

SOUTH CAROLINA

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I. AT-WILL EMPLOYMENT

A. Statute

See Section II.A.1. for information about South Carolina's handbook statute.

B. Case Law

"At-will employment is generally terminable by either party at any time, for any reason, or for no reason at all." Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 516 S.E.2d 923 (1999).

Otherwise stated, a contract for permanent employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation. Id.

An employee's "alleged independent consideration (detrimental reliance on the employment offer) is insignificant to alter an otherwise at-will employment contract." White v. Roche Biomedical Lab., Inc., 807 F. Supp. 1212 (D.S.C. 1992), aff'd, 998 F.2d 1011 (4th Cir. 1993).

A group of current and former teachers sued a prison school district, contending that state statutes providing for public employees' salary, leave, and compensation constituted implied employment "contracts" which the school district had breached. Abraham v. Palmetto Unified Sch. Dist. No.1, 343 S.C. 36, 538 S.E.2d 656 (Ct. App. 2000). The court of appeals disagreed, noting that under South Carolina law, it is "clear that public employees generally have no contractual rights in their employment." The court noted that "absent some clear indication that the legislature intended [to do so,] . . . the presumption is that 'a law is not intended to create private contractual [rights], . . . but [rather] merely declares [governmental] policy.'" Id., citing Alston v. City of Camden, 322 S.C. 39, 46, 471 S.E.2d 174, 178 (1996). The court held that "statutes regulating salaries and benefits of public employees do not create contractual rights for

those employees whose salaries and benefits the statutes set.” Id.

“[A]n at-will employee cannot maintain an action against a former employer for civil conspiracy that resulted in the employee’s termination.” Angus v. Burroughs & Chapin Co., 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), citing Mills v. Leath, 709 F. Supp. 671, 675 (D.S.C. 1988), aff’d in part and rev’d in non-relevant part, 368 S.C. 167, 628 S.E.2d 261 (2006). An employee can, however, maintain a civil conspiracy action against third parties if the employee is not a public official. See id.; Angus v. Burroughs & Chapin Co., 368 S.C. 167, 628 S.E.2d 261 (2006). An employee can also maintain a civil conspiracy action against former co-workers who did not have authority to terminate and who acted outside the scope of their employment with the intent to harm the employee. Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

The South Carolina state legislature passed, and the governor signed, legislation, effective March 15, 2004, that states:

It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

S.C. CODE ANN. § 41-1-110.

Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987), aff’d after remand, 300 S.C. 481, 388 S.E.2d 808 (1990), is an important holding regarding employee handbook law in South Carolina. Five years after Small commenced her employment with Springs, Springs issued and distributed an employee handbook to all its employees. It later issued a bulletin to its employees setting forth in full the termination procedures in the handbook. Both documents provided a four-step disciplinary process (with certain exceptions not germane to Small's case) consisting of a verbal reprimand, a written warning, a final written warning, and discharge. Small was terminated after one written warning. Small sued based on a violation of the handbook and bulletin procedures. The jury returned a verdict of \$300,000.00 actual damages in her favor. Springs' appeal followed. The South Carolina Supreme Court held:

The employment agreement in this case, like most employment agreements, was a unilateral agreement. Springs made an offer or promise to hire Small in return for specified benefits and wages. Small accepted this offer by performing the act on which the promise was implicitly or expressly based. Springs' promise

constituted the terms of the employment agreement. Small's action or forbearance in reliance on Springs' promise was sufficient consideration to make the promise legally binding. [Footnote omitted] There was no contractual requirement that Small do anything more than perform the act on which the promise was predicted in order to legally bind Springs.

* * *

If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document.

Small, 292 S.C. at 485, 357 S.E.2d at 454-55; see also S.C. CODE ANN. § 41-1-110 (enacted after the Small case). The Small court set aside the verdict as excessive and remanded the case for a new trial on damages only. See also Toth v. Square D Co., 712 F. Supp. 1231 (D.S.C. 1989) (Small is given retroactive effect).

When looking at an employment handbook to determine to what degree it creates a promise, the court must focus on the actual language of the employee handbook. Lingard v. Carolina By-Products, 361 S.C. 442, 447, 605 S.E.2d 545, 548 (Ct. App. 2004). “The court should [also] consider whether the promises are couched in permissive or mandatory language.” Id.

In Miller v. Schmid Laboratories, Inc., 307 S.C. 140, 414 S.E.2d 126 (1992), the court addressed whether a traditional “meeting of the minds” is required. The court held it was not. Id., at 142, 414 S.E.2d at 127. In attempting to establish if the handbook created a contract the court considers whether (1) the handbook set out procedures binding on the employer, (2) those procedures applied to the discharged employee, and (3) the employer violated those procedures. Id.

Where an employee never signed, reviewed, or otherwise received an employee handbook prior to his termination, a South Carolina District Court found the employee could not survive summary judgment on his breach of contract claim based on the handbook. Moss v. City of Abbeville, 740 F.Supp.2d 738 (D.S.C. 2010).

In Hessenthaler v. Tri-County Sister Help, Inc., 365 S.C. 101, 616 S.E.2d 694 (2005), the court held that a general nondiscrimination provision does not create an expectation that employment is guaranteed for any specific duration or that a particular process must be followed before an employee may be terminated. The court opined:

[i]n most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. But a ‘court should intervene to resolve the handbook issue as a matter of law . . . if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.’

Id. at 108, 616 S.E.2d at 697, quoting Fleming v. Borden, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994). The court found that the evidence in Hessenthaler established beyond doubt that the handbook did not constitute a contract. Id. at 110, 616 S.E.2d at 699. Therefore the court held that the issue of whether the handbook constituted a contract should not have been submitted to the jury. Id.

Where an employee handbook's procedures concerning discipline, discharge, and grievance are couched in mandatory terms, including assurances that the procedures will be followed, the employer's procedures and practices give rise to more than one reasonable inference concerning the creation of an employment contract, and it is up to a jury to determine whether the manual creates or alters an existing contractual relationship. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002).

In Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000), the court addressed a progressive discipline policy. The employment manual outlined a four-step progressive disciplinary process to be followed before termination. Plaintiff claimed the handbook constituted a binding contract that altered her at-will status and her employer breached that contract by failing to follow the disciplinary process described in the handbook. The Williams court found the employee handbook could constitute an employment contract that altered the plaintiff's at-will status, since the handbook set out procedures binding on the employer and contained a promise of fair treatment and, therefore, the trial judge properly denied defendant's motion for a directed verdict. Id., at 262, 529 S.E.2d at 33. Where the evidence is conflicting as to whether the employer violated its own procedures by not following its progressive disciplinary process, a jury should make this determination. Id., at 267, 529 S.E.2d at 36. The Williams court also held that an employee could not recover in tort for a claim for breach of the implied covenant of good faith and fair dealing in the employment context. Therefore, punitive damages were not recoverable on the claim. Id., at 268, 529 S.E.2d at 36.

In Lewis v. Fisher Service Co., 329 S.C. 78, 495 S.E.2d 440 (1998), Lewis was terminated by his employer, Fisher Service Company, for surreptitiously tape recording a meeting between himself and a supervisor. At the time he was hired, Lewis received an employee handbook, which contained a progressive disciplinary policy. The manual also contained a provision, however, "stating that when an employee's conduct violated 'very serious and widely-recognized behavior standards,' the employee could be terminated on the first offense." Lewis' employer decided that a violation of that standard had occurred and terminated him without engaging in progressive discipline. Lewis maintained that he had told the supervisor that the meeting would be taped and sued his employer for breach of implied contract pursuant to Small, 292 S.C. 481, 357 S.E.2d 452.

Subsequent to Lewis' termination, his prior employer discovered that there were several other incidents in which Lewis admitted to secretly recording meetings with other members of management and was allowed to introduce this evidence at trial. The federal district court certified questions regarding the after-acquired evidence doctrine in South Carolina to the South Carolina Supreme Court.

The South Carolina Supreme Court noted that a distinction had developed in the case law between those cases involving purely private concerns, such as individual breach of contract claims, and in those involving major public policy concerns, *e.g.*, prevention of discrimination or preservation of worker's compensation rights. Lewis, 329 S.C. at 444–45, 495 S.E.2d at 85-86. The court held that there should not be an absolute bar to the use of after-acquired evidence on the issue of liability in employee handbook breach of contract actions. Accordingly, the South Carolina Supreme Court adopted the following standard: (1) “the employer must prove that the wrongdoing was significant, [*i.e.*,] that it was of such severity that the employee . . . would have been terminated on those grounds alone if the employer had known of it at the time of the discharge”; and, (2) “this proof must be established, not by a preponderance of the evidence, but by clear and convincing evidence.” Id. at 445, 495 S.E.2d at 87.

In Cape v. Greenville County Sch. Dist., 365 S.C. 316, 618 S.E.2d 881 (2005), the court held that the lower court properly granted the school district's motion for summary judgment, where the appellant teacher signed a contract for a one year term that contained an at-will provision. The court held that the plaintiff could not maintain her breach of contract claim because under the express terms of her contract, she was employed at-will. Id. The court rejected the plaintiff's assertion that because the contract was for a definite term, the contract could only be terminated for cause. The court held that “[a]n employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause. These are mere presumptions, however, which the parties can alter by express contract provisions.” Id., at 319, 618 S.E.2d at 883. Accordingly, the court explained “this case presents a similar situation: the parties have, by an express contract provision, altered the presumption that employment for a definite term is terminable only upon just cause, and replaced that presumption with an at-will termination clause.” Id. Consequently, the court found that the lower court correctly held that the plaintiff's employment contract, while for a definite term, was terminable at will. Id.

The South Carolina Court of Appeals considered a handbook provision in Grant v. Mount Vernon Mills, Inc., 370 S.C. 138, 634 S.E.2d 15 (Ct. App. 2006), which provided that the employer's progressive discipline procedures “were normally given.” The court rejected the argument that such language was mandatory and concluded that “[n]othing in the employee handbook required [the employer] to give warnings to an employee before termination.” Id. at 150, 634 S.E.2d at 22. The court also held that “because nothing in the employee handbook outlined progressive disciplinary procedures in mandatory terms, the presumption that the employment was at-will was not rebutted and no disclaimer was needed.” Id. (holding the employee handbook did not contain promises enforceable in contract). The court further rejected plaintiff's assertion that because the employer warned other employees it was required to warn the plaintiff. The court explained that “[a]bsent a claim of illegal discrimination, an employee's status as an at-will employee is not altered by an employer's decision to give a warning to other at-will employees.” Id. at 151, 634 S.E.2d at 23.

In Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 698 S.E.2d 773 (2010), the court held that the following language in an email from the employer's agent to the employee created a two-year term contract of employment:

As we discussed, we at Brown & Brown are convinced that you are a big part of our future. This offer is from Hyatt Brown. The guaranteed salary for the first year is \$110,000. You will be assigned the duties, responsibilities and title of sales manager. Going forward, I will assign at least \$500,000 in coded existing business to comply with the 40/20 or apply the appropriate salary as a sales manager to insure that the second year will be \$120,000 earnings. As we discussed, if you are meeting your goals and achievements, doing your part, we will make sure we do our part and you are taken care of going forward.

The court construed this language against the drafter and determined there was a minimum of two years guaranteed employment. Id. at 309, 698 S.E.2d at 778. The court then held that even though the employee signed an Employment Agreement, which contained an at-will clause, after the date of this email, the Employment Agreement did not alter the terms of the two-year contract because there was no separate consideration for the Employment Agreement. Id. at 310, 698 S.E.2d at 779.

In Jones v. Hydro Conduit Corp., 2012 WL 1096141 (D.S.C. March 30, 2012), the court addressed whether a safety policy issued to employees working with dangerous machinery altered the employee's at-will status. The policy provided for disciplinary action to be taken against employees who failed to comply with the company's safety protocol. The policy also contained promises to conduct an investigation into alleged violations and promises to consider mitigating circumstances when deciding disciplinary measures. The court held that these promises were "too vague and indefinite to form the basis of a contract." Id.

2. Provisions Regarding Fair Treatment

In Shelton v. Oscar Mayer Foods Corp., 319 S.C. 81, 459 S.E.2d 85 (Ct. App. 1995), aff'd, 325 S.C. 248, 481 S.E.2d 706 (1997), the court held that where the employer expressly guaranteed to its employees that it would implement and adhere to the rules outlined in the handbook, the employer may be sued for failure to comply with its own rules. In this case, the handbook included aspirational language that the rules would be enforced fairly and equally. The court rejected the argument that the handbook's language was a general and gratuitous assurance of fair dealing. See also Mills v. Leath, 709 F. Supp. 671, 674 (D.S.C. 1988) (handbook language that stated "disciplinary actions taken against employees are fair, equitable and consistent in all departments" did not alter the employee's at-will status).

In King v. Marriott Int'l, Inc., 520 F. Supp. 2d 748 (D.S.C. 2007), aff'd, 267 F. App'x 301 (4th Cir. 2008), the plaintiff did not base his handbook claim on a progressive discipline or termination provision. Rather, the plaintiff asserted that Marriott's fair treatment policy created a contract which Marriott breached by terminating him. The court held that the policy was not enforceable as an employment contract because the provisions constituted only general policy statements. The court reasoned that the policy did not make any promises regarding disciplinary procedure or termination decisions, and "[c]onsequently, under South Carolina law, [the] policy statements [did] not create a contract or otherwise alter [the plaintiff's] at-will status." Id. at 756-57.

Likewise, in Watkins v. Disabilities Board of Charleston, 444 F. Supp. 2d 510, 516 (D.S.C. 2006), the Court held that the plaintiff's handbook claim failed because the provisions plaintiff cited were "only general policy statements that [did] not create an expectation that employment was guaranteed for any specific duration or that the employer [was] bound to a particular process." Id.

However, in Lord v. Kimberly-Clark Corp., 827 F. Supp. 2d 598, 604 (D.S.C. 2011), the court held that a company's "Code of Conduct" may have altered the plaintiff's at-will employment status. The defendant company distributed a code of conduct to its employees, which contained a "Non-Retaliation Policy." Id. at 599-600. The policy promised not to fire employees for reporting a code of conduct concern. The plaintiff argued that he was fired because he lodged a complaint against his supervisor. Id. at 599. The court found that the policy does not guarantee employment, but it "does create an expectation that employment will not be terminated in retaliation for filing a Code of Conduct complaint." Id. at 604. Thus, the court could not determine as a matter of law that the non-retaliation policy in the code of conduct did not alter the plaintiff's at-will status.

3. Disclaimers

Not all handbooks or documents issued by an employer will create a contract and alter the employment relationship. The employer may insert a "conspicuous disclaimer" or provision into a written document without being contractually bound or altering the at-will status. Small, 292 S.C. 481, 357 S.E.2d 452. But see Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589 (1994)(employee must have "actual notice" of changes in handbook that preserve or re-instate the at-will nature of the employer-employee handbook).

The 2004 legislation defined "conspicuous disclaimer" as one that is underlined and in capital letters, appearing on the first page of the document, and signed by the employee. S.C. CODE ANN. § 41-1-110. The statute continues to make clear that whether a disclaimer is conspicuous enough is a question of law. Id. Thus, pre-legislation case law remains instructive.

For example, in Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000), the court addressed, among other things, the conspicuousness of handbook disclaimers. Plaintiff was an at-will employee who was fired for excessive absences. During her employment, she received an employment manual. The manual contained a provision stating in its first paragraph that it was not a binding contract, but the words were not in bold type, capitalized or in any other way set-off from the rest of the handbook. The court found that the provision relied upon by the employer was not sufficiently conspicuous to be a valid disclaimer, since there was nothing about the provision that reasonably called attention to it. Id., at 264-65, 529 S.E.2d at 34-35. To be valid, a disclaimer must be visibly distinct from the rest of the handbook. Id.

In determining whether a disclaimer is "conspicuous," the court will consider the typesetting of the print, color and size of print, and the location of the disclaimer on a document. See, e.g., S.C. CODE ANN. § 41-1-110. Since Small did not define the term "conspicuous," the court has used the Uniform Commercial Code for guidance. S.C. CODE ANN. § 36-1-201(10) (1976). "[T]he language in the body of a form is 'conspicuous' if it is in larger or other

contrasting type or color.” Nettles v. Techplan Corp., 704 F. Supp. 95 (D.S.C. 1988); Kumpf v. United Tel. of the Carolinas, Inc., 429 S.E.2d 869, 311 S.C. 533 (Ct. App. 1993) (disclaimer located on the last page of the document under the heading “CONCLUSION” which was neither capitalized, boldfaced, set apart with distinctive border, nor in contrasting type or color, was inconspicuous and ineffective); see also Marr v. City of Columbia, 307 S.C. 545, 416 S.E.2d 615 (1992) (The front cover of the City's employee handbook had in large letters, “Not A Contract.” The next page of the handbook was devoted entirely to “IMPORTANT NOTICE.” The important notice filled less than one-third of the page and was one-half in regular type and one-half in large bold type. The court held that the disclaimer was sufficient to be “conspicuous” and there was no evidence the parties had treated the employee handbook as a contract notwithstanding the disclaimer.). But see Hannah v. United Refrigerated Servs., Inc., 312 S.C. 42, 430 S.E.2d 539 (Ct. App. 1993) (disclaimer that is at the front of an employee handbook, yet in the same type-face and color as the rest of the document, may not be considered conspicuous enough to prevent the document from altering the employment relationship as test for conspicuousness is “whether there is something about the provision that reasonably calls attention to it”).

A handbook preserving at-will employment status by disclaimer and non-promissory handbook language may supersede a previous employee-employer contractual relationship (created by handbook, written policy, oral assurances, or otherwise) only if the employee has “actual notice” of the substantial change in the relationship. See Fleming, 312 S.C. at 462–63, 450 S.E.2d at 595–96. The disclaimer and any promissory language provided in the handbook (or otherwise by the employer) are interpreted together to determine if the disclaimer is effective. Id. at 463–64, 450 S.E.2d at 596.

In Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905 (2005), the court applied the law in effect before the handbook statute was enacted and held that despite the presence of a disclaimer generally, a jury must decide whether the handbook as a whole conveys credible promises that should be enforced. The court did not apply the new statute because the handbook at issue in Conner was issued before June 30, 2004. Id.

The Conner court affirmed the jury’s verdict in favor of the employer. But the court held that the lower court erred in excluding evidence of the employer’s grievance procedure outlined in the handbook. The court went on to find, however, that despite the trial court’s error, the employee failed to show a reasonable probability that the jury’s verdict was influenced by the lack of the wrongfully excluded evidence. Id.

In Horton v. Darby Elec. Co., Inc. 360 S.C. 58, 599 S.E.2d 456, (2004), the company’s employment manual contained a disclaimer and language in its disciplinary policy stating: “It should be emphasized again that supervisors are not required to go through the entire three steps involved in this disciplinary procedure. Discipline may begin at any step in the procedure depending on the seriousness of the offense committed.” The court construed this as “the appropriate manner in which to give employees a guide regarding their employment without altering the at-will employment relationship.” Id., at 67–68, 599 S.E.2d at 460–61.

In Hessenthaler, 365 S.C. 101, 616 S.E.2d 694, the court held that “[b]ecause the

disclaimer appears on the front page of the handbook, in bold, capitalized letters, we hold that the disclaimer is conspicuous as a matter of law.” Id. at 109, 616 S.E.2d at 698.

In Anthony v. Atlantic Group, Inc., 909 F.Supp.2d 455 (D.S.C. 2012), the court held that an employee handbook contained “clear disclaimer language,” but not “conspicuous disclaimer language” as described by Section 41-1-110. The disclaimer language clearly alerted the employee to the at-will status of his employment, but the disclaimer appeared on page 27 of the handbook. Therefore, the disclaimer was not conspicuous as a matter of law. Id. at 468.

In Campbell v. Int’l Paper Co., 2013 WL 1874850 (D.S.C. May 3, 2013), the court held that since a disclaimer on the first page of a policy was not underlined in all capital letters and not signed by the employee, the disclaimer was not dispositive as to the issue of whether or not the policy created a contract. Still, the court relied in part on the disclaimer to find that the policy did not create an employment contract. The court stated that “the disclaimer is certainly an important factor in whether the policy is contractual in nature.” Id. at n.2.

4. Implied Covenants of Good Faith and Fair Dealing

A cause of action for breach of an implied covenant of good faith and fair dealing cannot be recognized absent proof of an underlying contract. Dodgens v. Kent Mfg. Co., 955 F. Supp. 560 (D.S.C. 1997). Once an employee's at-will status has been altered by a handbook, the resulting contract contains an implied covenant of good faith and fair dealing. It is for the jury to decide if this covenant has been breached. Id.; see also Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (Ct. App. 1995) (first recognition by a South Carolina court that an implied covenant of good faith and fair dealing in an employment contract can alter the employee's at-will status); see also Hindman v. Greenville Hosp. Sys., 947 F. Supp. 215 (D.S.C. 1996), aff'd, 133 F.3d 915, 1997 U.S. App. LEXIS 40230 (4th Cir. 1997)(at-will employee who was discharged could not maintain claim for breach of implied covenant of good faith and fair dealing against her former employer).

Tort remedies are not available for breach of implied covenant of good faith and fair dealing in the employment context. Osborn v. Univ. Med. Assocs., 278 F. Supp. 2d 720 (D.S.C. 2003), aff'd, Osborn v. Pharm. Educ. & Dev. Found., 174 F. App'x 763, 2006 U.S. App. LEXIS 8385 (4th Cir. 2006).

In Rotec Services v. Encompass Services, Inc., 359 S.C. 467, 597 S.E.2d 881, (Ct. App. 2004), the South Carolina Court of Appeals held that “the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract.” The Rotec court held that the plaintiff's breach of contract claim subsumed the plaintiff's implied covenant claim and therefore, the implied covenant claim was not a separate cause of action. Id. at 471, 597 S.E.2d at 883. Accordingly, the Rotec court affirmed the lower court's dismissal of the Plaintiff's implied covenant claim. Id. at 473, 597 S.E.2d at 884.

B. Public Policy Exceptions

1. General

The public policy exception to the at-will employment doctrine applies where an employer requires an employee to violate the law or the reason for the employee's termination itself is a violation of criminal law, but the exception is not limited to these two situations. Barron v. Labor Finders, 393 S.C. 609, 713 S.E.2d 634 (2011). Although the exception is not limited to these two situations, it has never been extended beyond them. McNeil v. S.C. Dep't of Corr., 404 S.C. 186, 192, 743 S.E.2d 843, 846 (Ct. App. 2013); see also Taghivand v. Rite Aid Corp., 411 S.C. 240, 243, 768 S.E.2d 385, 387 (2015) (noting that while the South Carolina Supreme Court has made clear that that the exception is not limited to the two situations, the court has "specifically recognized no others"); Crutchfield v. Pfizer, Inc., 2013 WL 2897023 (D.S.C. June 13, 2013) (noting the lack of jurisprudence in this area and deriding the uncertainty concerning what constitutes public policy in this context).

An existing remedy will preclude a plaintiff from bringing a wrongful discharge action on that claim. See e.g., Epps v. Clarendon County, 304 S.C. 424, 405 S.E.2d 386 (1991) (employee had an existing remedy for a discharge which allegedly violated rights other than the right to the employment itself); Dockins v. Ingles Mkt., Inc., 306 S.C. 496, 413 S.E.2d 18 (1992) (when statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to the statutory remedy).

"The determination of what constitutes public policy is a question of law for the courts to decide. . . . [O]nce a public policy is established, the jury would determine the factual question whether the employee's termination was in violation of that policy." Barron, 393 S.C. at 617, 713 S.E.2d at 638.

Nevertheless, the South Carolina Court of Appeals in McNeil v. S.C. Department of Corrections, held that a plaintiff cannot state a cognizable claim and survive a motion to dismiss where the retaliatory discharge was in violation of some vague or unclear public policy. McNeil v. S.C. Dep't of Corr., 404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013). Rather, a plaintiff must include in their complaint sufficient factual matter to allow a trial court, accepting those factual allegations as true, to conclude that the plaintiff's termination violated a clear mandate of public policy. Id. See also, Gray v. American HomePatient, Inc., 2015 WL 892780 (D.S.C. Mar. 3, 2015).

In Stiles v. Am. Gen. Life Ins. Co., 335 S.C. 222, 516 S.E.2d 449 (1999), the South Carolina Supreme Court extended the Ludwick exception to written employment contracts, which require notice periods for termination. The South Carolina Supreme Court accepted the following question certified by the federal district court:

May an employee who is employed under an employment contract which provides that either party may terminate the agreement "for any reason" with 30-days' notice—i.e., an at-will contract with a notice provision—maintain a tort action for wrongful discharge in violation of public policy?

Id. at 223, 516 S.E.2d at 450.

The court answered the question in the affirmative: An employee under an at-will contract with 30 day notice provision may maintain an action for wrongful discharge in violation of public policy under Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.3d 213 (1985). But see, Keeshan v. Eau Claire Cooperative Health Centers, 394 F. App'x 987 (4th Cir. 2010) (distinguishing Stiles because contract at issue in this case provided for a one year term of employment which would be automatically renewed for successive one year terms).

In Taghivand v. Rite Aid Corp., 411 S.C. 240, 243, 768 S.E.2d 385, 387 (2015), the South Carolina Supreme Court did not extend the Ludwick exception to a situation where an employee erroneously reports suspected criminal activity to law enforcement. In Taghivand, the South Carolina Supreme Court accepted the following question certified by the federal district court:

Under the public policy exception to the at-will employment doctrine [], does an at-will employee have a cause of action in tort for wrongful termination where (1) the employee, a store manager, reasonably suspects that criminal activity, specifically, shoplifting, has occurred on the employer's premises, (2) the employee, acting in good faith, reports the suspected criminal activity to law enforcement, and (3) the employee is terminated in retaliation for reporting the suspected criminal activity to law enforcement?

Id., at 242–43, 768 S.E.2d at 386.

The court answered the question in the negative and held the public policy exception to at-will employment is not broad enough to include employees who are terminated for reporting a suspected crime. Id. Specifically, the court expressed its reluctance to expand the definition of “public policy” for purposes of retaliatory discharge cause of action, stating, “[w]e exercise restraint when undertaking the amorphous inquiry of what constitutes public policy. . . . ‘public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.’” Id. at 244, 768 S.E.2d at 387 (citing Patton v. United States, 281 U.S. 276, 306, 50 S. Ct. 253, 74 L.Ed. 854 (1930) abrogated by Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970)). See also Bouknight v. KW Associates, LLC, 2016 WL 3344336 (D.S.C. Jun. 16, 2016) (finding alleged sources of public policy relied on by the plaintiff were too generic and peripheral to constitute a clear mandate of the particular public policy—hiring an attorney after filing a workers’ compensation claim—to sufficiently assert a violation of public policy claim). See also, Donevant v. Town of Surfside Beach, infra at section “3.”

2. Exercising a Legal Right

An employee allegedly discharged in retaliation for filing a complaint under the Fair Labor Standards Act is limited to remedies provided under the Act and precluded from maintaining a state tort action for wrongful discharge. Dockins v. Ingles Mkt., 306 S.C. 496, 413 S.E.2d 18 (1992).

An at-will employee who was discharged because he refused to contribute to a political action fund would have a cause of action for wrongful discharge. See Culler v. Blue Ridge Elec. Co-op. Inc., 309 S.C. 243, 422 S.E.2d 91 (1992); see also S.C. CODE ANN. § 16-17-560 (“It is unlawful for a person to . . . discharge a citizen from employment or occupation . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States. . . .”); Moshtaghi v. Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App.1994) (employee may not be terminated for exercising constitutional rights). See also, Shelton v. Newberry County School District, 2018 WL 4573094 (D.S.C. May 17, 2018), report and recommendation adopted, 2018 WL 3490908 (D.S.C. July 20, 2018) (denying the defendant summary judgment on the plaintiff’s first amendment retaliatory discharge claim)

An employer may not terminate an employee in retaliation for filing a sexual harassment complaint. Bookman v. Shakespeare Co., 314 S.C. 146, 442 S.E.2d 183 (Ct. App. 1994).

South Carolina law prohibits retaliation against an employee based upon an employee’s institution of, or participation in, proceedings under the South Carolina Workers' Compensation laws. S.C. CODE ANN. § 41-1-80.

In Wallace v. Milliken & Co., 305 S.C. 118, 406 S.E.2d 358 (1991), Milliken hired Wallace as an industrial machine operator. He injured his hand while operating a machine and filed workers' compensation claim. When Wallace finally returned for light duty, he was terminated. Wallace instituted suit alleging that he was discharged in retaliation for filing for workers’ compensation benefits in violation of the S.C. Retaliatory Discharge Statute (S.C. CODE ANN. § 41-1-80). A jury found in his favor, and the court of appeals affirmed.

The Supreme Court of South Carolina held that under the Workers' Compensation Act, an employee needed to prove that the filing of a claim was the “determinative factor” in his or her discharge. Id. at 121, 406 S.E.2d at 360. The court rejected the appellate court's use of a “substantial factor” test. The court also held that the ultimate burden of proof in such cases is on the employee. Id. at 122, 406 S.E.2d at 360. The judgment for Wallace was affirmed based on evidence sufficient to establish retaliation as the determinative factor for his discharge. Id. at 123, 406 S.E.2d at 361.

In Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 540 S.E.2d 94 (2000), the plaintiff was employed by Designer Ensembles and sustained a back injury at work. He was released by his doctor to return to work with restrictions, including permitting him to lie down, if necessary. He worked one shift before leaving work due to pain. He returned to his doctor and told his employer he was in too much pain to work. He was terminated for excessive unexcused absences.

The court rejected the plaintiff’s argument that Designer Ensembles’ reliance upon the written excuse requirement was pre-textual since the employer had direct verbal communication with his physicians. The court stated that it was inappropriate to second-guess the company’s enforcement of its own attendance policy.

Despite the temporal proximity between Hinton's filing of the workers' compensation claim and his discharge, the court found that Hinton had failed to show a causal connection between the two. Using the Wallace "determinative factor" test, the court found Hinton failed to prove that "but for" the filing of the workers' compensation claim, he would not have been discharged. Id. at 244–45, 540 S.E.2d at 98. See also Wallace, 305 S.C. 118, 305 S.E.2d 358. Under section 41-1-80 of the South Carolina Code, as the employer articulated a legitimate, non-retaliatory reason for the termination (Hinton's violation of the attendance policy), the proximity in time between the workers' compensation claim and the discharge was not sufficient evidence to carry Hinton's burden of proving causation. Thus, although temporal proximity between an employee's filing of a workers' compensation claim and his termination is one factor courts will consider, alone it is not sufficient to prove retaliatory discharge. See Hinton, 540 S.E.2d 94, 343 S.C. 236; see also Morgan v. Mattress Gallery, 2006 WL 1878983, 2006 U.S. Dist. LEXIS 48943 (D.S.C. July 6, 2006) (holding that even if the plaintiff had been fired as a result of his worker's compensation claim, his worker's compensation retaliation claim would be fatally deficient because it was undisputed that plaintiff was unable to perform his work duties); Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 416 S.E.2d 634 (Ct. App. 1994) (retaliatory discharge statute, S.C. CODE ANN. § 41-1-80, does not singularly accord an employee the right to a reasonable period of time for rehabilitation to demonstrate the ability to perform his former employment); Johnson v. J.P. Stevens & Co., 308 S.C. 116, 417 S.E.2d 527 (1992) (The retaliatory discharge statute does not require the formal filing of a workers' compensation claim by the employee. The purpose of the statute cannot be avoided by firing an injured employee before he files workers' compensation claim.).

A plaintiff is not required to formally file a workers' compensation claim in order to recover under Section 41-1-80. Atkinson v. House of Raeford Farms, Inc., 874 F. Supp. 2d 456, 475 (D.S.C. 2012), citing Johnson v. J.P. Stevens & Co., 308 S.C. 116, 119, 417 S.E.2d 527, 529 (1992). "The purpose of section 41-1-80 cannot be avoided by firing an injured employee before he or she files a claim." Id.

In Atkinson, the court found that the employer terminated the plaintiffs in violation of South Carolina Code Section 41-1-80 even though the plaintiffs had not yet filed a workers' compensation claim. The court held that:

[W]hile the mere seeking and receiving of medical treatment is not sufficient to constitute the institution of a workers' compensation claim, an employee's seeking or receiving of medical treatment from the employer accompanied by circumstances which would lead the employer to infer that a workers' compensation claim is likely to be filed is sufficient to institute a workers' compensation proceeding for the purposes of Section 41-1-80.

Id. at 475.

In Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999), overruled in part by Barron v. Labor Finders, 393 S.C. 609, 713 S.E.2d 634 (2011), the plaintiffs were employed as sandwich makers and contended that the employer promised to pay a unit rate for each sandwich. The employer contended the relevant unit was the package in which the two

sandwiches were sold. A jury resolved this factual conflict in favor of the employees and found that the employer had violated the Payment of Wages Act and had wrongfully discharged the plaintiffs in violation of public policy. The public policy claim arose from the employer's discharge of the plaintiffs upon learning that they had taken their Payment of Wages Act claims to the South Carolina Department of Labor.

Prior to Evans, the South Carolina Supreme Court had recognized that the public policy exception applies to an employee who is required to violate criminal law or where an employer's termination of an employee is itself a violation of criminal law, but had never been explicitly applied to a violation of a civil statutory law.

Additionally, Evans also acknowledges that where a statutory remedy of a wrongful discharge is available to an employee, the public policy exception is unavailable. 337 S.C. 95, 522 S.E.2d 350, citing Stiles v. Am. Gen. Life Ins. Co., 335 S.C. 222, 516 S.E.2d 449 (1999). However, the Evans opinion reasons that the absence of a statutory remedy allows the court, with the help of the jury, to fashion a non-statutory remedy in the form of a public policy claim.

In Barron, 393 S.C. 609, 713 S.E.2d 634 (2011), an employee brought a wrongful termination claim when she was terminated after complaining to her supervisor that she was not paid her full amount of commissions she had earned. The South Carolina Supreme Court affirmed summary judgment to the employer because there was no evidence the employee was terminated in retaliation for availing herself of the protections of the Payment of Wages Act. "She never filed a complaint with the Department of Labor as required by the Act, nor did she ever indicate to respondent she had filed or intended to file a complaint." Id. The court declined to address whether the employee would have been able to survive summary judgment on her claim if she had been terminated for filing a wage claim with the Department of Labor.

In Lawson v. S. Carolina Dep't of Corr., 340 S.C. 346, 532 S.E.2d 259 (2000), the plaintiff was an at-will employee who applied for an open position and was given a written test along with several other candidates. When another candidate scored the highest and was hired, he wrote a memo alleging the department had pre-selected the successful candidate and had unfairly allowed that applicant to consult reference materials while taking the written test. He was discharged shortly thereafter. He claimed his termination was a wrongful discharge under the public policy exception to the at-will employment doctrine. However, the court chose to place an important limit on the public policy doctrine. It found the public policy exception did not apply in this case as the plaintiff was not asked to violate the law and his termination itself did not violate any criminal law. But see Barron, 393 S.C. 609, 713 S.E.2d 634, (holding the exception is not limited to these two situations).

3. Refusing to Violate the Law

In Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213, Ludwick was a seamstress who worked as an at-will employee in Carolina's sewing plant. She was served with a subpoena to appear before the South Carolina Employment Security Commission (ESC). Ludwick was told that if she obeyed the subpoena she would be fired. Ludwick honored the subpoena and testified at the hearing, but she was summarily terminated. She filed suit alleging

that her discharge violated public policy.

The Supreme Court of South Carolina held that while termination at will remained the law in the state, an exception exists where the discharge constitutes a violation of a clear mandate of public policy. Id. In such a case, there arises a cause of action in tort for wrongful discharge.

We hold that the public policy exception is invoked when an employer required an at-will employee, as a condition of retaining employment, to violate the law. To hold otherwise would sanction defiance of the legal process legislated by the General Assembly. In a nation of laws the mere encouragement that one violate the law is unsavory; the threat of retaliation for refusing to do so is intolerable and impermissible.

Ludwick, 287 S.C. at 225, 337 S.E.2d at 216. The court emphasized that the alleged retaliatory discharge must constitute a clear violation of a mandate of public policy. Id.; See also, Barron, 393 S.C. 609, 713 S.E.2d 634, 637 (2011).

In Nolte v. Gibbs Int'l Inc., 335 S.C. 72, 515 S.E.2d 101 (Ct. App. 1998), the court of appeals reversed the trial judge's grant of summary judgment in favor of an employer who had allegedly discharged his employee, an accountant, for failing to prepare documents which would have violated various civil and criminal laws. The court noted that upon a full development of the facts at trial, a violation of the public policy exception under Ludwick might be established.

In Antley v. Shepherd, 340 S.C. 541, 532 S.E.2d 294 (Ct. App. 2000), the plaintiff, as Aiken County's tax assessor, had authority to appeal any rejections or modifications of appraisals she submitted to the board. When she exercised her power and appealed a decision, the county administrator informed her no board decisions would be appealed. When plaintiff failed to dismiss her appeal as directed, her employment was terminated for insubordination. The plaintiff stated she believed the order required her to violate her statutory duty to maintain the uniformity of countywide assessments. Id., aff'd as modified by Antley v. Shepherd, 349 S.C. 600, 564 S.E.2d 116 (2002).

The Antley court found since a state statute permitted, but did not require, that plaintiff file appeals to the board, the administrator's order to dismiss the appeal did not require her to violate the law. The court refused to expand the public policy exception to a situation where an employee refuses to comply with an order that she simply believes would require her to violate the law. Id.

In Nelson v. Science Applications Int'l Corp., 2013 WL 764664 (D.S.C. Feb. 7, 2013), the plaintiff attempted to substantiate a wrongful discharge in violation of public policy claim with her allegations of a hostile work environment. The court rejected the plaintiff's attempt. The court first noted the plaintiff's employer did not deny her rights under Title VII. Id. at *7. The court went on to state that even if that were the case, that is neither the commission of a crime nor was there any allegation that her employer required her to violate a public policy. Id. The court further found the plaintiff was limited to a statutory remedy under Title VII, noting "[w]hen a statute creates a substantive right and provides a remedy for infringement of that right,

the Plaintiff is limited to that remedy.” Id.

In Donevant v. Town of Surfside Beach, 414 S.C. 396, 778 S.E.2d 320 (Ct. App. 2015), aff’d 422 S.C. 264, 811 S.E.2d 744 (2018), the plaintiff, as the Building Official for the Town of Surfside Beach, was the only party authorized to issue a stop-work order for code violations. When the plaintiff exercised that duty, she was subsequently terminated. Specifically, when the plaintiff was out on medical leave for cancer, her duties as the Town’s Building Official were carried out by the neighboring city, Myrtle Beach. During the plaintiff’s medical leave, Myrtle Beach issued a demolition permit to the new tenant of a restaurant building space. Shortly after returning to work, the plaintiff discovered that new construction had begun in the subject restaurant space. Upon the plaintiff’s inspection of the premises, she determined that the tenant had begun “construction” on the premises which required a construction permit prior to starting the work; however, the only permit issued had been for demolition. Based on this, the plaintiff issued a stop-work order to halt construction at the premises and mentioned the same as a side note to the Town’s deputy administrator. The next day, the Town’s Administrator issued the plaintiff a written reprimand stating that the plaintiff had disobeyed an order to report all matters to him, the Town Administrator. Following the plaintiff’s refusal to sign the reprimand, the Town Administrator issued the plaintiff a 3-day suspension, which the plaintiff reluctantly signed because she feared she would be terminated. Within a week after returning from suspension, the Town Administrator terminated the plaintiff. The plaintiff filed suit for wrongful termination, and specifically claimed that the Town fired her in retaliation for issuing a stop-work order at the subject restaurant location. The jury returned a favorable verdict for the plaintiff, and appeal followed.

The S.C. Court of Appeals affirmed the lower court and sustained the jury’s verdict for the plaintiff. Id., aff’d 422 S.C. 264, 811 S.E.2d 744 (2018). Specifically, the court of appeals rejected the Town’s argument that the public policy exception to at-will employment requires a criminal punishment. Further, the court distinguished the Town’s attempt to liken the present case to that of Antley v. Shepherd, supra, because unlike Antley who did not have sole authority and only discretionary authority, the plaintiff was the only party authorized to issue a stop-work order for building code violations. Id., 414 S.C. at 412–13, 778 S.E.2d at 329-30. Further, the court held that the plaintiff was required by law to issue a stop-work order, as she had a legal duty to enforce compliance with the building code which required a permit for the work at the subject premises. Id. Specifically, the court found that the plaintiff’s claim was “clearly within what [South Carolina] courts have already articulated what the law is—that [the plaintiff] was required by her employer to violate the law.” Id., 414 S.C. at 413, 778 S.E.2d at 330–31. Indeed, the court noted that if the plaintiff had followed the Town Administrator’s directive and not taken action in response to the unlawful construction at the subject premises, she could have been charged with misconduct in office for failing to discharge her legal duty as the Town’s Building Official. Id., 414 S.C. at 413, 778 S.E.2d at 330. The court held that by suspending the plaintiff and ultimately terminating her for issuing the stop-work permit, the Town “effectively discharged [the plaintiff] for refusing to violate the law,” which is a claim for retaliatory discharge that falls within a recognized exception to the at-will employment doctrine. Id., 414 S.C. at 413–14, 778 S.E.2d at 330 (holding the plaintiff’s “claim for retaliatory discharge falls within a recognized exception to the at-will doctrine because she was required by her employer, ‘as a condition of continued employment, to break the law.’” (citing Taghivand, 411 S.C. at 243, 768 S.E.2d at 387; Barron, 393 S.C. at 614, 713 S.E.2d at 637)).

In addition, the court held that under these facts, the plaintiff also presented a cognizable claim that she was terminated “in violation of a clear mandate of public policy.” Id., 414 S.C. at 414–16, 778 S.E.2d at 330–31. The S.C. Code specifically provides the clear public policy of South Carolina for building codes and provides that municipalities such as the Town are required to enforce the building codes. S.C. CODE ANN. §§ 6-9-5(A), -10 (stating, in part, “The public policy of South Carolina is to maintain reasonable standards in buildings and other structures . . .”). Id. Accordingly, the court held, the General Assembly was clear in making enforcement of the building code a public policy of this state. Id., aff’d 422 S.C. at 266–67, 811 S.E.2d at 745–46 (answering in the affirmative the question of “whether it is a violation of a clear mandate of public policy to fire a building official for enforcing the building code.” (citing Ludwick, supra; Barron, supra)).

4. Exposing Illegal Activity (Whistleblowers)

The purpose of the South Carolina Whistleblower Act, S.C. CODE ANN. § 8-27-10, et seq., is to protect employees of public bodies when they report significant governmental wrongdoing and to provide a remedy to any employee of a public body who is retaliated against because he or she reports such violations.

The Act broadly defines the term “public body” to include all state agencies, commissions, boards, departments, special purpose districts or any organizations or agencies supported in whole or in part by public funds or which expend public funds. S.C. CODE ANN. § 8-27-10(1). It also includes quasi-governmental bodies. Id. This broad definition includes committees appointed by public bodies, which use public funds received from those public bodies. Id. The Act expressly exempts private corporations from its provisions. S.C. CODE ANN. § 8-27-50; see also Sutler v. Palmetto Elec. Coop., Inc., 325 S.C. 465, 481 S.E.2d 179 (Ct. App. 1997) (non-profit rural electric co-ops are not public bodies for purposes of the Whistleblower Act).

It is illegal for a public body to dismiss, suspend from employment, demote or decrease the compensation of an employee whenever the employee files a written report of wrongdoing. S.C. CODE ANN. § 8-27-20. “Wrongdoing” is defined as any action by a public body, which results in substantial misuse, abuse, destruction or loss of substantial funds or public resources. S.C. CODE ANN. § 8-27-10(5). “Wrongdoing” also includes allegations that a public body has intentionally violated federal or state statutory law or regulations or other political subdivision ordinances or regulations or a code of ethics. Id.

The report must be filed within sixty (60) days of the date the reporting employee first learned of the alleged wrongdoing. Id. at § 8-27-10(4)(c). If an employee is dismissed, suspended from employment, demoted or receives a decrease in compensation within one year after having filed a written report of wrongdoing, the employee may bring an action under the Act for either reinstatement, lost wages, actual damages not to exceed \$15,000 and reasonable attorneys fees. Id. at § 8-27-30. No punitive damages are available to plaintiffs under this Act. Campbell v. Bi-Lo, Inc., 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990).

A whistleblower action may only be filed after the employee has exhausted all available

grievance or administrative remedies and those grievance or administrative proceedings have resulted in a finding that the employee would not have been disciplined but for the reporting of the alleged wrongdoing. Id. at § 8-27-30(A); see, Ransom v. S. C. Water Res. Comm'n, 321 S.C. 211, 467 S.E.2d 463 (Ct. App. 1996) (plaintiff must exhaust administrative remedies prior to filing a suit under the Whistleblower Act); Allen v. S.C. Alcoholic Beverage Comm'n, 321 S.C. 188, 467 S.E.2d 450 (1996) (court cannot waive requirement that the employee exhaust his grievance rights before filing a claim); see also, Seago v. Central Midlands Council of Gov't, 2017 WL 74110 (D.S.C. Jan. 9, 2017)(granting defendant's motion to dismiss the plaintiff's Whistleblower Act claims because the plaintiff failed to plead in her complaint that she had met the conditions precedent—exhaustion of administrative remedies—sufficient for relief under the Act).

A wrongful discharge action against an employer based on a public policy exception to the employment at-will doctrine was not limited to situations when the employer required the employee to violate criminal law or when the employee's termination was itself a violation of criminal law. Garner v. Morrison Knudsen Corp., 318 S.C. 223, 456 S.E.2d 907 (1995). It is inappropriate to dismiss a former employee's action for failure to state claim, where the former employee's claim was based on termination in retaliation for reporting and testifying about radioactive contamination and unsafe working conditions at the nuclear facility where he worked. Id.

Section 41-15-510 of the South Carolina Code prohibits the discharge or discrimination against an employee for filing a complaint or participating in a proceeding under the state occupational safety and health act.

III. CONSTRUCTIVE DISCHARGE

“Constructive discharge” occurs when an employer deliberately creates intolerable work conditions to force an employee to resign. Fleming v. S.C. Dep't of Corr., 952 F. Supp. 283 (D.S.C. 1996). A plaintiff must prove two elements to establish a constructive discharge claim: deliberateness of defendant's actions and intolerability of working conditions. Id.

“Generally speaking, when an employee contracts to fill a particular position any material change in duties or significant reduction in rank constitutes a constructive discharge which, if unjustified, is a breach of the contract. Thus, the focus is on the existence of a material change in duties or rank and the justification, or lack thereof, for the change.” Long v. Lockheed Missiles & Space Co., Inc., 783 F. Supp. 249 (D.S.C. 1992) (addressing case in context of ERISA pre-emption) (citation omitted).

One of the essential elements of any constructive discharge claim is that the adverse working conditions must be so intolerable that a reasonable employee would resign rather than endure such conditions. Shealy v. Winston, 929 F.2d 1009 (4th Cir. 1991).

In Graves v. Horry-Georgetown Technical College, 391 S.C. 1, 704 S.E.2d 350 (Ct. App. 2010), the court held that an employee who was constructively discharged was required to exhaust her administrative remedies by filing a grievance under her employer's policies and

procedures before bringing a lawsuit under Federal law.

IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

A person hired under an employment contract for a definite term may not be discharged before completion of the term without just cause. Shivers v. John H. Hartland Co., Inc., 310 S.C. 217, 423 S.E.2d 105 (1992), aff’d, 1993 U.S. App. LEXIS 1922 (4th Cir. 1993).

If the fact finder finds a contract to terminate only for cause, he must determine whether the employer had a reasonable good faith belief that sufficient cause existed for termination. Employers cannot be expected to act as judges, so the test is not whether the employee actually committed misconduct, but whether the employer had a reasonable good faith belief that it had cause to terminate. Shivers, 310 S.C. 217, 423 S.E.2d 105.

Whether an employer breached an employment contract when it terminated an employee for the receipt of gifts from a supplier was a jury question in the employee's wrongful discharge suit; the provision under which the employee was terminated prohibited only those gifts which might appear to influence a decision by the employee. See Kumpf, 311 S.C. 533, 429 S.E.2d 869.

In Cape v. Greenville County Sch. Dist., 365 S.C. 316, 618 S.E.2d 881 (2005), the court held that an employment contract for an indefinite term is presumptively terminable at will, while a contract for a definite term is presumptively terminable only upon just cause; however, these are mere presumptions which the parties can alter by express contract provisions.

The employment contract in Cape was for a definite term and contained an at-will termination clause indicating that the employee was terminable at will. Therefore, the court held that the employee had no breach of contract cause of action based on her termination because by an express contract provision, the parties altered the presumption that employment for a definite term was terminable only upon just cause. Id.

B. Status of Arbitration Clauses

Arbitration is a matter of contract and is controlled by contract law. S. Carolina Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 437 S.E.2d 22 (1993). Statutory claims can be arbitrated. Reese v. Commercial Credit Corp., 955 F. Supp. 567 (D.S.C. 1997) (employer's arbitration policy, which made arbitration the required, and exclusive, forum for resolution of all employment disputes, encompassed FMLA and ADA claims).

“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.” Hooters of Am., Inc. v. Phillips, 39 F. Supp. 2d 582, 613 (D.S.C. 1998), aff’d, 173 F.3d 933 (4th Cir. 1999).

Arbitration of disputes arising under contract may be provided for by reference to outside

documents. Failure to read the whole agreement is not a defense to an arbitration clause. See First Baptist Church of Timmonsville v. George A. Creed & Son, Inc., 276 S.C. 597, 281 S.E.2d 121 (1981).

Employee's and employer's mutual promises to arbitrate constituted sufficient consideration for an arbitration agreement. See O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) (holding an employee's agreement to submit complaints to arbitration “as a condition of employment and continued employment” did not obligate employer to provide employee with continued employment to enforce agreement).

The South Carolina Court of Appeals has held, “the determination regarding whether a valid arbitration agreement existed was a ‘gateway’ matter that the circuit court could properly consider.” Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), aff'd in part and vacated in non-relevant part, 2014 WL 2535489 (S.C. Jan. 29, 2014).

In Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998), the court held enforceable an arbitration agreement that Circuit City required job applicants to sign. Johnson had applied for a job as a sales associate at a Circuit City store. The employment application contained a “Dispute Resolution Agreement” that required the parties to resolve all of their disputes (pre- and post-employment) in arbitration rather than resorting to the courts. Johnson was not hired and she sued Circuit City for race discrimination. The court ruled the agreement was valid. Id. It found that Circuit City's consideration was the company's pledge to arbitrate any claims it had against the applicant. Id.

In Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), the court addressed whether a hospital could compel arbitration in a suit filed against it by a doctor. A company called LocumTenens.com (“Locum”) is an online medical professional placement corporation, which places doctors in hospitals throughout the United States. In 2006, Locum entered into a contract with the defendant hospital to place temporary doctors at the hospital to work as independent contractors. That contract contained an arbitration clause. In 2007, Locum entered into a contract with the plaintiff anesthesiologist to place him at the defendant hospital for a few months. That contract also contained an arbitration clause.

After the hospital fired the plaintiff, he filed suit against the hospital for numerous causes of action. The hospital filed a motion to compel arbitration. The trial court denied the motion because the plaintiff did not sign an agreement with the hospital to arbitrate any claims, and the contract between Locum and the hospital was general in nature and not specific to the plaintiff.

The court of appeals reversed the trial court’s denial of the hospital’s motion to compel arbitration. The court held that Dr. Pearson was equitably estopped from disclaiming the arbitration agreement in the contract between Locum and the hospital. The court reasoned that the plaintiff benefitted from the contract in that he was able to work at the hospital and receive compensation; thus, he should not be able to disclaim the arbitration agreement contained in that contract.

V. ORAL AGREEMENTS

A. Promissory Estoppel

As a general matter, a written agreement may be orally modified so long as the modification is supported by consideration, even if the written contract explicitly states all changes must be in writing. APAC-Carolina, Inc. v. Towns of Allendale & Fairfax, S.C., 868 F. Supp. 815 (D.S.C. 1993), aff'd, 41 F.3d 157 (4th Cir. 1994). However, if the contract is unambiguous, extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its plain terms. See Bates v. Lewis, 311 S.C. 158, 427 S.E.2d 907 (Ct. App. 1994).

The oral statement “as long as you do your job, keep your nose clean, that you’d have a job at Farmers Telephone right on” is not sufficiently explicit to constitute an offer to limit termination to just cause, thereby altering the at-will employment status. See Prescott v. Farmers Tel. Coop. Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). The South Carolina Supreme Court concluded that a reasonable person in Prescott’s position would construe the statement as praise or encouragement, or even “puffery,” rather than as an offer of definite employment. Id. Vague assurances of job security, even if repeated, do not give rise to contractual rights. In Prescott, the court took great pains to affirm and adhere to the employment at-will doctrine in South Carolina, while at the same time firmly establishing principles that allow employees to prove oral, unilateral contracts in derogation of the at-will rule. Id.

“Promissory estoppel comes into play in situations where actual consideration is not present, and is thus inapplicable in situations where a contract exists since a necessary element of a valid contract is consideration.” White v. Roche Biomedical Lab., Inc., 807 F. Supp. 1212, 1217 (D.S.C. 1992) (citations omitted), aff'd, 998 F.2d 1011 (4th Cir. 1993).

In South Carolina, the elements of promissory estoppel are: (1) the presence of a promise unambiguous on its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. Id.

In King v. PYA/Monarch, Inc., 317 S.C. 385, 453 S.E.2d 885 (1995), an employee was given oral assurances of job security and guaranteed that he could not be terminated without just cause at the time of employment. The employee was not given a copy of an employee manual, but he was aware one existed and he was told that three warnings would be issued before termination. The employee was subsequently discharged and sued for breach of employment contract. The employer argued that the manual could not have been relied upon by the employee to create a contract since it was intended for their supervisor's discretion only and it was not given to the employees. The court recognized that although the manual was not distributed, the employee was told of its existence and that the employer followed a three reprimand system and they could not terminate without cause. The court held that once the employer “voluntarily chose to (1) publish the Rules and Regulations and (2) orally assure [the employee] that their provisions would be followed in compliance with the Manual, [the employer] cannot later deviate from these assurances at its own pleasure.” Id. at 389, 453 S.E.2d at 888.

In Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 620 S.E.2d 65 (2005), the court held that summary judgment was proper as to the plaintiffs' promissory estoppel claim, because it was unreasonable for the teachers to rely upon the school district's statement that the teachers would receive a ten percent salary increase if they became national board certified because the record indicated that the employer informed the teachers on several occasions that the incentive was subject to the board's approval.

Under South Carolina law, the alleged promise must be established in unambiguous terms to support an action for estoppel. Rushing v. McKinney, 370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006). In Rushing, the plaintiff brought a promissory estoppel claim based on statements allegedly made by the Defendant that he planned to "settle up" certain funds. The Rushing court, however, held that the alleged statements were not specific enough to constitute an unambiguous promise. The court emphasized that the plaintiff could not clearly articulate the specific terms of the alleged promise. Accordingly, the Rushing court held that the plaintiff was "precluded from recovering on a theory of promissory estoppel." Id.

In Bishop v. City of Columbia, 401 S.C. 651, 738 S.E.2d 255, 261 (Ct. App. 2013), the city forced retirees to start contributing to their group health insurance plans, despite promising free health care for life. The retirees sued the city on an equitable estoppel cause of action. Specifically, retirees asserted that they detrimentally relied on promises from city employees that the health insurance would be free for life. The court reversed summary judgment and held that a question of fact existed as to whether explanations by city employees were authorized and reasonably relied upon. Id.

B. Fraud

Breach of contract accompanied by fraudulent act is not based on the same elements as fraud, and, thus, failure to recover on claim for fraud does not prevent recovery for breach of contract accompanied by fraudulent act. Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993).

In order to recover for breach of contract accompanied by fraudulent act, the plaintiff must establish a breach of a contract, that the breach was accompanied with fraudulent intention, and that the breach was accompanied by fraudulent act. Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996).

A genuine issue of material fact may arise as to whether an employer fraudulently breaches a contract of employment by fabricating pretextual reasons for an employee's termination knowing the reasons were false without justifying termination for cause. Conner, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002).

C. Statute of Frauds

South Carolina's Statute of Frauds is codified at Section 32-3-10 of the South Carolina Code.

In Lewis v. Finetex, Inc., the court applied the Statute of Frauds to an employee's oral contract claim holding that "it is clear that an oral contract of employment for eighteen months is within the statute of frauds since it is incapable of performance within one year." 488 F. Supp. 12, 13 (D.S.C. 1977).

Parol evidence is admissible to show that the writing at issue was procured with fraudulent intent. Hansen v. DHL Labs., Inc., 319 S.C. 79, 459 S.E.2d 850 (1995).

VI. DEFAMATION

A. General Rule

1. Libel

A plaintiff can recover damages for a false spoken or written statement which damages his reputation if he can show that the statement had defamatory meaning, was published with actual or implied malice, was false, was published by defendant, concerned plaintiff and resulted in presumed damages or special damages to the plaintiff. Parker v. Evening Post Pub. Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994); see also Hampton v. Conso Prods., Inc., 808 F. Supp. 1227 (D.S.C. 1992) (employer did not defame employee by placing employee on medical leave; employee offered no evidence she did not require medical treatment or was not mentally ill, and no reasonable trier of fact could find that employer acted maliciously in requesting employee to go on medical leave and receive medical treatment at employer's expense).

Defamation in South Carolina is "classified as either actionable *per se* or not actionable *per se*." Fountain v. First Reliance Bank, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012). Libel (written or printed defamation) is actionable *per se* and the plaintiff does not need to prove special damages. Seaton v. City of N. Charleston, 2012 WL 6186158, at *3 (D.S.C. Dec. 12, 2012). Slander (spoken or communicated defamation) is only actionable *per se* when the alleged statements charge the plaintiff with one of five things: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession. Fountain, 398 S.C. at 442, 730 S.E.2d at 309. Whether a statement is actionable *per se* is a question of law for the court. Id. "If the statement is actionable *per se*, then the defendant 'is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.' If the statement is not actionable *per se*, then 'the plaintiff must plead and prove both common law malice and special damages.'" Id., citing Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006).

"To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 272 S.E.2d 633 (1980) (court would not determine on motion for summary judgment whether employee's discharge following the giving of a polygraph test gave fellow employees the belief that he had been discharged for a wrongful activity such that employee could bring action for defamation).

In Howard v. Allen Univ., 2012 WL 3637746, at *4 (D.S.C. Aug. 22, 2012), the court denied a motion to dismiss plaintiff's defamation claim filed on behalf of the President and Interim President of the university. The plaintiff argued that the action of stripping the plaintiff of his significant duties insinuated that he was unfit for his position or that he had engaged in misconduct. Id. Analyzing the claim as "false insinuation defamation", the court held third parties "could have reasonably inferred that Plaintiff was stripped of his job duties, budget, and staff, and Dr. Wilson terminated him, because he was unfit for the position." Id.

A plaintiff must specifically plead to whom the defamatory statements were made. Campbell v. Int'l Paper Co., 2013 WL 1874850 at *4, (D.S.C. May 3, 2013). In Campbell, the court held that simply alleging that an employer made defamatory statements "publicly known" is not enough. Id.

In Seaton v. City of North Charleston, 2012 WL 6186158 (D.S.C. Dec. 12, 2012), a former firefighter brought suit against her former employer, the City of North Charleston, alleging defamation and defamation *per se*. The court discussed South Carolina's jurisprudence on defamation, and cleared up the standard for asserting a claim. In New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964), the United States Supreme Court held that public officials must prove "actual malice" in a defamation suit. "Actual malice" is defined as "knowledge of falsity or reckless disregard as to truth or falsity." Seaton, 2012 WL 6186158 at *2 (citing Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497, 505, 514 (1998)). On the other hand, "common law malice" involves ill will with the intent to injure the plaintiff. Id. The court held that a plaintiff bringing a claim for defamation that is not actionable *per se* must prove that the defendant acted with "common law malice," and not "actual malice." Id. at *4.

The Seaton court also addressed whether the South Carolina Tort Claims Act ("SCTCA") shields government entities from defamation suits. The SCTCA states that government entities are not liable for losses resulting from employee conduct which includes "actual malice." Id.; see also S.C. CODE ANN. § 15-78-60(17). The court cited several South Carolina cases for the proposition that this "actual malice" is a reference to the constitutional standard enunciated by Sullivan. See, e.g., Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994); Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640, 643 (S.C. 1991). Therefore, since a plaintiff has to show "common law malice" in a defamation suit, a governmental entity may be liable for a loss resulting from defamation.

2. Slander

See discussion under "Libel" above.

B. References

Pursuant to section 41-1-65 of the South Carolina Code Annotated, employers are granted immunity from liability for the disclosure of certain information. An employer can orally disclose information to a prospective employer relating to a current or former employee's

dates of employment, pay level and wage history.

Furthermore, an employer can respond in writing to a prospective employer's written request concerning (1) written employee evaluations (must be written evaluation signed by employee), (2) job performance, (3) official personnel notices that formally record the reasons for separation, (4) whether an employee was voluntarily or involuntarily released and (5) the reason for the separation. Id.

Employers must give employees access to any information released to prospective employers. The law does not protect employers who knowingly or recklessly communicate information received from a source known or thought to be unreliable or release or disclose false information regarding a current or former employee. Id.

Employers should be careful to limit the scope of communication to avoid extraneous matters and to avoid publication to others than those to whom the privilege applies. See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986).

In Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001), the plaintiff was an employee who was terminated for allegedly stealing gasoline, although the company failed to fully investigate the incident or explain the allegations to the plaintiff. At a meeting after the Plaintiff was terminated, his supervisor told at least six other employees that he was fired for misappropriating or misusing company property. The plaintiff filed a defamation suit against both his supervisor and Holnam, Inc. regarding the statement made at the meeting. The Murray court held that the employer could be vicariously liable for defamatory statements made by an agent acting within the scope of his employment even if the agent was not expressly authorized to make it. The court also stated that the qualified privilege applies to communications between officers and employees of a corporation if made in good faith and in the usual course of business. However, where the speaker exceeds his privilege and his statements go beyond what the occasion requires, he will not be protected. The court held whether or not the plaintiff was unnecessarily defamed was a question for the jury. But see King v. Charleston Cnty. Sch. Dist., 664 F.Supp.2d 571, 586 (D. S.C. 2009) (holding school psychologist did not have authority to speak on behalf of the Defendant School District, and thus, school psychologist's alleged statement could not render School District liable for defamation).

C. Privileges

Absolute privilege exists as to any utterance arising out of judicial proceeding and having any reasonable relation to it. Woodward v. Weiss, 932 F. Supp. 723 (D.S.C. 1996), aff'd, 1997 U.S. App. LEXIS 27095 (4th Cir. 1997). The "judicial proceedings" to which this absolute immunity applies include preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it. Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990); see also Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002).

Where the publication is made in good faith and with proper motives, a person may claim a qualified or conditional privilege. The privilege exists if the person "correctly or reasonably

believes that some important interest of his own or a third party is threatened.” A qualified privilege may exist where the parties have a common business interest. However, the protection of a qualified privilege may be lost by the manner of its exercise. The publication must have occurred in a proper manner and to proper parties only. Moshtaghi v. Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994), citing Fulton v. Atlantic Coast Line R.R. Co., 220 S.C. 287, 67 S.E.2d 425 (1951); Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986); see also S.C. CODE ANN. § 41-1-65 (employers granted immunity from liability for disclosure of information).

Under South Carolina law, communications between servants, agents, business associates, or officers of the same corporation have a qualified privilege. Statements made by supervisors to an employer's agent that they were investigating an employee's accusations of sexual harassment against a co-worker and asking whether she knew anything about those accusations were protected by qualified privilege in the context of the co-worker's defamation claim; there was no evidence that the supervisors did not act in good faith in investigating the employee's allegations of harassment, and the supervisor's statements to the agent were made in the privacy of the agent's home. Bell v. Evening Post Pub Co., 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1995); see also Murray, 344 S.C. 129, 542 S.E.2d 743; Harris v. Tietex Int'l Ltd., Ct. App. Appellate Case No. 2014-000902 (Ct. App. Jun. 29, 2016, Op. No. 5418) (affirming the trial court's grant of summary judgment for the employer, finding the plaintiff's defamation claim based on three internal memos that concern an evaluation of his job performance fails because the plaintiff does not argue malice or abuse of privilege), petition for cert. pending (S.C. Sup. Ct. Appellate Case No. 2016-002125).

D. Other Defenses

1. Truth

Truth of the communication is a complete defense to a defamation action. See Parker v. Evening Post Pub. Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994).

In Castine v. Castine, 403 S.C. 259, 743 S.E.2d 93 (Ct. App. 2013), the court held that a defendant must demonstrate “substantial truth” to each individual statement that he or she made. The defendant wrote a letter to the plaintiff's employer that contained numerous incriminatory remarks about the plaintiff. The defendant's stated purpose was to get the plaintiff fired. The defendant pled truth as an absolute defense. The court held that the defendant was not entitled to the truth defense as a matter of law because he admitted that one of the allegations in the letter was false.

2. No Publication

A business or corporation is a single entity. South Carolina courts have suggested that communications between officers and agents of a corporation and dictation to a stenographer employed by the corporation do not constitute publication. Watson v. Wannamaker, 216 S.C. 295, 57 S.E.2d 477 (1950). But see McBride v. Sch. Dist. of Greenville Cnty., 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010) (“[I]n South Carolina, an employee's statement to

another employee is a ‘publication’ when the privilege of the employees’ common interest is abused.”).

3. Self-Publication

The publication requirement is not satisfied when the allegedly defamatory information is communicated to third parties by the plaintiff rather than the defendant. Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 272 S.E.2d 633 (1980).

4. Invited Libel

An employee who approves the content of a letter of reference consents to its publication and cannot later hold the employer liable for the statements in the letter. Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984).

5. Opinion

Words must be given their ordinary and popular meaning, be of and concerning the plaintiff, judged in the light of the facts, to whom it is addressed, and considered as a whole. Pierce v. Nw. Mut. Life Ins. Co., 444 F. Supp. 1098 (D.S.C. 1978). A jury is required to determine the sense in which a defendant used allegedly defamatory words. Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909 (1968).

E. Job References and Blacklisting Statutes

South Carolina does not have a blacklisting statute.

F. Non-Disparagement Clauses

There are no reported cases on this issue.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

In Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981), the South Carolina Supreme Court first recognized the tort of intentional infliction of emotional distress, also known as outrage. In order to maintain an action for outrage in South Carolina, a plaintiff must establish the following:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct,
- (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community,
- (3) the actions of the defendant caused the plaintiff emotional distress,
- and (4) the emotional distress suffered by the plaintiff was so severe that no

reasonable man could be expected to endure it.

Id. at 778; see also Todd v. S.C. Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602, quashed in part on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). In addition, “[t]he law limits the claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. It is not enough that the conduct is intentional and outrageous. It must be conduct directed at the plaintiff, or occur in the presence of a plaintiff, of whom the defendant is aware.” Upchurch v. N.Y. Times Co., 314 S.C. 531, 431 S.E.2d 558 (1993) (citations omitted).

It is a matter of law for the court to determine in the first instance whether a defendant's conduct is so extreme and outrageous as to allow recovery. Butts v. AVX Corp., 292 S.C. 256, 355 S.E.2d 876 (Ct. App. 1987); see also Corder v. Champion Rd. Mach. Int'l Corp., 283 S.C. 520, 324 S.E.2d 79 (Ct. App. 1984) (alleged threats of discharge and retaliatory discharge for filing worker's compensation claims did not constitute extreme, atrocious, utterly intolerable conduct required to state cause of action for tort of outrage).

A claim of outrage may be rebutted by proof that a defendant acted in good faith and in a reasonable manner, even though the plaintiff is put to considerable distress and embarrassment. Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987).

Wrongful discharge does not constitute behavior which is so extreme and outrageous as to support a claim for outrage, no matter how unfair or reprehensible the circumstances. Butts, 292 S.C. 256, 355 S.E.2d 876; Corder, 283 S.C. 520, 324 S.E.2d 79 (a party who does nothing more than charge that one's termination from a job constitutes outrageous conduct will not state an adequate cause of action for outrage under South Carolina law).

An employee may combine an outrage claim with causes of action provided under the discrimination statutes. Frazier v. Badger, 361 S.C. 94, 603 S.E.2d 587 (2004) (middle school teacher could bring common-law action against assistant principal for outrage, rather than statutory civil rights suit for sexual harassment; these were not mutually exclusive avenues for relief).

In Hansson v. Scalise Builders of S. Carolina, 374 S.C. 352, 650 S.E.2d 68 (2007), the South Carolina Supreme Court clarified the standard for summary judgment on outrage claims. The plaintiff in Hansson was a construction worker and alleged that his coworkers “constantly derided him with callous and vulgar remarks and gestures related to homosexuality.” The plaintiff alleged that he suffered a loss of sleep and started grinding his teeth as a result of his coworkers conduct. The Court of Appeals held that the lower court erred in granting summary judgment on the plaintiff's emotional distress claim and held that the plaintiff had “demonstrated a genuine issue of material fact regarding the element of ‘outrageous conduct.’”

The Supreme Court in Hansson reversed the Court of Appeals and held that in order to recover damages for purely mental or emotional distress “the plaintiff must show both that the conduct on the part of the defendant was extreme and outrageous, and that the conduct caused distress of an ‘extreme or severe nature.’” Id., at 356, 650 S.E.2d at 71. The Court rejected the

plaintiff's assertion that the Court of Appeals properly ended its summary judgment analysis with the determination that reasonable minds could differ as to whether the defendant's conduct was extreme and outrageous. The Court held that "when ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim for intentional infliction of emotional distress." Id. at 358, 650 S.E.2d at 71. The Court determined that because plaintiff admitted that he did not miss any work as a result of the actions of his coworkers, the plaintiff "failed to provide any legally sufficient evidence . . . to show his resulting emotional distress was severe within the contemplation of this Court's mental anguish jurisprudence." Id. at 359-60, 650 S.E.2d at 72.

The South Carolina Court Tort Claims Act may bar suit for outrage against the government, because the Act provides that there is no governmental liability for "employee conduct . . . which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. CODE ANN. § 15-78-60(17).

The South Carolina Workers Compensation Act ("Act") covers employee claims for intentional infliction of emotional distress. Crutchfield v. Pfizer, Inc., 2013 WL 2897023 (D.S.C. June 13, 2013). Since intentional infliction of emotional distress claims fall within the Act, the Act is the exclusive remedy for employees. In Crutchfield, the employee argued that she could sue her co-workers in their individual capacities. The court disagreed, and held that "immunity under the Act 'is conferred not only on the direct employer but also on co-employees.'" Id., citing Posey v. Proper Mold & Eng'g, Inc., 378 S.C. 210, 661 S.E.2d 395, 403 (Ct. App. 2008).

In order to proceed on a claim for intentional infliction of emotional distress against a co-employee, the plaintiff must show that the defendant acted outside the scope of his or her employment. Nelson v. Sci. Applications Intern. Corp., 2013 WL 764664, at *11 (D.S.C. Feb. 7, 2013).

B. Negligent Infliction of Emotional Distress

South Carolina courts have limited recognition of negligent infliction of emotional distress claims to those alleging "bystander liability." Doe v. Greenville Sch. Dist., 375 S.C. 63, 651 S.E.2d 305 (2007). In order to prevail on this cause of action, a plaintiff must show that: (a) the negligence of the defendant caused death or serious physical injury to another; (b) the plaintiff bystander was in close proximity to the accident; (c) the plaintiff and the victim are closely related; (d) the plaintiff contemporaneously perceived the accident; and (e) the plaintiff's emotional distress manifests itself by physical symptoms capable of objective diagnosis and be established by expert testimony. Id.

VIII. PRIVACY RIGHTS

A. Generally

"In South Carolina, three separate and distinct causes of action can arise under the rubric of invasion of privacy: (1) wrongful appropriation of personality; (2) wrongful publicizing of private affairs; and (3) wrongful intrusion into private affairs." Snakenberg v. Hartford Cas. Ins.

Co., 299 S.C. 164, 170, 383 S.E.2d 2, 5 (Ct. App. 1989).

“Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff’s name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff’s exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity.” Id.

“Wrongful publicizing of private affairs involves a public disclosure of private facts about the plaintiff. The gravamen of the tort is publicity as opposed to mere publication. The defendant must intentionally disclose facts in which there is no legitimate public interest—there is no right of privacy in public matters. Additionally, the disclosure must be such as would be highly offensive and likely to cause serious mental injury to a person of ordinary sensibilities.” Id. at 170–71, 383 S.E.2d at 6.

Under South Carolina law, to maintain a cause of action for invasion of privacy for wrongful intrusion into private affairs, the plaintiff has the burden of proving that there has been (1) an intrusion, (2) into that which is private, (3) which is substantial and unreasonable, and (4) which is intentional. Id. at 171–72, 383 S.E.2d at 6.

Private matters are those topics which concern aspects of the plaintiff personally and things that are not matters of general concern. See Snakenberg, 299 S.C. at 172, 383 S.E.2d at 6; see also Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956). For an intrusion to rise to the level of substantial and unreasonable action, the conduct must be blatant and shocking such that a person of ordinary feelings and sensibilities would, under like circumstances, experience mental injury, harm or humiliation. Snakenberg, 299 S.C. at 171, 383 S.E.2d at 6. Whether the conduct in question meets this test is, in the first instance, a question of law for the court. Id. at 172. The law, however, does not protect excessive sensibility. Whether or not the conduct was severe enough to incur a liability is a question of law. Meetze, 230 S.C. 330, 95 S.E.2d 606 (1956).

In Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836 (2003), the employer complained to the Workers’ Compensation Commission regarding letters sent by the employee’s attorney to claimant’s treating physicians, which threatened legal action if the physicians discussed the claimant’s condition and cause of falls subsequent to the compensable injury for which the claimant sought additional covered medical treatment. The Commission issued a cease and desist order to the claimant’s attorney, and the claimant sought review. Both the circuit court and the court of appeals affirmed the Commission; however, on certiorari review, the South Carolina Supreme Court reversed, holding that the provision of the Workers’ Compensation Act governing disclosure to the employer of the employee-claimant’s existing written records and documentary materials did not authorize other ex parte methods of communication between the employer, or its representatives, and claimant’s health care provider.

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

All private employers who are required to complete federal employment eligibility verification forms or documents must register and participate in the federal “E-Verify” program. S.C. CODE ANN. § 41-8-20. The employer must verify the work authorization of each new employee within three business days of employing that person. Id. “A private employer who knowingly or intentionally employs an unauthorized alien violates the private employer's licenses.” S.C. CODE ANN. § 41-8-30. Failure to use E-Verify will result in probation, suspension, or revocation of your business license. S.C. CODE ANN. § 41-8-50.

In addition, “[a] public employer may not enter into a services contract with a contractor for the physical performance of services within this State unless the contractor agrees to register and participate in the federal work authorization program to verify the employment authorization of all new employees and require agreement from its subcontractors, and through the subcontractors, the sub-subcontractors, to register and participate in the federal work authorization program to verify the employment authorization of all new employees[.]” S.C. CODE ANN. § 8-14-20(B).

2. Background Checks

Employers may obtain an applicant’s criminal history information, unless sealed, from the South Carolina Law Enforcement Division. S.C. CODE ANN. REGS. 73-23. See also generally, S.C. CODE ANN. §§ 23-3-110 thru -140.

C. Other Specific Issues

1. Workplace Searches

There are no reported cases on this issue.

2. Electronic Monitoring

In the State of South Carolina, it is “unlawful for any person to be an eavesdropper or a peeping tom . . . for the purpose of spying upon or invading the privacy of the persons spied upon and the doing of any other acts of a similar nature tending to invade the privacy of such persons.” S.C. CODE ANN. § 16-17-470(A). However, the bona fide business use of “security surveillance for the purposes of decreasing or prosecuting theft, shoplifting, or other security surveillance measures,” is specifically excluded from the "Peeping Tom" statute. Id. at § 16-17-470(E).

South Carolina has enacted a law allowing an employer to monitor its employees’ electronic and oral communications with prior consent. The law does not define “prior consent.” See S.C. CODE ANN. § 17-30-30(C) (“It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.”).

3. Social Media

In Shelton v. Newberry County School District, 2018 WL 4573094 (D.S.C. May 17, 2018), report and recommendation adopted, 2018 WL 3490908 (D.S.C. July 20, 2018), the plaintiff, an African-American male who was employed as a Parenting Coordinator at an elementary school, was terminated following several warnings concerning the content and nature of social media posts. The plaintiff alleged “that the defendant’s advisement that he needed to be aware of the opinions of the conservative, white Board members in making his Facebook posts was an unconstitutional abridgement on its face of his freedom of speech, and that the defendant’s warnings that he needed to comply with other overbroad restrictions . . . were unconstitutionally overbroad restrictions on expressive activity, on their face and as applied or threatened to be applied.” Id., 2018 WL 4573094 at *10. While the defendant’s Staff Conduct policy, at issue, did not specifically address social media use, the plaintiff asserted the defendant’s interpretation of the policy and explanation and guidelines imposed at orientation and throughout his employment violated his constitutional rights. Id., 2018 WL 4573094 at *10–13. Thus, the plaintiff did not rely on the language itself; “[r]ather the plaintiff argue[d] that the defendant’s ‘erroneous, subjective and ambiguous interpretation of speech restrictions’ render the policy unconstitutional.” Id., 2018 WL 4573094 at *12. The orientation and guidance concerning social media use included the following: a PowerPoint presentation highlighting guidelines related employee use of social media; specific advice to avoid posting photos or other information that could “portray the District to be in a negative light”; reminders that the defendant expected employees to serve as positive role models for students; and encouragement to employees to use the privacy settings on their social media accounts. Id., 2018 WL 4573094 at *1–2.

Rejecting the plaintiff’s argument, the court found that although the staff conduct policy could be applied in a way that violates the employee’s constitutional rights, the policy itself is not constitutionally invalid on the basis of being overbroad or impermissibly vague and that the social media guidelines as applied were sufficient for ordinary people to understand what conduct is prohibited. Id., 2018 WL 4573094 at **13–14. Notably, the court also rejected the plaintiff’s prior restraint argument under the First Amendment. Id., 2018 WL 4573094 at *11 (noting that under the policy it is only *after* speech is uttered that violation of the policy can occur; thus, there is no prior restraint—i.e. forbidding of certain communications). The Court granted the defendant summary judgment on the plaintiff’s First Amendment facial challenge, finding the defendant’s conduct policy was not facially unconstitutional on overbreadth and vagueness grounds. 2018 WL 3490908, *1 (D.S.C. July 20, 2018), adopting report and recommendation 2018 WL 4573094 at *14.

4. Taping of Employees

See discussion under “Electronic Monitoring” above.

5. Release of Personal Information on Employees

There are no reported cases on this issue.

6. Medical Information

The following South Carolina statutes address issues involving medical information:

S.C. CODE ANN. § 44-22-100 (confidentiality of drug abuse and mental health patient records); S.C. CODE ANN. § 41-1-15 (confidentiality of test results received by employer through a substance abuse program); S.C. CODE ANN. § 40-75-190 (confidentiality of communications between clients and licensed counselors and therapists); and S.C. CODE ANN. § 44-115-40 (requires express written consent of patient before physician may release copies of medical records).

IX. WORKPLACE SAFETY

A. Negligent Hiring

“In circumstances where an employer knew of or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring . . . the employee” James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). “Negligent hiring cases ‘generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties.’” Kase v. Ebert, 392 S.C. 57, 63, 707 S.E.2d 456,459 (Ct. App. 2011), citing Doe v. ATC, Inc., 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2005).

In Kase v. Ebert, 392 S.C. 57, 63, 707 S.E.2d 456,459 (Ct. App. 2011) the court held that an employee’s single assault conviction twenty years prior to his hiring by employer was not reason for the employer to foresee employing employee would create an undue risk of harm to the public. Kase, 392 S.C. at 63, 707 S.E.2d at 459.

B. Negligent Supervision/Retention

Under certain circumstances, an employer is under a duty to exercise reasonable care to control an employee acting outside the scope of his employment. An employer may be liable for negligent supervision if the employee intentionally harms another when he: “(1) is upon the premises in possession of the [employer] or upon which the [employee] is privileged to enter only as his [employee], or (2) is using a chattel of [the employer] and . . . [the employer] (a) knows or has reason to know that he has the ability to control his [employee], and (b) knows or should know of the necessity and opportunity for exercising such control.” Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992) (citing Restatement (Second) of Torts § 317 (1965)).

In James v. Kelly Trucking Co., 377 S.C. 628, 661 S.E.2d 329 (2008), the South Carolina Supreme Court addressed the following certified question: “Does South Carolina law prohibit a plaintiff from pursuing a negligent hiring, training, supervision, or entrustment claim once *respondeat superior* liability has been admitted?” The court noted, “In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public.” Id. at 330, 377

S.C. at 631. Thus, the court answered the certified question “no.”

In Doe v. ATC, Inc., 367 S.C. 199, 624 S.E.2d 447 (Ct. App. 2005), the court held that “a single isolated incident of prior misconduct (of which the employer knew or should have known) may support a negligent retention claim, provided the prior misconduct has a sufficient nexus to the ultimate harm.”

In Hollins v. Wal-Mart Stores, Inc., 381 S.C. 245, 672 S.E.2d 805 (Ct. App. 2008), a mother sued Wal-Mart after her daughter was touched by a Wal-Mart employee who began masturbating in her presence. The court of appeals held the trial court properly excluded the testimony of a police officer who arrested the employee after the officer was told the employee exposed himself to young girls. The court held the evidence was not relevant to the tort of negligent supervision because there was no evidence Wal-Mart knew of the arrest, as the arrest took place on the edge of Wal-Mart property without attracting attention of on-lookers, the employee was not working at the time and was in plain clothes, and Wal-Mart was not contacted about the incident.

In Hoskins v. King, 676 F.Supp.2d 441 (D.S.C. 2009), the court granted summary judgment to an employer on the plaintiff’s negligent supervision claim where the employee struck and killed a bicyclist while she was talking on the employer’s cell phone. The court held that even though the employer knew the employee had previously been in a car accident while talking on a cell phone, the employer did not have sufficient notice that entrusting the employee with a cell phone would pose an unreasonable risk to the public. Id.

C. Interplay with Worker’s Comp. Bar

The South Carolina Worker’s Compensation Act (“Act”) provides the exclusive remedy for an employee against his employer for a work-related injury. See S.C. CODE ANN. § 42-1-540. The exclusivity provision provides employers with immunity from civil suit. Posey v. Proper Mold & Eng’g, Inc., 378 S.C. 210, 224, 661 S.E.2d 395, 403 (Ct. App. 2008). This same immunity applies to co-employees. Id.

However, South Carolina courts recognize a limited exception to the exclusivity provision where the employer commits an intentional tort. This exception allows a plaintiff to maintain an action against an employer when the tortfeasor is the “alter ego” of the employer. See Dickert v. Metro. Life Ins. Co., 311 S.C. 218, 428 S.E.2d 700 (1993).

In Klump v. Bausch and Lomb, Inc., 2010 WL 3852275 (D.S.C. Sept. 24, 2010), the court noted that the “alter-ego” exception does not necessarily bar a plaintiff’s claim against an individual co-worker for deliberate sexual misconduct. Thus, the court espoused that a co-worker may be subject to liability for an intentional tort “so long as the plaintiff can establish the tortfeasor acted with the requisite specific intent” to injure the plaintiff.

While the Klump court noted the immunity under the exclusivity provision of the Act does not necessarily bar a plaintiff’s direct claim against a co-worker, in Lindquist v. Tanner, 2013 WL 4441946 (D.S.C. June 26, 2013), adopted id. at *1 n.1 (D.S.C. Aug. 15, 2013), the

court held that even if a co-worker's "conduct could be construed as 'intentional', this exception only applies where the allegedly intentional conduct was committed by the employer through an "alter ego" of the employer itself." Id. 2013 WL 4441946 at *22.

In Lindquist, the plaintiff alleged state law claims for civil assault and battery against a co-worker, claiming the co-worker had blown a kiss to her, and hugged and kissed her twice. Id. at *7. The plaintiff argued that her co-worker was her boss and therefore constituted her employer under the "alter-ego" exception to an individual's immunity for a tort under the workers' compensation exclusivity provision. The court found, however, that while the co-worker "may have been empowered to give instructions to the [p]laintiff about what duties she was to perform on any given work day, there is no evidence to show that he was even a manager; rather, [another employee] was the [plaintiff's and the defendant co-worker's] manager[.]" Id. at *22. Accordingly, the court held that the co-worker's conduct was not "intentional" conduct of the plaintiff's employer for purposes of the Act's "alter ego" exception and, therefore, "any 'injuries' suffered by the [p]laintiff as a result of this incident are covered under the Worker's Compensation Act." Id.

D. Firearms in the Workplace

S.C. CODE ANN. § 23-31-220 allows public and private employers to prohibit persons from carrying weapons in the workplace.

E. Use of Mobile Devices

South Carolina does not have a statute governing mobile device use in the workplace.

X. TORT LIABILITY

A. Respondeat Superior Liability

A plaintiff attempting to recover against a master under a theory of *respondeat superior* must prove (1) that a master servant relationship existed at the time of the injuries; and (2) the servant was acting within the scope of his employment at the time of the tortious act. See Armstrong v. Food Lion, Inc., 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006).

The plaintiff must first prove that a master-servant relationship exists. See Felts v. Richland Cnty., 303 S.C. 354, 357, 400 S.E.2d 781, 782 (1991). "The primary consideration in determining whether a master-servant relationship exists is whether the purported master has the right to control the servant in the performance of his work, and the manner in which it is done." Id. (citing Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480 (1909); Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969) (emphasis in original)). Courts generally look to four factors to determine the right of control: "(1) direct evidence of the right to, or exercise of, control, (2) method of payment, (3) furnishing of equipment and (4) right to fire." Id. (citing Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971)).

In Watkins v. Mobil Oil Corp., 291 S.C. 62, 64-65, 352 S.E.2d 284, 285 (Ct. App. 1986), a gas station employee named McCampbell assaulted a customer. A company called Station Operators, Inc. operated the gas station. The injured customer brought suit against Mobil Oil Corporation (brand of oil used at station) alleging that McCampbell was an agent/servant/employee of Mobil. The court held that no such relationship existed because the plaintiff failed to produce evidence that “Mobil asserted any right to control Station Operators’ operations or its employees, including McCampbell.” Id. at 66, 352 S.E.2d at 286. The court found that:

Indeed, the evidence shows nothing more than that Station Operators sold Mobil's gasoline, permitted an employee to wear clothing exhibiting Mobil's emblem, and displayed Mobil's name atop its station and on its pumps. The display of Mobil signs and its emblem merely represented to motorists and others that the station marketed Mobil's products.

Id. (citing Coe v. Esau, 377 P.2d 815 (Okla. 1963)).

In Jamison v. Morris, 385 S.C. 215, 220, 684 S.E.2d 168, 170 (2009), the plaintiff passenger was injured in an automobile accident when the driver of the vehicle was intoxicated at the time of the crash. The plaintiff brought suit against the Texaco Mini Mart (“Mini Mart”) alleging that the Mini Mart illegally sold beer to the underage driver. The plaintiff also brought suit against Anderson Oil Company (“Anderson”), who provided gasoline to Mini Mart, and Texaco, the franchisor.

The court stated that whether or not Texaco or Anderson could be held liable under a theory of vicarious liability is whether either one “has the right or power . . . to control Mini Mart ‘in the performance of [its] work and the manner in which the work is to be done.’” Id. at 222, 684 S.E.2d at 171 (citing Watkins, 291 S.C. at 65-66, 352 S.E.2d at 286). The court then said that “[w]e find nothing . . . which supports a finding that Texaco or Anderson exercised control over the sale of food, beverages, or general merchandise by Mini Mart.” Id. at 224, 684 S.E.2d at 172.

An act is within the scope of a servant’s employment where the act is “reasonably necessary to accomplish the purpose of his employment and is in furtherance of the master’s business.” Lane v. Modern Music, Inc., 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964). An employee is not acting within the scope of the employment when the employee acts for his or her own personal reasons wholly disconnected from the employment. If there is uncertainty as to whether the employee was acting within the scope of his employment, the question will be resolved against the master and submitted to the jury for a determination. Crittenden v. Thompson-Walker Co., 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986).

In Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 227, 317 S.E.2d 748, 753 (Ct. App. 1984), the court upheld a jury’s finding that two Harris Teeter employees were acting within the scope of their employment when they took part in the detention of a suspected shoplifter.

In Armstrong v. Food Lion, Inc., 371 S.C. 271, 276-77, 639 S.E.2d 50, 53 (2006), the court held that Food Lion employees were not acting within the scope of their employment when they attacked and injured customers.

B. Tortious Interference with Business/Contractual Relations

The tort of interference with contractual relations can be asserted when a third party takes some action to get an employee fired. The third party may be a former, but not the current employer. A plaintiff must prove that (1) there is an employment contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom. Deberry v. McCain, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981).

A claim for interference with prospective contractual relations can be made, for example, when a third party wrongfully acts to prevent a plaintiff from securing an employment opportunity. A plaintiff must show (1) that the defendant intentionally interfered with plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 395 S.E.2d 179 (1990).

In a related context, an employee can, however, maintain a civil conspiracy action against third parties whose alleged decision to terminate her and maliciously induce her employer to fire her resulted in her termination. Angus v. Burroughs & Chapin Co., 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), rev'd 368 S.C. 167, 628 S.E.2d 261 (2006) (holding that employee's status as a public official precluded her from maintaining a civil conspiracy action).

In Faile v. Lancaster County, 2013 WL 786447, at *5 (D.S.C. Mar. 1, 2013), the court held that an at-will employee cannot bring a civil conspiracy claim against an employer based upon the employee's termination. However, the court specified its holding was limited to the context of an employee's termination, stating "all civil conspiracy claims by at-will employees against employers are not barred . . ." Id. (clarifying the court does not "hold that an employee, even an at-will employee, can never bring a civil conspiracy claim for something bad that happens to him incident to his employment.")

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

Modern courts have usually, in passing on these contracts, employed three criteria: (1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest? (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood? (3) Is the restraint reasonable from the standpoint of a sound public policy? See Carolina Chem. Equip. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996), citing Standard Register Co. v. D.C. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961).

Courts in South Carolina generally apply a five-part test in determining a covenant's reasonableness:

- (1) Whether it is necessary to protect the legitimate interests of the employer;
- (2) Whether it is reasonably limited in its operation with respect to time and place;
- (3) Whether it is unduly harsh and oppressive in curtailing legitimate efforts of the employee to earn a livelihood;
- (4) Whether it is reasonable from the standpoint of public policy; and
- (5) Whether it is supported by valuable consideration.

Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct. App. 1995).

“Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer.” Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992).

A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers. Rental Unif. Serv. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983). For instance, in Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013), the court held that a 20-mile radius restriction imposed upon cardiologists was reasonable because “the restriction is limited to areas where [r]espondents primarily dealt with Columbia Heart patients.” Id. at 20, 728 S.E.2d at 491.

A valid non-compete agreement does not need a geographic limitation if the provision contains other sufficient limitations. Wolf v. Colonial Life & Accident Ins. Co., 309 S.C. 100, 420 S.E.2d 217, 222 (Ct. App. 1992) (“Prohibitions against contacting existing customers can be a valid substitute for a geographic limitation.”).

B. Blue Penciling

Where the covenant not to compete is divisible, or severable, the courts can “blue pencil” the provision, or split up the covenant and carve out an area which is reasonably necessary to protect the covenantee. Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 344 (1958); Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681 (D.S.C. 2003).

In Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 621 S.E.2d 352 (2005), the court held that a noncompete agreement without a geographical limitation may not be “blue penciled” according to New Jersey law and then enforced in South Carolina. The court analyzed New Jersey law and found no cases that added a geographical term when one was previously omitted. Therefore, the court held that the agreement could not be reformed so as to

add an entirely new term to which neither of the parties agreed. Id.

Furthermore, the Stonhard court held that the agreement was unenforceable under South Carolina law because the lack of a geographical limitation and lack of a reasonable substitute rendered the agreement unreasonable and violative of public policy. Id.

In Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010), the South Carolina Supreme Court held “in South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall on their own terms.”

C. Confidentiality Agreements

In Milliken & Company v. Morin, 386 S.C. 1, 685 S.E.2d 828 (Ct. App. 2009), aff’d as modified, 399 S.C. 23, 731 S.E.2d 288 (2012), a former employer sued its former employee alleging the employee breached a confidentiality provision of an employment agreement, among other allegations. The employee argued the confidentiality provision was overbroad and unreasonable. The court held that the confidentiality provision was enforceable because it was limited to three years, it “did not prohibit [the employee] from disclosing or using any and all information he learned working at [the employer], or using the general knowledge and skills he learned while working there”, and the employee “testified he could have obtained other jobs without violating the confidentiality provision.” Id. at 11-12, 685 S.E.2d at 834. The court also rejected the employee’s argument that it was unenforceable because it was unlimited to territory. The court held that it was limited to the employer’s competitors, which was reasonably necessary to protect the employer’s business. Id. at 12, 685 S.E.2d at 834.

On appeal, in Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288 (2012), the South Carolina Supreme Court addressed whether confidentiality agreements and non-compete agreements should be analyzed under the same standard. The court held that unlike non-compete agreements, confidentiality agreements should not be strictly construed in favor of the employee. “Because these [confidentiality agreements] are not in restraint of trade, we hold there is no ‘ancient disfavor’ and thus they are not to be strictly construed in favor of the employee.” Id. at 32, 731 S.E.2d at 293. “[C]ourts should look to . . . whether the restriction is reasonable in that it is no greater than necessary to protect the employer’s legitimate interests, and it is not unduly harsh in that it curtails the employee’s ability to earn a living.” Id.

D. Trade Secrets Statute

South Carolina Trade Secrets Act, begins at S.C. CODE ANN. § 39-8-10, et seq.

Every employee who knows or who reasonably should have known of the existence of any employer's trade secret has a duty to refrain from using or disclosing the trade secret without the employer's permission independent of any agreement with the employer. S.C. CODE ANN. § 39-8-30(B).

“A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his

trade secret may bring a civil action to recover damages incurred as a result of the wrongful act and to enjoin its appropriation, disclosure, use or wrongful acts pertaining to the trade secrets.” Id. at § 39-8-30(C).

A contractual duty not to disclose a trade secret or to limit the use of the trade secret must not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation. Id. at § 39-8-30(D).

A covenant not to divulge trade secrets is subjected to the same scrutiny as a covenant not to compete. See Carolina Chem. Equip. v. Muckenfuss, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996) (covenant which was unlimited as to time and place and contained a broad definition of “trade secret” was unenforceable, because the restraint was far greater than necessary to protect any legitimate interests and it would prevent the employee from using general skills and knowledge he acquired while working for the employer).

Further, a nondisclosure provision(s) concerning trade secrets that effectively prevents a former employee from ever working in a similar capacity for an employer’s competitor can operate as a noncompete provision. Fay v. Total Quality Logistics, 419 S.C. 622, 799 S.E.2d 318 (S.C. Ct. App. Mar. 1, 2017), cert. granted, Feb. 1, 2018. Therefore, if such nondisclosure provision(s) operate as a noncompete and have no reasonable time restriction, the provision(s) violate South Carolina public policy. Id. Specifically, the nondisclosure provisions at issue in Fay (1) prevented the employee from revealing or using the employer’s confidential information “at any time during the course of his . . . employment by [the employer], and *at all times thereafter*,” unless authorized by the employer; and (2) provided that if the employee engaged in an employment relationship with a competing business “in a similar position” to his position with the employer it would “necessarily and inevitably result in [Fay] revealing, basing judgments and decisions upon, or otherwise using [the employer’s] Confidential Information to unfairly compete with [the employer].” Id. (emphasis added). The court noted that a “Competing Business” included “any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States.” Id. The court found that these provisions, when read in conjunction, were so broad they effectively became a noncompete since the employee could *never* hold a similar position with any competitor without violating the agreement. Id. Therefore, the provisions required a reasonable time restriction, and were unenforceable without such. Id. (citing Milliken & Co. v. Morin, 399 S.C. 23, 38–39, 731 S.E.2d 288, 296 (2012) and Muckenfuss, *supra*).

In Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 580 S.E.2d 163 (Ct. App. 2003), the court held that compensation and salary information regarding physicians and the purchase price of physician practices did not meet the statutory definition of “trade secret” for public bodies. Section 30-4-40(a)(1) of the South Carolina Code specifically defines “trade secrets” for public bodies as including “feasibility, planning, and marketing studies, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.”

E. Fiduciary Duty and their Considerations

In Poole v. Incentives Unlimited, Inc., 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999), aff'd, 345 S.C. 378, 548 S.E.2d 207 (2001), the plaintiff had been an at-will employee at Incentives for four years when she was asked to sign an employment agreement containing a covenant not to compete. The plaintiff was told she had to sign the agreement to remain employed. She was offered no other compensation or consideration in exchange for signing the agreement. Later in the year, the plaintiff left Incentives and began working for another competing employer.

The court found the non-compete clause was not valid. To be upheld, a covenant not to compete must be supported by valuable consideration. If the agreement had been signed at the beginning of the plaintiff's at-will employment, consideration would have existed. Consideration would also exist if the plaintiff had gained an increase in salary, bonus, or changed work conditions in exchange for signing the clause. However, since the plaintiff was already an at-will employee at the time she signed the agreement, there was no adequate consideration for entering into the agreement.

In Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 620 S.E.2d 65 (2005) the South Carolina Supreme Court affirmed the trial court's grant of summary judgment in favor of the school district on the issue of whether the District breached a fiduciary duty toward schoolteachers. The district, acting through the Greenwood County School Board (the Board), reduced the schoolteachers' annual incentive from ten percent to one percent of one's salary. Id. at 636, 620 S.E.2d at 68. The court noted there was no evidence indicating the Board acted in bad faith or with malice in making the decision. Id. The court found the "decision was clearly within the Board's discretion and the Board did not breach its fiduciary duty to the teachers." Id.

XII. DRUG TESTING LAWS

A. Public Employers

In Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989), the Fourth Circuit Court of Appeals upheld a Fourth Amendment challenge to an Army program of random drug testing of civilian employees at a chemical weapons plant. The court found that the government's compelling interest in safety outweighed the individual employee's expectation of privacy. Id.

B. Private Employers

A person who drives a commercial motor vehicle within the State is considered to have consented to a test of his or her blood, breath, or urine for the purpose of determining that person's alcohol concentration or the presence of any other drugs.

An employer has the right to establish a drug prevention program in the workplace. S.C. CODE ANN. § 41-1-15. All information, including test results, received by the employer through a substance abuse program is confidential communications. Id. The release of any such information can only be made with the written consent of the employee unless "the release is completed through disclosure by an agency of the State in a civil or administrative proceeding,

order of a court of competent jurisdiction, or determination of a professional or occupational licensing board in a related disciplinary proceeding.” Id. Further, a consent form, in the very least, must contain the following: (1) name of the person or entity authorized to obtain the information; (2) purpose of the disclosure; (3) exact information to be disclosed; (4) duration of the consent; and (5) signature of the person authorizing the release of information. Id.

To be eligible for state grants or contracts of \$50,000 or more, an employer must certify that it will provide a drug free work place and satisfy the South Carolina Drug Free Workplace Act’s requirements. S.C. CODE ANN. §§ 44-107-10 et seq. The Act does not, however, extend to subcontractors. 1991 Op. Atty. Gen., No 91-5, p. 29.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

“Employer” is defined as “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 person, but does not include an Indian tribe or a bona fide private membership club other than a labor organization.” S.C. CODE ANN. § 1-13-30(e).

The South Carolina Human Affairs Law was amended in 2018 to include “pregnancy, childbirth, or related medical conditions, including, but not limited to, lactation, and women affected by pregnancy, childbirth, or related medical conditions must 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 must be interpreted to permit otherwise.” S.C. CODE ANN. § 1-13-30 (l)(2018).

B. Types of Conduct Prohibited

Discrimination against any individual because of race, religion, color, sex, age (40 or older), national origin or disability is unlawful. Id. at § 1-13-20.

Section 1-13-80 of the South Carolina Code sets forth a list of unlawful employment practices for an employer, along with certain exceptions. In addition to expounding the definition of “because of sex” in the context of pregnancy and related conditions, the 2018 South Carolina Pregnancy Accommodations Act also amended § 1-13-80 to provide that it is unlawful for an employer:

(a) to fail or refuse to make reasonable accommodations for medical needs arising from pregnancy, childbirth, or related medical conditions of an applicant for employment or an employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer;

(b) to deny employment opportunities to a job applicant or employee, if the denial is based on the need of the employer to make reasonable accommodations to the known limitations for medical needs arising from pregnancy, childbirth, or related medical

conditions of an applicant for employment or an employee;

(c) to require an applicant for employment or an employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that the applicant or employee chooses not to accept, if the applicant or employee does not have a known limitation related to pregnancy, or if the accommodation is unnecessary for the applicant or employee to perform the essential duties of her job;

(d) to require an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions; or

(e) to take adverse action against an employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation to the known limitations for medical needs arising from pregnancy, childbirth, or related medical conditions.

In addition, for purposes of this revision to the unlawful employment practices provision, employers “shall provide written notice of the right to be free from discrimination for medical needs arising from pregnancy, childbirth, or related medical conditions, pursuant to this [provision] to new employees at the commencement of employment, and existing employees within [120] days after the effective date of this [Act].” S.C. Acts No. 244 (May 17, 2018).

For purposes of what constitutes a “reasonable accommodation” the amended South Carolina Human Affairs Law now provides explicit examples of reasonable accommodations with regard to from pregnancy, childbirth, or related medical conditions. For individuals with medical needs arising from pregnancy, childbirth, or related medical conditions, “reasonable accommodation” may include:

[P]roviding more frequent or longer break periods; providing more frequent bathroom breaks; providing a private place, other than a bathroom stall for the purpose of expressing milk; modifying food or drink policy; providing seating or allowing the employee to sit more frequently if the job requires the employee to stand; providing assistance with manual labor and limits on lifting; temporarily transferring the employee to a less strenuous or hazardous vacant position, if qualified; providing job restructuring or light duty, if available; acquiring or modifying equipment or devices necessary for performing essential job functions; modifying work schedules[.]

S.C. Code Ann. § 1-13-30(T)(4) (2018). The law also provides a short list of accommodations that are not required unless the employer also provides them to other employees. Specifically, “an employer is not required to do the following, unless the employer does or would do so for other employees or classes of employees that need a reasonable accommodation:(i) hire new employees that the employer would not have otherwise hired;(ii) discharge an employee, transfer another employee with more seniority, or promote another employee who is not qualified to perform the new job;(iii) create a new position, including a light duty position for the employee, unless a light duty position would be provided for another equivalent employee; or(iv)

compensate an employee for more frequent or longer break periods, unless the employee uses a break period which would otherwise be compensated.” Id.

C. Administrative Requirements

The individual must complain to the State Human Affairs Commission in writing under oath or affirmation within 180 days after the alleged discriminatory practice occurred. Id. at § 1-13-90(a).

A federal court has no jurisdiction over a case alleging employment discrimination based upon race where the plaintiff has not exhausted available state remedies. Settles v. Pinkerton, Inc., 482 F. Supp. 461 (D.S.C. 1979).

In Gleaton v. Monumental Life Insurance Co., 719 F. Supp. 2d 623 (D.S.C. 2010), the court denied a motion to dismiss a plaintiff’s race discrimination claim under the South Carolina Human Affairs Law (SCHAL) on the grounds that plaintiff should be allowed to plead discrimination claims under both Title VII and SCHAL in the alternative.

D. Remedies Available

If the State Human Affairs Commission finds that an employer has engaged in any unlawful discriminatory practice, it states its findings of fact and serves upon the employer an opinion and order requiring that such unlawful practice is discontinued. S.C. CODE ANN. § 1-13-90(c)(16). The Commission may also require other action including the hiring, reinstatement or upgrading of employees, with or without back pay to the persons aggrieved by such practice. Id.

The State Human Affairs Commission is authorized to institute proceedings in a court to prevent or restrain any person from violating any provision of the chapter. Id. at § 1-13-70(s).

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

XIII. STATE LEAVE LAWS

A. Jury/ Witness Duty

Section 41-1-70 of the South Carolina Code subjects an employer to civil liability for dismissing or demoting an employee because the employee complies with a subpoena or serves on a jury.

B. Voting

Section 16-17-560 of the South Carolina Code prohibits the discharge of an employee based on political opinions or the exercise of political rights and privileges guaranteed under the laws and constitutions of the United States or South Carolina.

C. Family/ Medical Leave

In Drew v. Waffle House, Inc., 351 S.C. 544, 571 S.E.2d 89 (2002), the plaintiff was injured at work and requested leave. Although her supervisor authorized the leave, plaintiff was fired when she reported back to work. Plaintiff sued alleging a violation of the Family and Medical Leave Act (“FMLA”). The trial judge awarded plaintiff \$103,273 in back pay for pre-trial loss of wages and \$304,845.69 in front pay. He also awarded liquidated damages under the statute. He calculated the amount of liquidated damages by adding the amount of back pay, prejudgment interest and front pay. On appeal, Waffle House contested the award of front pay claiming it was highly speculative because it was based on the assumption plaintiff would have worked for Waffle House for another 19 years until her retirement at 65. The South Carolina Supreme Court held that front pay is equitable relief and because liquidated damages do not include equitable relief, they should have been excluded from the calculation of liquidated damages. The award of front pay was sustained, because Waffle House failed to carry its burden to prove that plaintiff would have been terminated for another unrelated reason while on FMLA leave, or that her continued employment would have been limited.

South Carolina does not have a separate state law governing family/medical leave with regard to private employers. South Carolina does have numerous laws that apply only to full-time state employees, including leave for: sickness (S.C. CODE ANN. § 8-11-40(A)); care of sick family members (S.C. CODE ANN. § 8-11-40(C)); recuperation from physical attacks on employee while on the job (S.C. CODE ANN. § 8-11-40(B)); organ donation (S.C. CODE ANN. § 8-11-65); death of immediate family members (S.C. CODE ANN. § 8-11-177); alcoholism rehabilitation (S.C. CODE ANN. § 8-11-110(g)); care of adopted child after placement (S.C. CODE ANN. § 8-11-155); and emergency or extreme hardship (S.C. CODE ANN. § 8-11-670).

D. Pregnancy/Maternity/Paternity Leave

South Carolina does not have a separate state law governing pregnancy/maternity/paternity leave. However, “[e]mployers may not require an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the know limitations for medical needs arising from pregnancy, childbirth, or related medical conditions. S.C. Code Ann. § 1-13-80(4)(d). See also Section “B.” in XXIII “State Anti-Discrimination Statute(s)”, supra.

E. Day of Rest Statutes

Generally, it is unlawful on Sunday for any person to engage in worldly work, labor or to employ others to engage in work or labor, excepting work of necessity or charity. Sunday work has been declared a nuisance and may be enjoined by a court of competent jurisdiction. S.C. CODE ANN. § 53-1-40. However, the statute’s prohibition has many exceptions, which are provided by S.C. CODE ANN. §§ 53-1-40 and -50. Further, practitioners are warned to review local South Carolina day of rest ordinances.

F. Military Leave

Criminal sanctions may be imposed against a person who willfully deprives a member of the National Guard of South Carolina of his or her employment on account of his or her National Guard membership. Criminal sanctions may also be imposed against one who attempts to dissuade a person from enlisting in the National Guard of South Carolina by threat of injury to his or her employment. S.C. CODE ANN. § 25-1-2190.

G. Sick Leave

South Carolina law does not require private employers to provide employees with sick leave benefits, either paid or unpaid. If an employer chooses to provide sick leave benefits, it should comply with the terms of its established policy or employment contract. A South Carolina employer may be required to provide unpaid sick leave in accordance with the FMLA or other federal laws.

H. Domestic Violence Leave

South Carolina does not require employers to provide leave for this purpose. A South Carolina employer may be required to provide unpaid leave in accordance with the FMLA or other federal laws, as applicable and/or related to this purpose. Note that S.C. Code Ann. § 16-3-1550 does protect a victim (or a witness) from adverse job consequences for lawfully responding to subpoena.

I. Other Leave Laws

Bereavement Leave. South Carolina law does not require employers to provide bereavement leave to employees. Employers may choose to provide bereavement leave and should comply with any bereavement policy or practice it maintains.

XIV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

South Carolina does not have a minimum wage. The federal minimum wage of \$7.25 per hour applies to workers in South Carolina.

B. Deductions from Pay

S.C. Code Ann. § 41-10-30 requires employers to notify “each employee in writing at the time of hiring . . . the deductions which will be made from wages, including payments to insurance programs.” Further, any changes in these deductions “must be made in writing at least seven calendar days before they become effective.” Id.

C. Overtime Rules

South Carolina does not have laws governing overtime payment. Federal law applies.

D. Time for payment upon termination

South Carolina employers are required to pay all wages due an employee within 48 hours of the employee's separation of employment or by the next regular payday, not to exceed 30 days. S.C. CODE ANN. § 41-10-50.

Cases addressing the S.C. Payment of Wages Act (§§41-10-10, et seq.)

In Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999), James Futch was an eighty-eight (88) year-old tugboat captain and local manager of operations at McAllister's Georgetown port. When Futch's employer informed him by written memorandum in December of 1992 that his job would terminate at the end of 1993, Futch developed a business plan and began soliciting his employer's customers in efforts to set up a rival business upon his termination. Upon learning of Futch's plans, the employer fired Futch immediately and refused to pay him \$4,200 in monthly commissions he had earned during July and August of 1993.

Futch brought an action seeking \$4,200 plus treble damages and attorney's fees under the payment of wages statute, S.C. CODE ANN. §§ 41-10-10 et seq. The employer answered, asserting Futch's disloyalty as a defense, and counter-claimed to recover all wages paid to Futch during the entire period of disloyalty. At trial, employer argued the trial judge should grant a directed verdict motion because Futch clearly had violated his duty of loyalty to the employer, thus forfeiting any right to compensation. The trial judge denied the employer's motion and the jury awarded \$4,200 to Futch after brief deliberation. The trial judge trebled the damages and awarded attorney's fees and prejudgment interest to Futch for a total award of \$16,402.

The court of appeals reversed, holding that the trial judge should have granted the employer's directed verdict motion. In doing so, the court of appeals adopted a bright-line general rule that an agent guilty of disloyalty to his principal forfeits all compensation.

On appeal, the South Carolina Supreme Court affirmed the propriety of the "disloyalty" defense, but reversed the court of appeal's bright-line rule that an agent's breach of the duty of loyalty requires the forfeiture of all compensation. The opinion of the South Carolina Supreme Court recognizes that legitimate, but conflicting, interests require a rule which protects an employer from unfair exploitation, while encouraging free competition and the protection of the individual rights of employees who want to go into business for themselves. Consequently, the court adopts the RESTATEMENT (SECOND) OF AGENCY rule as explicated by Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 493 (Col. 1989), and makes the application of the rule a matter for the jury in most cases:

The general rule is that an employee is not entitled to any compensation for services performed during the period he engaged in activities constituting a breach of his duty of loyalty even though part of those services may have been properly performed. However, even when an employee breaches the duty of loyalty during some periods, he may still recover compensation for services

properly rendered during periods in which no such breach occurred and for which compensation is apportioned in his employment agreement. Apportioned compensation is that paid to an agent or employee that is allocated to certain periods of time or the completion of specified items of work.

Futch, 335 S.C. at 607–08, 518 S.E.2d at 596.

“Whether an agent or employee’s compensation is apportioned, *i.e.*, allocated to certain periods of time or to the completion of specified items of work, usually is a question for the jury. Whether the agent or employee acted disloyally during a particular apportioned period or task also is a question for the jury in most cases.” Id. at 609, 518 S.E.2d at 596.

The South Carolina Supreme Court reinstated the jury’s verdict for Futch of \$4,200, but declined to reinstate the award of treble damages and attorney’s fees because there was a finding that there was a bona fide dispute about whether the employer owed Futch any wages. Id. at 612, 518 S.E.2d at 598. The court noted that the balancing approach adopted by the court is a new development in South Carolina employment law and it would be unfair to penalize an employer because the rules of liability were not fully developed when the case was tried. Id.

In C.A.F.E. v. S. Carolina Dep’t of Labor, Licensing, and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999), Carolina Alliance for Fair Employment (“C.A.F.E.”), which is a statewide alliance for fair employment, conducted an undercover “testing project” to investigate the practices of temporary agencies. C.A.F.E. hired “testers” to register and accept temporary jobs through employment agencies and then submit written reports to C.A.F.E. The other plaintiff was one of the “testers” who worked for one day at a temporary job through Adecco Temporary Services.

Plaintiff filed a complaint with the South Carolina Department of Labor, claiming Adecco violated the notice requirement in South Carolina Code Annotated section 41-10-01(A), by failing to provide written notice to her of the specific wages of her assignment. Upon investigation, the Department found Adecco displays a poster stating a guarantee of a minimum of \$4.25 per hour, with some assignments paying higher rates. Plaintiff actually received \$6.00 per hour for her work. The Department found the poster satisfied the statutory notice requirement. Plaintiffs then filed suit.

The court found neither C.A.F.E. nor the individual plaintiff had standing to sue, as there was no employer/employee relationship, the plaintiff is not a member of C.A.F.E. and she suffered no injury to herself. Id. at 486, 523 S.E.2d at 800. A mere interest in an issue is not enough to create standing. Id. at 487, 523 S.E.2d at 800. However, due to the public importance of the issue, the court issued an opinion on the merits. The court of appeals held that temporary employment agencies are not required to give each employee written notice of their specific pay for each assignment. Id. at 491, 523 S.E.2d at 803. Rather, the intent of the statute is met if an employer provides a possible range of terms or wages. Id.

The court in O’Neal v. Intermedical Hosp. of S. Carolina, 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003), held that under the South Carolina Payment of Wages Act, an employee may recover treble damages plus costs and attorneys’ fees, at the discretion of the court, for a failure

to pay wages.

In O'Neal, the court of appeals held that there must not be a bona fide dispute concerning the payment of wages for the court to impose treble damages or attorneys' fees on the employer. At some point during her employment, O'Neal complained to her employer that she was not receiving the proper pay for regular, weekend, and night hours worked. She subsequently filed a claim with the Department of Labor, which determined that Intermedical had failed to comply with the Payment of Wages Act, but that it had, belatedly, remedied its failure. The next month, a dispute arose as to scheduling O'Neal's hours to work, which ultimately resulted in her involuntary termination for insubordination, refusal to work a scheduled shift, and an unexcused absence.

The court stated,

“by using ‘may,’ rather than ‘shall,’ [as in the employee may recover treble damages] the legislature has provided that the penalty is discretionary with the judge. This interpretation accords with the purpose of the Wage Payment Act, to wit: to protect employees from the unjustified and willful retention of wages by the employer. The imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh.”

Id. at 508, 585 S.E.2d at 531 (emphasis in original). Propriety of treble damages under the Wage Payment Act turns not on whether an employer is successful in defending against a suit for nonpayment of wages, but whether there existed a bona fide dispute concerning payment of the wages. Id. at 510, 585 S.E.2d at 532. See also S.C. CODE ANN. § 41-10-80(C) (Supp. 2003). A bona fide dispute existed as to whether employer owed its former employee any wages, and thus, the imposition of the award of attorney fees to employee was improper. Id. See also S.C. CODE ANN. § 41-10-80(C) (Supp. 2003); Goodwyn v. Shadowstone Media, Inc., 408 S.C. 93, 757 S.E.2d 560 (Ct. App. 2014) (finding a bona fide dispute as to the plaintiff's entitlement to wages (including inconsistencies in the amount claimed in plaintiff's resignation letter and the amount claimed at trial and defendant's evidence it properly withheld a portion of the wages claimed by the plaintiff) precluded an award of exemplary damages—treble damages and attorney's fees).

In Temple v. Tec-Fab, Inc., 381 S.C. 597, 675 S.E.2d 414 (2009), the court confirmed that it is the trial court's obligation to determine whether a bona fide dispute over the payment of wages existed and whether treble damages are or are not warranted. Specifically, the court held that held that a finding that an employee is entitled to recover unpaid wages is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages, as would provide a basis for awarding the employee treble damages under the Payment of Wages Act. Id.

In Williams v. Grimes Aerospace Co., 988 F. Supp 925 (D.S.C. 1997), the court held that although the employer did not pay the plaintiff when the plaintiff's overtime wages were due, the employer nevertheless did not violate the Payment of Wages Act. The court emphasized that the employer eventually paid the employee all the disputed wages following its investigation. Thus, the Williams court held that because the employer paid the employee after a short delay, the

employer did not violate the Act and granted the employer's motion for summary judgment. Specifically, the court held a short delay in the payment of wages does not violate the Payment of Wages Act. Id.

In Ross v. Lingand Pharmaceuticals, Inc., 371 S.C. 464, 639 S.E.2d 460 (Ct. App. 2006), the court held that the employer's incentive payout plan violated the Payment of Wages Act because it merely set target dates for when payments would be made rather than providing for a specific time and place for payment. The court also upheld the lower court's award of treble damages opining that the employer's policy "was based on its unilateral, arbitrary decision on when to issue compensation and that no good faith dispute existed." Id. at 465. But see Temple v. Tec-Fab, Inc., 370 S.C. 383, 635 S.E.2d 541 (Ct. App. 2006) (reversing lower court's grant of treble damages and holding that a bona fide dispute existed over the wages in question), aff'd in part and rev'd in part, 381 S.C. 597, 600-01, 675 S.E.2d 414, 416 (2009) (reversing part of court of appeals decision that held a bona fide dispute existed, finding it was for the trial court to determine, in the first instance, whether there existed a bona fide dispute such that treble damages were not warranted and remanding this to the trial court to make this determination).

Severance payments do not constitute "wages" under the Payment of Wages Act. Osborn v. Univ. Med. Assocs., 278 F. Supp. 2d 720 (D.S.C. 2003), aff'd, 174 F. App'x 763, 2006 U.S. App. LEXIS 8385 (4th Cir. 2006). The Osborn court explained as follows: "It is clear that severance payments are not covered under the Payment of Wages Act because they were expressly excluded from the definition of 'wages' by the South Carolina Legislature in 1990. . . . Prior to this 1990 Amendment, section 41-10-10 provided that, wages includes vacation, holiday, sick leave, and severance payments which are due to an employee under any employer policy or employment contract.' Accordingly, [the plaintiff's] claims for any additional severance benefits are not covered by the Payment of Wages Act." Id. at 741-42.

An employee's "tips" constitute "wages" under the S.C. Payment of Wages Act. Carbone v. Zen 333 Inc., 2016 WL 7383920 (D.S.C. Dec. 21, 2016). Specifically, the court found that nothing in the SCPWA required that wages must come from an employer. Id. at **3-4. Indeed, the court stated "a straightforward reading of the statute indicates that tips are considered wages under the SCPWA." Id. at *3. This finding arguably follows under the rationale that employers are entitled to count an employee's tips as wages for purposes of the tip credit under the FLSA. The court also found that the plaintiffs' SCPWA claim was not preempted by the FLSA, rejecting the defendant's argument that because the statute establishing the SCPWA requires claims to make reference to a violation of FLSA mandates, the FLSA should take precedence over the SCPWA. Id. at **4-6. Indeed, the court disagreed with the defendant's interpretation that the SCPWA is a purely derivative measure that allows employees harmed by an employer's violation of some other law to obtain damages under the SCPWA. Id. The court therefore denied the defendant's motion to dismiss on those grounds.

In Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 620 S.E.2d 65 (S.C. 2005), the court held that the employer did not violate the Payment of Wages Act because the employer notified the employees about the change in wages well in advance of the seven-day statutory requirement.

In Allen v. Pinnacle Healthcare Systems, LLC, et. al., 394 S.C. 268, 715 S.E.2d 362 (Ct. App. 2011), the South Carolina Court of Appeals recognized that “the legislature intended to impose individual liability on agents or officers of a corporation who knowingly permit their corporation to violate the [Payment of Wages] Act.”

In Williams v. MKKM, Inc., 2016 WL 284621 (D.S.C. Jan. 21, 2016), the District Court held that the plaintiff sufficiently alleged a claim under the SCPWA where she alleged that the defendants would schedule her to work, she would arrive at the appointed time, but the defendants would not allow her to clock in until there was a table for her to serve and, thus, failed to pay her all of the wages she was due. Specifically, the court rejected the defendant’s argument that a plaintiff must allege that the defendant’s conduct violated a specific policy or employment contract provision to state a claim under the SCPWA. Id. at *3 (noting that although the defendants may prevail at summary judgment on this claim, the plaintiff has nonetheless sufficiently plead a SCPWA claim for purposes of a Rule 12(b)(6) motion to dismiss).

In Mathis v. Brown & Brown of South Carolina, Inc., 389 S.C. 299, 698 S.E.2d 773 (2010), a former employee with a two-year contract brought a Payment of Wages Act claim based on a reduction of his wages. The employer argued there was a bona fide dispute as to the employee’s contract and wage claims, and therefore, there was no violation of the Act. However, the court found that the relevant time period to determine whether there was a bona fide dispute is the time at which the wages are withheld. Thus, the court rejected the employer’s argument that the employee waived his claim by continuing to work after the reduction, and that he was not entitled to the wages because he violated a non-piracy agreement.

The court next rejected the employer’s claim that it did not violate the Act because it gave seven days’ notice of the reduced wages. The employer relied on S.C. Code Ann. § 41-10-30 states:

Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases.

However, the court noted, “S.C. Code Ann. § 41-10-40(C) provides: ‘An employer shall not withhold or divert any portion of an employee’s wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions as required by subsection (A) of § 41-10-30.’” The court concluded that the employer could not comply with the Act merely by giving seven days’ notice because the wages were not deductions, but reductions.

Finally, the court concluded that the Act does not apply to prospective wages. Thus, the employee was not entitled to the wages he would have received under his two-year contract if he had not been terminated. Id.

E. Breaks and Meal Periods

South Carolina does not have laws governing breaks and/or meal periods. Federal law applies.

F. Employee Scheduling Laws

South Carolina does not have laws governing employee scheduling.

XV. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

The Clean Indoor Air Act of 1990, S.C. Code Ann. § 44-95-10 *et seq.*, prohibits smoking in certain indoor areas including public schools, hospitals, and government buildings. The Act requires establishments to designate smoking and nonsmoking areas if they choose to permit smoking.

B. Health Benefit Mandates for Employers

South Carolina does not have a statute on this issue.

C. Immigration Laws

All private employers who are required to complete federal employment eligibility verification forms or documents must register and participate in the federal “E-Verify” program. S.C. Code Ann. § 41-8-20. The employer must verify the work authorization of each new employee within three business days of employing that person. *Id.* “A private employer who knowingly or intentionally employs an unauthorized alien violates the private employer's licenses.” S.C. CODE ANN. § 41-8-30. Failure to use E-Verify will result in probation, suspension, or revocation of a business license. S.C. CODE ANN. § 41-8-50.

In addition, South Carolina law provides for a civil action for “wrongful termination against an employer who discharges an employee authorized to work in the United States for the purpose of replacing that employee with a person the employer knows or should reasonably know is an unauthorized alien.” S.C. CODE ANN. § 41-1-30 (further providing the elements an aggrieved employee must show, and the civil remedies available under the statute).

Further, “[a] private employer who terminates an employee to comply with the provisions of this chapter shall not be subject to a civil action for wrongful termination of the employee under [the South Carolina Human Affairs Law, S.C. Code] Section 41-1-30 or as otherwise provided for by law.” S.C. CODE ANN. § 41-8-110.

D. Right to Work Laws

South Carolina is a “right to work” state. S.C. CODE ANN. § 41-7-10 provides “the right of persons to work must not be denied or abridged because of membership or nonmembership in a labor union or labor organization.” Any agreement between an employer and a labor organization that denies non-members the right to work for that organization is unlawful and against public policy. S.C. CODE ANN. § 41-7-20.

E. Lawful Off-duty Conduct (including lawful marijuana use)

Personnel action, including employment, termination, demotion, or promotion of an employee, is prohibited if based on use of tobacco products outside the workplace. S.C. Code Ann. § 41-1-85.

F. Gender/Transgender Expression

South Carolina does not have a statute on this issue. Although the South Carolina Human Affairs Law does not include sexual orientation and gender identity to the list of protected characteristics, some local governments in South Carolina have enacted local policies and ordinances prohibiting public sector employment discrimination. These policies and ordinances are generally referred to as Human Rights Ordinances and are non-discrimination employment policies to include sexual orientation and gender identity. While these local ordinances and policies apply only to local government employees and do not impact private sector employment, practitioners are encouraged to review local ordinances and policies.

G. Other Key State Statutes

Medical exams and inquiries are prohibited except under certain conditions. S.C. CODE ANN. § 1-13-85.

S.C. CODE ANN. Section 63-13-40 governs the requirements of background checks for child care facilities. Such facilities include, but are not limited to, nursery schools, child care centers, and group care homes. See S.C. CODE ANN. § 63-13-20 (also listing exclusions from the definition).

The dismissal, suspension, demotion or other discipline of, or discrimination against, an employee who refuses to perform or assist in the performance of an abortion is prohibited. S.C. CODE ANN. § 44-41-50.

Retaliation against an employee for instituting a proceeding under the South Carolina Workers’ Compensation Law is prohibited. S.C. CODE ANN. § 41-1-80.

Retaliation against an employee in the forms of dismissal, suspension, demotion, or a decrease in compensation for reporting violations of state or federal laws, waste, fraud, corruption, gross negligence, or mismanagement in government is prohibited. (Note: The maximum amount of actual damages an employee may recover was increased from \$15,000 to \$300,000). S.C. CODE ANN. § 8-27-20.

As originally written the “South Carolina Bill of Rights for Handicapped Persons” prohibited discrimination against a “handicapped person with respect to employment, public accommodations, public services, or housing without reasonable justification.” S.C. CODE ANN. § 43-33-530. A handicapped person had the right to seek injunctive relief or civil damages and attorney's fees. In 1996, an amendment deleted employment provisions from the statutes. S.C. CODE ANN. §§ 43-33-520 and -530.

S.C. CODE ANN. Section 44-43-80 provides that all employers who employ 20 or more persons may grant paid leaves of absence to an employee who seeks to undergo a medical procedure to donate bone marrow. Under this statute “employee” is defined as “a person who performs services for hire for an employer for an average of twenty or more hours a week and includes all individuals employed at a site owned or operated by an employer but does not include an independent contractor.” S.C. CODE ANN. § 44-43-80. Nevertheless, the language in the leave provision is permissive, not mandatory.