disagreement with Defendant's assessment of her credentials...does **not equate to a legal claim.**"


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Defamation

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Defamation


- Libel – written defamation, or defamation accomplished by actions or conduct.
- Slander – spoken defamation.
- Elements:
 - A false and defamatory statement,
 - Made with either “implied malice” or “actual malice,”
 - That is not privileged,
 - That is “published” to a third party, and
 - That either (1) caused special harm, or (2) is actionable regardless of special harm – *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002).



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False & Defamatory Statement


- *False.*
 - May be a question of fact for a jury.
 - Truth is an absolute defense, but must be raised and proved as an affirmative defense.
- *Defamatory.*
 - Statement tends to impeach plaintiff’s reputation – *White v. Witherspoon*, 328 S.C. 179, 493 S.E.2d 345 (1997) (allegation that attorneys took most of settlement in civil right case for themselves “could impute a derogation from the ethical responsibilities of that attorney”).
 - The court initially determines whether “the publication is incapable of any reasonable construction which will render the words defamatory.”



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False & Defamatory Statement

- *Insinuation as Defamation?*
 - *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980).
 - Employee discharged immediately following a polygraph test, allegedly giving fellow employees and others “the feeling and belief that respondent had been discharged for some wrongful activity.” *Dismissal reversed.*
 - “This insinuation and inference of wrongdoing amounted to the publication of defamatory matter.”
 - **CITE FROM CASE - “A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.”**



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False & Defamatory Statement

- *Insinuation as Defamation?*
- *Moore v. Rural Health Services*, 2007 WL 666796 (D.S.C. Feb. 27, 2007) (Harwell).
 - Employer requested the Sheriff's Department to escort employee from the premises, informed the deputy that he was stealing the employer's property, and insisted that the deputy search his vehicle.
 - Defamation claim survived motion for summary judgment.

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EXPERIENCE MATTERS

False & Defamatory Statement

- *Name-Calling & Opinion*
- *Goodwin v. Kennedy*, 347 S.C. 30, 552 S.E.2d 319 (S.C. App. 2001)
 - Local Minister called Assistant Principal a race traitor for disciplining an African-American student – which was injurious in Asst. Principal's profession.
 - **"In my opinion John Jones is a liar"** implies a knowledge of facts which lead to the conclusion that Jones told an untruth.
 - Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Dismissal reversed.
- *"SOB" v. "Paranoid SOB"*
- *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978).

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"Per Se" v. "Per Quod"

- *Per se.*
 - Does not require proof of special damages – they are presumed.
 - Slander is only actionable *per se* if it relates to one of the following five categories: (1) the commission of a crime of moral turpitude; (2) the contraction of a "loathsome disease"; (3) adultery; (4) lack of chastity; and (5) **"unfitness in one's business or profession."**
- Can be question of law or fact.
- All libel is actionable *per se*.
- *Per Quod.*
 - Must have evidence of "tangible losses or injury to the plaintiff's property, business, occupation or profession, capable of being assessed monetarily."

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