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SOUTH DAKOTA

I. AT-WILL EMPLOYMENT

A. Statute

An employment having no specified term may be terminated at the will of either party on notice to the other, unless otherwise provided by statute. S.D. CODIFIED LAWS § 60-4-4.

B. Case Law

The employment-at-will doctrine remains the law in South Dakota. S.D. CODIFIED LAWS § 60-4-4 states: "An employment having no specified term may be terminated at the will of either party. . . ." Further, when there is no employment contract or specified term of employment, and the employer has no established procedures for discharging employees, the employment is terminable at the will of the employer under S.D. CODIFIED LAWS § 60-4-4. *Henning v. Avera McKennan Hospital*, 945 N.W.2d 526, 531 (S.D. 2020) (citing *Hollander v. Douglas Cnty.*, 620 N.W.2d 181 (S.D. 2000)). Personnel in an employment at will arrangement may be dismissed at any time for any reason. *Id.*

Under the employment-at-will law of South Dakota, an employer owes no duty of continued employment, and therefore may dismiss an employee at any time, for any reason, as long as an employment contract, a statute, or public policy does not indicate otherwise. *Reynolds v. Ethicon Endo-Surgery, Inc.*, 454 F.3d 868 (8th Cir. 2006).

Employees may be terminated at will in South Dakota, except for: (1) terminations that contravene public policy; (2) employees with express "for cause only" agreements or implied "for cause only" cases where an employee handbook contains a detailed list of exclusive grounds for discharge and a mandatory specific procedure that the employer agrees to follow; or (3) an employee who accepted employment after being promised future promotion to a certain position. *Zavadil v. Alcoa Extrusions, Inc.*, 363 F. Supp. 2d 1187 (D.S.D. 2005).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

Exceptions to the employment-at-will doctrine are to be narrowly construed. *Larson v. Kreiser's, Inc.*, 472 N.W.2d 761, 764 (S.D. 1993).

A. Implied Contracts

1. Employee Handbooks/Personnel Materials

In *Hollander v. Douglas County*, 620 N.W.2d 181 (S.D. 2000), the South Dakota Supreme Court, again, acknowledged a narrow employee handbook-based exception to the employment-at-will doctrine recognized in *Osterkamp v. Alkota Manufacturing, Inc.*, 332 N.W.2d 275 (S.D. 1983).

> The exception can develop in one of two ways. First, an agreement to discharge for cause arises when an employee handbook "explicitly provides, in the same or comparable language that discharge can occur for cause only." Second, a contract providing that termination will not occur absent cause will be implied "where the handbook contains a detailed list of exclusive grounds for employee discipline or discharge and, a mandatory and specific procedure which the employer agrees to follow prior to any employee's termination."

Hollander, 620 N.W.2d at 185 (internal citations omitted). The Supreme Court concluded that the County could not treat Hollander like an employee-at-will due to the discharge-for-cause-only provision in its policy. *Id.* at 186, *accord. Kolda v. City of Yankton*, 852 N.W.2d 425, 431 (S.D. 2014) (similarly finding that the exception applied to a police officer where a city employee handbook explicitly provided that employees could only be terminated with notice and for just cause). However, even though Hollander could only be terminated for cause, the Supreme Court determined that the County had ample evidence to establish cause and, therefore, Hollander was not wrongfully terminated. *Hollander*, 620 N.W.2d at 187.

In *Osterkamp v. Alkota Manufacturing, Inc.*, 332 N.W.2d 275 (S.D. 1983), Osterkamp was a foreman of a welding crew at the time of his termination. The employer's general manager terminated Osterkamp for "disloyalty." Osterkamp brought a civil action claiming that the employer had violated the "corrective discipline procedures" of its "Employees Handbook." The Handbook enumerated 28 rules as a basis for discipline, but none of those rules related to "disloyalty." *Id*. at 277.

> The "Disciplinary Action" section of the Handbook stated:
>
> The Company will not discharge nor give disciplinary layoff to any employee without just cause. The Company affirms and endorses the theory and practice of 'corrective discipline.'
>
> The corrective discipline procedures stated:
>
> An employee warning notice will be used for violations of work rules and regulations.

(1) FIRST NOTICE -- will be a warning.
(2) SECOND NOTICE -- will result in a 1 (one) day suspension.
(3) THIRD NOTICE -- will result in a 1 (one) week suspension.
(4) FOURTH NOTICE -- will result in discharge.

Violations will be kept in the individual personnel file permanently [sic]. All violations over one year old will be disregarded for discharge purposes.

Id. The South Dakota Supreme Court did not engage in any analysis regarding the binding nature of the Handbook provisions, but held that since there was no dispute that the Handbook procedures were not followed in regard to Osterkamp's termination, the evidence adduced at trial was sufficient to support a jury verdict of $30,000.00. *Id*. Osterkamp was earning approximately $13,000.00 per year at the time of his discharge. *Id*. at 279.

This handbook-based exception is construed narrowly. For example, extraneous provisions in an employee handbook which may be tangentially related to discharge of employees, like appraisal procedures regarding work performance and employee development, does not create a "for cause only" employment agreement. *Hopes v. Black Hills Power & Light Co.*, 386 N.W.2d 490, 491 (S.D. 1986).

In another case where the court applied the exception narrowly, an employment manual's list of grounds for termination of an employee was found to not constitute a detailed list of the exclusive grounds for termination, as required to create an implied for-cause contract, because the manual prefaced this list with a disclaimer that it was not an all-inclusive list. *Semple v. Federal Exp. Corp.*, 566 F.3d 788, 793 (8th Cir. 2009).

2. Provisions Regarding Fair Treatment

For-cause contracts may also be implied through explicit promises made by employers, so long as such promise displays clear intent on the part of the employer. *Aberle v. City of Aberdeen*, 718 N.W.2d 615, 622 (S.D. 2006). For example, an explicit assurance made to a job applicant that he would become an executive if he continued to work for the company, which was repeated on several occasions, can give rise to an exception to at-will employment. *Larson v. Kreiser's, Inc.*, 427 N.W.2d 833, 834 (S.D. 1988).

The employer's intent can be determined through the language used in the promise. The Eighth Circuit Court of Appeals determined that the South Dakota Supreme Court would likely hold that an employer's letter promising to terminate employees "for good reason" creates a termination-for-cause employment agreement. *Lesmeister v. Am. Collid Co.*, 4 F.3d 631, 632 (8th Cir. 1993).

3. Disclaimers

Notwithstanding other language in employee handbooks, employers may preserve the at-will employment relationship through disclaimers, such as, "[N]one of [these] provisions constitute a contract of employment, nor do they represent a binding agreement or promise." *Zavadil v. Alcoa Extrusions, Inc.*, 363 F.Supp.2d 1187, 1192 (D.S.D. 2005). In *Zavadil*, such disclaimers were deemed sufficient to reserve to the employer the right to discharge employees

at will; however, this reservation was undone with subsequent peer review policies and procedures which contained no such disclaimers. *Id., accord. Semple v. Federal Exp. Corp.*, 566 F.3d 788, 793 (8th Cir. 2009); *Petersen v. Sioux Valley Hospital Ass'n*, 486 N.W.2d 516, 520 (S.D. 1992) (any implied agreements in an employee handbook were disclaimed by the statement, "Employment can be terminated by the employee or the employer at any time for any reason.").

4. Implied Covenant of Good Faith and Fair Dealing

In *Breen v. Dakota Gear & Joint Co.*, 433 N.W.2d 221, 224 (S.D. 1988), the court refused to recognize an implied covenant of good faith and fair dealing in the employment-at-will relationship. This decision was last affirmed in *Nelson v. Web Water Dev. Ass'n*, 507 N.W.2d 691, 697 (S.D. 1993).

B. Public Policy Exceptions

1. General

Exceptions to the employment-at-will doctrine are to be narrowly construed. *Larson v. Kreiser's, Inc.*, 472 N.W.2d 761, 764 (S.D. 1993), (citing *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225 (S.D. 1988)).

2. Exercising a Legal Right

In *Niesent v. Homestake Mining Co. of California*, 505 N.W.2d 781, 783 (S.D. 1993), the South Dakota Supreme Court that the public policy exception applies to retaliatory discharge for filing a workers' compensation claim.

3. Refusing to Violate the Law

In *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225 (S.D. 1988), Johnson began working for Kreiser's in 1979 as the company accountant. He was responsible for properly charging to the corporate officers any personal bills paid by the corporation. Larson, the president and chairman of the board, regularly converted company property to his own personal use. In 1986, Larson became critical of Johnson's actions in charging such expenses against Larson's personal account. On March 2, 1987, Johnson was terminated. He filed suit for wrongful termination claiming that he was fired solely because he refused to violate the law by allowing Larson to convert corporate revenue to his own personal use. *Id*. at 226.

The South Dakota Supreme Court recognized a narrow public policy exception to the at-will employment rule, which extends to an employee's refusal to commit an illegal act.

> An employee has a cause of action for wrongful discharge when the employer discharges him in retaliation for his refusal to commit a criminal or unlawful act. It is repugnant to public policy to expect an employee to commit such acts in

> order to save his job. Consequently, we carve out this exception to the at-will doctrine codified at SDCL 60-4-4. In doing so, we conclude that a contract action for wrongful discharge is more appropriate than a tort action. A contract action is predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform a criminal or unlawful act.

Id. at 227. The court stated that the concern regarding frivolous lawsuits by employees who are discharged for valid reasons would be allayed by the employee's burden of proof. The employee must show "the dismissal violate[d] a clear mandate of public policy," after which the burden shifts to the employer to show the termination was for a valid reason. To prevail, "the employee must prove by a preponderance of the evidence that the discharge was for . . . impermissible reason[s]." *Id.* at 227-28.

In *Tiede v. CorTrust Bank, N.A.*, 748 N.W.2d 748 (S.D. 2008), the South Dakota Supreme Court held that a bank officer properly stated a claim for retaliatory discharge when she charged she was terminated for filing Suspicious Activity Reports and Currency Transaction Reports that her superiors told her not to file, but which she alleged she was required to file under the federal Bank Secrecy Act.

4. Exposing Illegal Activity (Whistleblowers)

In *Dahl v. Combined Insurance Co.*, 621 N.W.2d 163 (S.D. 2001), the plaintiff was terminated after reporting to the South Dakota Division of Insurance that premiums collected by agents and managers working under him had not been remitted to the company. The Supreme Court held that Dahl stated a cause of action for wrongful discharge under the public policy exception. The court recognized "[w]histle blowing, or the reporting of unlawful or criminal conduct to a supervisor or outside agency," as another public policy exception to the employee-at-will doctrine. The court went on to state, however, that the "exception cannot be invoked by employees to primarily protect their proprietary interests, exact revenge on an employer, or for personal gain." *Id*. at 167. In 2019, the South Dakota Supreme Court affirmed *Dahl*, noting that "[t]his reasoning stands the test of time." *Hallberg v. S.D. Bd. of Regents*, 937 N.W.2d 568, 577 (S.D. 2019).

As noted above, this exception is limited. Only whistle blowing which promotes public good is protected by this public policy exception. *Petersen v. ProxyMed, Inc.*, 617 F. Supp. 2d 835, 846 (D.S.D. 2008).

III. CONSTRUCTIVE DISCHARGE

Constructive discharge may form the basis for a wrongful termination claim under South Dakota Law. *See Anderson V. First Century Fed. Credit Union*, 738 N.W.2d 40, 46-48 (S.D. 2007). Constructive discharge occurs when an employer has intentionally rendered an employee's working conditions so intolerable that the employee is essentially forced to terminate his or her employment. *Turner v. Honeywell Federal Mfg. & Technologies, LLC*, 336 F.3d 716, 724 (8th Cir. 2003). The employer's actions must have been intended to force the employee to quit, meaning the employee's resignation must be a reasonably foreseeable consequence of the employer's actions. *Anderson*, 738 N.W.2d 40, 47. The intolerability of working conditions is judged by an objective standard, not the plaintiff's subjective

feelings. *Id*. To be reasonable, an employee has an obligation not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving the employer a reasonable chance to work out a problem has not been constructively discharged. *Summit v. S-B Power Tool*, 121 F.3d 416, 421 (8th Cir.1997).

A general atmosphere of tension in the work environment was not considered intolerable, because the employee was unable to show that managers singled him out for ill-treatment, or that the employer did anything deliberate in an attempt to render his working conditions intolerable, and no one told him he should resign or that he would be terminated, demoted, or disciplined. *Anderson v. First Century Fed. Credit Union*, 738 N.W.2d 40, 47 (S.D. 2007).

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Termination

The Eighth Circuit Court of Appeals held that the South Dakota Supreme Court would hold that an employer's letter promising to terminate employees "for good reason" creates a termination-for-cause employment agreement under the narrow public policy exception doctrine expressed in *Osterkamp*. *See Lesmeister v. Am. Collid Co.*, 4 F.3d 631, 632 (8th Cir. 1993).

South Dakota courts appear to recognize both express "for cause only" agreements, and implied "for clause only" cases in which employee handbook contains detailed list of exclusive grounds for discharge and mandatory specific procedure for employer to follow (see above). *Bass v. Happy Rest. Inc.*, 507 N.W.2d 317, 320 (S.D. 1993).

B. Status of Arbitration Clauses

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This also applies to arbitration agreements between employers and employees or between their respective representatives. S.D. CODIFIED LAWS § 21-25A-1.

If there is doubt whether a case should be resolved by traditional judicial means or by arbitration, arbitration will prevail. *Thunderstik Lodge, Inc. v. Reuer*, 585 N.W.2d 819, 822 (S.D. 1998) (*citing City of Hot Springs v. Gunderson's, Inc.*, 322 N.W.2d 8, 10 (S.D.1982)). Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. *Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Const., Inc.*, 701 N.W.2d 430, 435 (S.D. 2005). An arbitration agreement may be waived. *Tjeerdsma v. Global Steel Buildings, Inc.*, 466 N.W.2d 643, 645 (S.D.1991).

V. ORAL AGREEMENTS

A. Promissory Estoppel

"[P]romissory estoppel may be invoked where a promisee alters his position to his detriment in the reasonable belief that a promise would be performed." *Canyon Lake Park, LLC v. Loftus Dental, P.C.*, 700 N.W.2d 729, 739 (S.D. 2005) (citing *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 848 (S.D. 1990)).

The three elements of promissory estoppel are:

> (1) the detriment suffered in reliance must be substantial in an economic sense;
> (2) the loss to the promisee must have been foreseeable by the promisor; and
> (3) the promisee must have acted reasonably in justifiable reliance on the promise made.

Id.

Estoppel is not applicable if any of these elements are lacking or have not been proven by clear and convincing evidence. *Century 21 Associated Realty v. Hoffman*, 503 N.W.2d 861, 866 (S.D. 1993).

A discharged at-will employee was found to have no claim for promissory estoppel under South Dakota law due to the employer's alleged oral promise to the employee of permanent employment, because such a promise would be interpreted as indefinite and terminable at-will. *Talkington v. Am. Colloid Co.*, 767 F.Supp. 1495, 1501 (D.S.D. 1991).

Courts in South Dakota are more reluctant to apply estoppel and other equitable remedies in an employee's favor when a state employment law statute would find the opposite result. *Minor v. Sully Buttes Sch. Dist.*, 345 N.W.2d 48, 50 (S.D. 1984).

B. Fraud

One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. S.D. CODIFIED LAWS § 20-10-1. A deceit within the meaning of § 20-10-1 is either:

> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
> (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
> (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise made without any intention of performing.

S.D. CODIFIED LAWS § 20-10-2.

Employee's claims that he was orally promised to be made a "full partner" after working for one year at reduced salary were contradicted by subsequent written employment contract, and thus, absent showing of material facts indicating that the corporate employer wrongfully induced the employee to enter into the initial employment contract, the employer was not liable to employee for the alleged fraudulent misrepresentation, even though the written employment was flawed in several other ways. *Schwaiger v. Mitchell Radiology Assocs.*, P.C., 652 N.W.2d 372 (S.D. 2002); *but see Poeppel v. Lester*, 2013 S.D. 17, ¶24, 827 N.W.2d 58 (holding the issue in *Schwaiger* was not properly before the court, and relegating the *Schwaiger* rule to advisory status).

C. Statutes of Fraud

Under the South Dakota Statute of Frauds, an agreement that by its terms is not to be performed within a year from the making thereof is not enforceable in the absence of a signed writing. S.D. CODIFIED LAWS § 53-8-2(1). This would tend to include any promise of unlimited employment.

For instance, an employee's claim of wrongful termination of a permanent employment contract was barred by Statute of Frauds, where there was no writing signed by employer that showed the duration of the employment contract. *Harriman v. United Dominion Indus., Inc.*, 693 N.W.2d 44, 49 (S.D. 2005).

A court also found that an oral contract of employment, whereby an employee was given one year from time she began her duties in which to turn an operation around, and she was to begin those duties in one week, could not be performed within one year of its making (rather, a year and one week), and thus, was unenforceable under Statute of Frauds. *Trovese v. O'Meara*, 493 N.W.2d 221 (S.D. 1992).

If a contract was, at its outset, unable to be performed within one year, the Statute of Frauds applies, even if the employee was terminated within one year. *Id.* at 222. However, if early termination is explicitly contemplated in the agreement, then the contract could conceivably be performed within a year, and no writing is required. *Knigge v. B&L Food Stores, Inc.*, 890 N.W.2d 570, 574 (S.D. 2017).

VI. DEFAMATION

A. General Rule

Defamation is either libel or slander. S.D. CODIFIED LAWS § 20-11-2. Both libel and slander are defined as “unprivileged” communications. S.D. CODIFIED LAWS §§ 20-11-3, 20-11-4. In a cause of action for defamation, privilege may be raised as a defense. *Sparagon v. Native Am. Publishers, Inc.,* 542 N.W.2d 125, 132 (S.D. 1996).

In *Blote v. First Federal Savings & Loan Association of Rapid City*, 422 N.W.2d 834 (S.D. 1988), the discharged vice-president of savings and loan association brought action against savings and loan association alleging wrongful discharge and defamation. The court held, inter alia, that the association’s

argument, in an unemployment compensation proceeding, that it terminated the vice-president for misconduct was a privileged communication, which could not form the basis for a defamation action. Administrative proceedings are "official proceedings" covered by statute providing that malice is not inferred from publication of the communication made in any legislative or judicial proceeding, or in any other official proceeding authorized by law. The court also held that a communication, without malice, to an interested person, by an interested person, is privileged.

1. Libel

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. S.D. CODIFIED LAWS § 20-11-3.

2. Slander

Slander is a false and unprivileged publication, other than libel, which:

> (1) Charges any person with crime, or with having been indicted, convicted, or punished for crime;
> (2) Imputes to him the present existence of an infectious, contagious, or loathsome disease;
> (3) Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;
> (4) Imputes to him impotence or want of chastity; or
> (5) By natural consequence, causes actual damage.

S.D. CODIFIED LAWS § 20-11-4.

B. Immunity for References

Employers are immune from liability if they disclose information about a current or former employee's job performance to a prospective employer. The disclosure must be: 1) in writing; 2) in response to a written request from the employee or prospective employer; and 3) made available to the employee on written request. Immunity is lost by recklessly, knowingly, or maliciously disclosing false or deliberately misleading information, or disclosing information that is made confidential by a non-disclosure agreement or any law. See S.D. CODIFIED LAWS § 60-4-12.

C. Privileges

Communications which are "privileged" are outside the definition of defamation and are defined by statute:

A privileged communication is one made:

> (1) In the proper discharge of an official duty;
> (2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law;
> (3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;
> (4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.
> In the cases provided for in subdivisions (3) and (4) of this section, malice is not inferred from the communication or publication.

S.D. CODIFIED LAWS § 20-11-5. If a communication is "privileged," it is not actionable. *Petersen v. Dacy*, 550 N.W.2d 91 (S.D. 1996); Peterson v. City of Mitchell, 499 N.W.2d 911 (S.D. 1993).

The test for determining whether a communication is privileged under S.D. CODIFIED LAWS § 20 11-5(3) involves an inquiry into the individuals or circumstances involved. *Peterson*, 499 N.W.2d at 915-16 (citing *Uken v. Sloat*, 296 N.W.2d 540, 542-43 (S.D. 1980)). "'An infallible test in determining whether a communication is or is not privileged is to ask whether, if true, it is a matter of proper public interest in relation to that with which it is sought to associate it.'"

In *Settliff v. Akins*, 616 N.W.2d 878 (S.D. 2000), one of the issues was that of conditional privileges. The Supreme Court referred to its previous decision in *Keiser*, wherein the court noted, "[a]n occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that never sharing the common interest is entitled to know." *Id.* at 891. Because of the circumstances surrounding the issue of defamation in an alleged conditional privilege, the Supreme Court determined that there was a question of fact for the jury to determine in this matter, and ruled that the trial court did not err in denying summary judgment.

In another case, qualified immunity regarding communications between interested parties applied to a letter that a hospital's employee sent to a doctor's employer regarding an incident involving hospital's patient, and thus, the doctor could not prevail on defamation claim against hospital; communication was not made with malice since the employee did not in fact entertain serious doubts as to truth of publications. *Schwaiger v. Avera Queen of Peace Health Servs.*, 714 N.W.2d 874 (S.D. 2006).

D. Other Defenses

1. Truth

Truthful statements do not amount to slander. The truth of an allegedly defamatory statement is measured by the ordinary implication of the words at the time the statement was made. *Guilford v. Nw. Pub. Serv.*, 581 N.W.2d 178, 180 (S.D. 1998). The measure is an objective one. *Manuel v. Wilka*, 610 N.W.2d 458, 465 (S.D. 2000).

2. No Publication

Private statements may also sometimes fail to qualify as slander. For instance, utterance of an alleged defamatory statement by husband to wife in private conversation, not knowing or having reason to believe they could be overheard, has been held not to constitute publication sufficient to support slander action. *Springer v. Swift*, 239 N.W. 171 (S.D. 1931).

3. Self-Publication

The South Dakota Supreme Court has yet to address the doctrine of compelled self-publication. *See Schwaiger v. Avera Queen of Peace Health Serv.*, 714 N.W.2d 874, 881 (S.D. 2006).

4. Invited Libel

There is no South Dakota case law on this issue.

5. Opinion

There is no constitutional privilege for a broad category of speech labeled "opinion"; expressions of opinion may often imply assertions of objective fact, and those statements are actionable. *Paint Brush Corp., Parts Brush Div. v. Neu*, 599 N.W.2d 384, 396 (S.D. 1999).

While statements of opinion (without any objective facts) are protected by the First Amendment even though they may be false, false statements of fact are afforded no constitutional protection. *Krueger v. Austad*, 545 N.W.2d 205, 214 (S.D. 1996).

6. Actual Harm to Reputation

Plaintiffs do not need to prove actual harm to reputation or any other damage in order to recover for slander under South Dakota law. *Walkon Carpet Corp. v. Klapprodt*, 231 N.W.2d 370, 373 (S.D. 1975).

E. Job References and Blacklisting Statutes

Denial of right to work because of membership or nonmembership in union is a misdemeanor. No person shall be deprived of life, liberty, or property without due process of law. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization. S.D. CODIFIED LAWS § 60-8-3.

F. Non-Disparagement Clauses

There is no South Dakota case law on this issue.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

In *Groseth International, Inc. v. Tenneco, Inc.,* 410 N.W.2d 159, 169 (S.D. 1987), the South Dakota Supreme Court set the standard to be applied to determine a prima facie case for intentional infliction of emotional distress. The factors are whether: (1) an act by defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause plaintiff severe emotional distress; (3) the defendant's conduct was the cause in fact of plaintiff's injuries; and (4) the plaintiff suffered an extreme disabling emotional response to defendant's conduct.

Note that in South Dakota, the tort of intentional infliction of emotional distress includes reckless conduct resulting in emotional distress. To establish reckless conduct, a plaintiff must show that a defendant "recklessly acted in a manner which would create an unreasonable risk of harm to him, and that [defendant] knew or had reason to know of facts which would lead a reasonable man to realize that such actions would create the harm that occurred." *Wangen v. Knudson*, 428 N.W.2d 242, 248 (S.D. 1988).

For example, in *Wangen*, a supervisor falsely told a plaintiff that he was fired after he refused the supervisor's order to participate in an alcohol treatment program. Because the supervisor knew that the plaintiff was suffering from and had been hospitalized for depression, the court upheld a jury award for intentional infliction of emotional distress in favor of the plaintiff, whose depression had worsened following the incident. The court explained that because liability arises "from the actor's knowledge that the other is particularly susceptible to emotional distress by reason of some physical or mental condition or peculiarity[,] ... [a]ctions which may not make [him] liable in one situation may make him liable in another." *Id.*

In *Petersen v. Sioux Valley Hospital Association*, 486 N.W.2d 516, 519 (S.D. 1992), the South Dakota Supreme Court held a plaintiff had made a plausible case of intentional infliction of emotional distress based on a supervisor's conduct in failing to warn her about a meeting at which she had to confront co-workers' complaints. Because the plaintiff previously had told the supervisor about her fear of confrontational group meetings, the court held a jury could find the supervisor's conduct "reckless in view of her nature and condition." *Id.* at 519. On rehearing, the state supreme court clarified the law regarding the tort of intentional infliction of emotional distress. The court adhered to *Wangen*, reaffirming that the tort "encompasses liability for reckless infliction of emotional distress as stated therein." *Id.* at 469.

Accordingly, in *Moysis v. DTG Datanet*, 278 F.3d 819 (8th Cir. 2002), the Eighth Circuit, applying South Dakota law, held that the question of whether the manner in which a former employee was terminated—after suffering a brain injury in an auto accident—demonstrated reckless disregard of a high probability that the former employee would suffer emotional distress, was proper for the jury.

Besides the issue of intent and knowledge, the conduct in an IIED claim must be "so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Tibke v. McDougall*, 479 N.W.2d 898, 907 (S.D. 1992). South Dakota courts have found that a false accusation of felony elder abuse by an employer to an employee did not

constitute conduct outrageous enough for an IIED claim. *Harvey v. Reg'l Health Network, Inc.*, 906 N.W.2d 382, 395 (S.D. 2017).

The South Dakota Supreme Court, in *French v. Dell Rapids Community Hospital*, 432 N.W.2d 285 (S.D. 1988), held the trial court improperly granted summary judgment on French's intentional infliction of emotional distress claim. The plaintiff was recruited for a position in the hospital by one of the doctors. While a few of the doctors resisted based on plaintiff's educational background, the plaintiff was hired but placed on a 90-day probationary period. Shortly after the hiring, doctors began to complain. At the expiration of the probationary period, plaintiff was dismissed. *Id.* at 286-287. The Court held the record did not support the trial court's grant of summary judgment due to the severity of the complaints.

Just as the conduct must be outrageous, damages stemming from an IIED claim must be severe. A former employee's various conditions including difficulty sleeping, irritability, a general feeling that he was not well, and high blood pressure, were no more than ordinary and did not rise to the level necessary to sustain a claim of intentional infliction of emotional distress. *Anderson v. First Century Fed. Credit Union*, 738 N.W.2d 40 (S.D. 2007).

B. Negligent Infliction of Emotional Distress

In *Wright v. Cola Bottling System*, 414 N.W.2d 608, 609 (S.D. 1987), the South Dakota Supreme Court formally recognized a claim for negligent infliction of emotional distress. Courts will recognize a cause of action for negligently causing some foreseeable emotional distress accompanied by bodily harm. The Court adopted the standard for negligent infliction of emotional distress set forth in the RESTATEMENT (SECOND) OF TORTS.

In South Dakota, the tort of negligent infliction of emotional distress requires manifestation of physical symptoms. Further, there must be some causal nexus between the distress and the physical injury. *Wright*, 414 N.W.2d at 609.

In *Richardson v. East River Electric Power Cooperative*, 531 N.W.2d 23 (S.D. 1995), the Court was unwilling to apply negligent infliction of emotional distress based on the fact that East River escorted Richardson to her office to gather her belongings, and then requested that she immediately leave the building. The Court held that while the incident was not pleasant for either party, East River's behavior did not rise to the level of extreme or outrageous conduct. *Id.* at 28. It should be noted that the Court seemed to use negligent and intentional inference interchangeably in this case.

Similarly, in *Henning v. Avera McKennan Hosp.*, 945 N.W.2d 526, 534 (S.D. 2020), the South Dakota Supreme Court found that summarily terminating an at-will employee where no duty of investigation was owed did not give rise to a NIED claim.

VIII. PRIVACY RIGHTS

A. Generally

To recover on an invasion of the right to privacy claim, a claimant must show an "unreasonable, unwarranted, serious and offensive intrusion upon the seclusion of another." *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 424 (S.D. 1994) (citing *Baldwin v. First Nat'l Bank of Black Hills*, 362

N.W.2d 85, 88 (S.D.1985)). Furthermore, "[t]he invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities." *Montgomery Ward v. Shope*, 286 N.W.2d 806, 808 (S.D. 1979) (citations omitted).

B. New Hire Processing

1. Eligibility Verification & Reporting Procedures

In South Dakota, all potential employees must fill out an I-9 Employment Eligibility Verification Form before they start work. Every employer within the state shall furnish to the directory of new hires a report of any newly hired employee which includes the name, address, and social security number as assigned by the Internal Revenue Service. S.D. CODIFIED LAWS § 25-7A-3.3. This information is strictly confidential, and can only be accessed by the Department of Social Services, the Department of Labor and Regulation, and the Department of Education.

2. Background Checks

Criminal background investigations of prospective employees and student teachers in schools are allowed pursuant to S.D. CODIFIED LAWS § 13-10-12. Any county may issue an ordinance requiring any person over eighteen years of age seeking employment with the county to submit to a state and federal criminal background investigation pursuant to S.D. CODIFIED LAWS §§ 7-18A-37 and 9-14-42.

Central registry background checks shall be conducted on all known employees of any child welfare agency. S.D. CODIFIED LAWS § 26-6-23.2.

Each real estate appraiser applicant for initial certification, licensure, or registration must conduct a state and federal criminal background investigation pursuant to S.D. CODIFIED LAWS § 36-21B-2.2.

Persons continuously employed by a South Dakota school district since July 1, 2000 are exempt from criminal background checks. S.D. CODIFIED LAWS § 13-10-14.

C. Specific Issues

1. Workplace Searches

According to the South Dakota Department of Labor, there is no South Dakota statute or case law on this issue.

2. Electronic Monitoring

Pursuant to S.D. CODIFIED LAWS § 23A-35A-1 and 23A-35A-20, it is a felony for one who is not a send or receiver of a telephone communication or one who is not present during such a conversation or discussion to intentionally and by means of an instrument or device overhear or record the communication or aid, authorize, employ, procure, or permit another to do so without the consent of either a sender or receiver.

3. Social Media

There is no South Dakota law regarding social media regulations for employees.

4. Taping of Employees

See S.D. CODIFIED LAWS § 23A-35A-1 and 23A-35A-20 above.

5. Release of Personal Information of Employees

South Dakota has an open records law (S.D. CODIFIED LAWS § 1-27) granting public access to some information obtained by state agencies. The law specifically excludes personnel information as non-public, other than salaries and routine directory information.

6. Genetic Information

South Dakota prohibits employers from obtaining, seeking to obtain, or using genetic information to discriminate against an employee or a prospective employee. S.D. CODIFIED LAWS § 60-2-20.

7. Medical Information

It is a misdemeanor for any employer to require any employee to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of continued employment. S.D. CODIFIED LAWS § 60-11-2.

8. Restrictions on Requesting Salary History

There is no statutory or common law in South Dakota restricting employers from obtaining, seeking, or using prior salary information.

9. Opening Employee Mail

In *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003), the South Dakota Supreme Court held that evidence showed an employer opened a letter from a law firm to a former employee on the employee's age discrimination claim that was mistakenly mailed to the employer. The employer realized it was meant for the employee personally, but read the entire contents of package, made photocopies, and disseminated them to its officers. *Id.* at 658. This was deemed sufficient to establish the employer had intruded on the employee's seclusion, for purposes of the employee's invasion of privacy claim. *Id.* at 661.

10. Data Breaches

Employers must notify employees of breaches to their security systems if employees' unencrypted personal or protected information has been stolen or encrypted information has been stolen, along with the security key, within 60 days of the occurrence. Notification isn't necessary if employers determine, after an appropriate investigation and notice to the attorney general, that the breach will not likely result in harm to employees. Employers already covered by federal law (i.e., HIPAA or the Gramm Leach Bliley Act) are considered to be complying with this state law. Personal or protected

information includes employees' first and last names in connection with any of the following data elements:

- Social Security numbers;
- driver's license numbers;
- account, credit card or debit card numbers, in combination with any required security codes, access codes, passwords, routing numbers, PINs or any additional information that would permit access to a financial account;
- health information; and
- identification numbers assigned to employees in combination with required security codes, access codes, passwords or biometric data generated for authentication purposes.

Protected information includes user names or email addresses used in combination with passwords, security questions or other information that permits access to online accounts and account numbers or credit or debit card numbers in combination with security code, excess codes or passwords that permit access to financial accounts.

Employers may notify employees in writing or electronically. Employers must also notify credit reporting agencies.

See S.D. CODIFIED LAWS §§ 22-40-19 – 26.

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision/Retention

Employers can be held responsible for negligent acts of their employees under respondeat superior theory, and negligent hiring and supervision of employee may also give rise to liability. *Rehm v. Lenz*, 547 N.W.2d 560 (S.D. 1996). For instance, in *Rehm v. Lenz*, a husband and wife claimed that a mental health center where a psychologist was employed was negligent based on respondeat superior, and that it failed to exercise care in hiring, supervising, and retaining the psychologist; these claims were governed by three-year limitations period. *Id.* at 566.

In *McGuire v. Curry*, 766 N.W.2d 501 (S.D. 2009), a racetrack, which hired an underage employee to transport beer, hard liquor, and other items to a concessions area on racetrack property, was found liable to a motorcycle passenger injured in a traffic accident with the employee, due to breaching a duty to supervise the employee to prevent him from becoming intoxicated at work. Although the racetrack imposed a no-drinking policy for underage employees, it was foreseeable that by providing an underage employee unrestricted and unsupervised access to alcoholic beverages, the employee could consume alcohol while at work, abuse the alcohol, leave the premises after work unfit to drive, and injure a member of the general public. *Id.* at 504. However, because the need for a background check increases as an employee position requires more frequent contact with the public, and the employee in question did not primarily interface with the public, the racetrack was not liable for negligent hiring. *Id.* at 507.

To that end, in another case, a restaurant supervisor was not required to conduct further background checks on an employee who informed his supervisor that he had a prior felony conviction for a gang-related offense when employee was first hired. *Iverson v. NPC Intern.*, Inc., 801 N.W.2d 275 (S.D.

2011). Thus, the restaurant was not liable for the plaintiff's injuries arising from the employee's assault of plaintiff in back of restaurant based on theory of negligent hiring, regardless of whether the employee was subsequently given additional duties that placed him in closer contact with public. *Id.* at 280. The employee was originally hired as utility worker whose responsibilities were to cut and prepare pizzas in back of restaurant and away from public, so at the time of hiring, the employer could not have anticipated how often the employee would interact with the public.

B. Interplay with Worker's Compensation Bar

Pursuant to S.D. CODIFIED LAWS § 62-3-2, an employee is limited to workers compensation for a remedy related to an injury or death arising out of and in the course of employment, except for those rights and remedies arising from intentional tort.

C. Firearms in the Workplace

South Dakota is a permitless carry state. S.D. CODIFIED LAWS § 23-7-7. No other laws interfere with an employer's right to ban employees from bringing weapons to work.

D. Use of Mobile Devices

The only law prohibiting the use of mobile devices in South Dakota pertains to texting and driving. There are no other restrictions on mobile devices specific to South Dakota.

X. TORT LIABILITY

A. Respondeat Superior Liability

See discussion under Section IX.A. above.

B. Tortuous Interference with Business/Contractual Relations

1. Interference with Contractual Relations

In *Nelson v. Web Water Development Association, Inc.*, 507 N.W.2d 691 (S.D. 1993), the former manager of a corporation sued the corporation and its directors for breach of contract, conversion, conspiracy, defamation, and other torts including tortious interference with contract. The former manager alleged that the directors had individually interfered with his business relationship or expectancy with his employer. The South Dakota Supreme Court affirmed the trial court's rejection of the former manager's claim for damages arising out of a claim for interference with business contract or expectancy. *Id.* at 699. The Court recognized the following elements for the tort of interference with business contract or expectancy:

(1) The existence of a valid business relationship or expectancy;
(2) Knowledge by the interferer of the relationship or expectancy;
(3) An intentional and unjustified act of interference on the part of the interferer;
(4) Proof that the interference caused the harm sustained; and
(5) Damage to the party whose relationship or expectancy was disrupted.

Id. The Court ruled that, as a matter of law, no cause of action for tortious interference with contract may be maintained against a corporate officer who, acting within the scope of his or her authority, discharges an employee. *Id.*, at 700; *see also Case v. Murdock*, 589 N.W.2d 917 (S.D. 1999).

In *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 756 N.W.2d 399 (S.D. 2008), the Supreme Court concluded that in the employment context, under limited circumstances, an action for intentional interference with contractual relations against a corporate officer can be maintained in South Dakota. A woman brought claims against her former employer for wrongful discharge, breach of contract, and wrongful interference of contract. Her claim for wrongful interference of contract stemmed from a corporate officer, to advance his own interests, tortiously interfered with her contractual relationship by advocating for the nonrenewal of her employment contract. *Id.* at 403.

The court did not overturn *Nelson*, but rather held that a claim for tortious interference with contractual relations may be made against a corporate officer, director, supervisor, or co-worker, who acts wholly outside the scope of employment, and who acts through improper means or for an improper purpose. To state a claim, a plaintiff must allege and prove each of the following elements, which are nearly identical to the ones listed above: (1) the existence of valid contractual relationship; (2) intentional interference with that relationship; (3) by a third party; (4) accompanied through improper means or for an improper purpose; (5) a casual effect between the interference and damage to the relationship; and (6) damages. *Id.* at 406.

2. Interference with Business Relations

In *Setliff v. Akins*, 616 N.W.2d 878 (S.D. 2000), the Supreme Court recognized that a valid business relationship need not be cemented by contract. An at-will employment relationship may be a valid business relationship for purposes of establishing a cause of action for tortious interference, notwithstanding the lack of a true meeting of the minds. *Id.* at 898.

Even where no contract was intended, an employee may show tortious interference by showing that the employer induced a third person not to enter into a business relation with another, induced a third person not to continue a business relation with another, or prevented a third person from continuing a business relation with another. *Sancom, Inc. v. Qwest Comm. Corp.*, 643 F. Supp. 2d 1117, 1129-1130 (D.S.D. 2009).

XI. RESTRICTIVE COVENANTS/NON-COMPETITION AGREEMENTS

A. General Rule

S.D. CODIFIED LAWS § 53-9-8 is generally regarded as a prohibition against agreements in "restraint of trade." However, its provisions are much broader as the statute actually prohibits any agreements which restrain "a lawful profession, trade or business." In applying the statute to a factual setting, courts must analyze three criteria:

(1) Does the conduct of the parties concern a "lawful profession, trade or business"?
(2) If so, has there been a material restraint upon exercising that "lawful profession, trade or business"?

(3) If so, is the conduct authorized by the statutory exceptions contained in S.D. CODIFIED LAWS § 53-9-9, 53-9-10, or 53-9-11?

See Aqreva, LLC v. Bailly, 950 N.W.2d 774, 784 (S.D. 2020) (citing *Communications Tech. Sys., Inc. v. Densmore*, 583 N.W.2d 125, 127-128 (S.D. 1998)).

S.D. CODIFIED LAWS § 53-9-11 discusses the permissible scope of covenants not to compete or noncompete agreements. It provides:

> An employee may agree with an employer at the time of employment or at any time during his employment not to engage directly or indirectly in the same business or profession as that of his employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer within a specified county, first or second class municipality or other specified area for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.

Courts generally attempt to construe such noncompete narrowly, so as to avoid restraints on trade. *Communication Technology System v. Densmore*, 583 N.W.2d 125, 129 (S.D. 1998). In *Communication Technology System,* the court affirmed the order of the lower court that granted summary judgment in favor of a former employee and rival computer company, in an action based upon the hiring of former employee as a computer programming consultant. The court held that the noncompete agreement of appellant computer company was void under state statute.

Whether a court reviews a noncompete agreement for reasonableness depends upon the circumstances under which the employment ends. If an employee quits or is fired for good cause, no further showing of reasonableness will be necessary as long as the noncompete agreement complies with S.D. CODIFIED LAWS § 53-9-11. *Cent. Monitoring Serv., Inc. v. Zakinski*, 553 N.W.2d 513, 521 (S.D. 1996). If an employee, however, is fired for no fault of his own, the noncompete agreement will be enforceable only if it is reasonable. To determine whether a noncompete agreement is reasonable, the court will consider factors such as the extent and duration of the restraint, the nature of the business or profession involved, and the public interest. *Id.* This involves balancing the competing interests of the former employee, the employer, and the public. *Hot Stuff Foods, LLC v. Mean Gene's Enterprises, Inc.*, 468 F. Supp. 2d 1078, 1101 (D.S.D. 2006).

B. Blue Penciling

South Dakota courts narrowly construe noncompete agreements. *Am. Rim & Brake v. Zoellner*, 382 N.W.2d 421 (S.D. 1986). If a noncompete agreement is overly broad, a court may rewrite the agreement to comply with the statutory requirements. *Ward v. Midcom, Inc.*, 575 N.W.2d 233 (S.D. 1998); *Simpson v. C & R Supply, Inc.*, 598 N.W.2d 914 (S.D. 1999).

C. Confidentiality Agreements

S.D. CODIFIED LAWS § 37-29-7 provides that South Dakota's Trade Secrets Act does not affect "contractual remedies, whether or not based upon misappropriation of a trade secret[.]"

The general preference of South Dakota courts is to strictly construe such contracts, enforcing them only to the extent necessary to protect the employer's interest in confidential information. *Hot Stuff Foods, LLC v. Mean Gene's Enterprises, Inc.*, 468 F. Supp. 2d 1078, 1101 (D.S.D. 2006). Employment contract nondisclosure clauses are not enforced, under South Dakota law, if: (1) if a trade secret or confidential relationship does not exist; (2) the employer discloses such information to others not in a confidential relationship; and (3) such information is legitimately discovered and openly used by others. *Id.*

Under South Dakota law, a secrecy agreement containing standard non-compete language was not a waiver of the employer's right to terminate an employee at will. *Talkington v. Am. Colloid Co.*, 767 F. Supp. 1495, 1500 (D.S.D. 1991).

D. Trade Secret Statute

South Dakota has enacted the Uniform Trade Secrets Act. S.D. CODIFIED LAWS Ch. 37-29.

E. Other Considerations

S.D. CODIFIED LAWS § 53-9-11, which permits some covenants not to compete, applies only to an employee's agreement not to compete with his or her employer, and does not apply to an agreement between two employers where one employer agrees not to recruit another employer's employees. Agreements between businesses prohibiting the recruiting of any of their employees by the other business are not enforceable under S.D. CODIFIED LAWS § 53-9-8. *Commc'n Tech. Sys., Inc. v. Densmore*, 583 N.W.2d 125 (S.D. 1998).

XII. DRUG TESTING LAWS

A. Public Employers

S.D. CODIFIED LAWS § 3-6F-1 provides drug screening programs for applicants to certain positions. The commissioner of the Bureau of Human Resources shall establish and implement a drug screening program for applicants who seek the following employment:

(1) Positions at the Human Services Center or the South Dakota Developmental Center whose primary duty includes patient or resident care or supervision;
(2) Positions at the South Dakota State Veterans' Home whose primary duty includes patient or resident care or supervision;
(3) Safety sensitive positions; and
(4) Positions in the Department of Agriculture, Wildland Fire Suppression Division whose duties include firefighting.

The commissioner may also establish and implement a drug screening program for employees holding those positions based upon reasonable suspicion of illegal drug use by any such employee.

A safety-sensitive position is defined as "any law enforcement officer authorized to carry firearms and any custody staff employed by any agency responsible for the rehabilitation or treatment of any adjudicated adult or juvenile." S.D. CODIFIED LAWS § 3-6C-1(24).

S.D. CODIFIED LAWS § 27B-1-19 provides a drug screening policy for community support providers. Any community support provider shall have a drug screening policy for applicants seeking employment and current employees whose primary duty includes patient or resident care or supervision.

B. Private Employers

The South Dakota Supreme Court found that a drug screening program does not waive at-will employment, unless the intent of the employer to the contrary is made explicit. *Henning v. Avera McKennan Hosp.*, 945 N.W. 526, 531 (S.D. 2020)

Note that S.D. CODIFIED LAWS § 62-4-37 provides "No compensation shall be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section shall be on the defendant employer."

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

"Employer" means any person within the State of South Dakota who hires or employs any employee, and any person wherever situated who hires or employs any employee whose services are to be partially or wholly performed in the State of South Dakota. S.D. CODIFIED LAWS § 20-13-1(7).

"Employee" means any person who performs services for any employer for compensation, whether in the form of wages, salary, commission, or otherwise. S.D. CODIFIED LAWS § 20-13-1(6).

B. Types of Conduct Prohibited

It is an unfair or discriminatory practice for any person, because of race, color, creed, religion, sex, ancestry, disability, or national origin, to fail or refuse to hire, to discharge an employee, or to accord adverse or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or any term or condition of employment. S.D. CODIFIED LAWS § 20-13-10. Note that South Dakota law does not expressly prohibit age discrimination.

South Dakota courts apply a McDonnell Douglas burden-shifting framework where the plaintiff asserting discrimination first establishes a prima facie case of discrimination, the burden then shifts to the defendant to present a viable defense, and finally, the burden shifts back again to the plaintiff to prove pretext. *Davis v. Wharf Res. (USA), Inc.*, 867 N.W.2d 706, 713 (S.D. 2015). The prima facie case involves proving (1) the plaintiff was a member of a protected group, (2) the plaintiff was qualified for his or her job, (3) the plaintiff suffered an adverse employment action, and (4) circumstances permit an inference of discrimination. *Id.* The South Dakota Supreme Court has adopted an "objectively qualified" standard for the second element, in alignment with the Eighth Circuit. *Id.* at 714. The fourth element is often proven by showing that the plaintiff was treated worse than similarly situated employees who are not members of his or her protected class. *Id.* at 715.

An employee established a prima facie case for a sexually hostile work environment, where she belonged to a protected group, her co-worker's comments were unwelcome harassment based on sex, her employer knew of the comments, and after comments were made, supervisors began to more closely scrutinize her work, placed her on a work improvement plan, and ultimately discharged her. *Williams v. S.D. Dept. of Agriculture*, 779 N.W.2d 397 (S.D. 2010).

Genuine issues of material fact, regarding whether customers' alleged discriminatory conduct and employer's acquiescence to that conduct was sufficiently humiliating to an African-American employee to create hostile work environment, precluded summary judgment on the employee's claims against the employer, alleging racial discrimination under § 1981, Title VII and South Dakota law. *Mutua v. Texas Roadhouse Mgmt. Corp.*, 753 F. Supp. 2d 954 (D.S.D. 2010).

C. Administrative Requirements

A state discrimination claim under the South Dakota Human Relations Act must be filed with the Department of Human Rights within 180 days from the last date of discrimination. S.D. CODIFIED LAWS § 20-13-31. A party can “dual charge” a Title VII claim at the same time. Once the Department of Human Rights completes the investigation of a charge, the complainant will receive a written decision containing a summary and analysis of the facts along with a determination regarding probable cause. No probable cause decisions may be appealed to Circuit Court within 30 days pursuant to S.D. CODIFIED LAWS § 1-26-30 and 1-26-31. Also, if the charge was dual filed under Title VII, the complainant may request the EEOC conduct what is called a "substantial weight review". A substantial weight review request would mean that the Division would send its file to the EEOC for review to see if they concur with the Department’s findings. The complainant may request an appeal to Circuit Court and/or an EEOC substantial weight review.

D. Remedies Available

In a civil action, if the court or jury finds that an unfair or discriminatory practice has occurred, it may award the charging party compensatory damages. S.D. CODIFIED LAWS § 20-13-35.1. The court may grant as relief any injunctive order, including affirmative action, to effectuate the purpose of this chapter. Punitive damages may be awarded under S.D. CODIFIED LAWS § 21-3-2 for any non-contractual violation where the defendant has been found guilty of oppression, fraud, or malice.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged for serving on jury duty. S.D. CODIFIED LAWS § 16-13-41.1.

B. Voting

No employee may be denied the right to take time off to vote for a period of two consecutive hours during voting time, but only if they do not have two consecutive hours during voting time where they are not required to be at work. S.D. CODIFIED LAWS § 12-3-5. This is a paid leave. *Id.*

C. Family/Medical Leave

Under S.D. CODIFIED LAWS § 3-6C-13, public employees may donate accrued vested leave to another state employee so long as:

(1) The recipient employee is terminally ill and the employee's condition does not allow a return to work;
(2) The recipient employee is suffering from an acutely life threatening illness or injury which has been certified by a licensed physician as having a significant likelihood of terminating fatally and the employee's physical condition does not allow a return to work for a period of at least ninety consecutive days; and
(3) All leave benefits for which the recipient employee is eligible have been exhausted.

The donation is not allowed after the recipient employee is able to return to work or is approved for disability benefits provided for in S.D. CODIFIED LAWS § 3-12-98 or any other public disability benefits.

D. Pregnancy/Maternity/Paternity Leave

There are no statewide laws in South Dakota governing maternity and paternity leave.

E. Day of Rest Statutes

There are no statewide laws in South Dakota governing time off for days of rest.

F. Military Leave

S.D. CODIFIED LAWS § 33A-2-9 states any member of the South Dakota National Guard ordered to active duty service by the Governor or the President has all protections afforded to persons serving on federal active duty by the Servicemembers Civil Relief Act of 2003. 54 Stat. 1178, 50 App. U.S.C. §§ 501-548 and 560-591. The service member is also protected by the Uniformed Services Employment and Reemployment Rights Act, 108 Stat. 3149, 38 U.S.C. §§ 4301 to 4333.

G. Sick Leave

There are no statewide laws in South Dakota governing maternity and paternity leave.

H. Domestic Violence Leave

There are no statewide laws in South Dakota governing maternity and paternity leave.

I. Other Leave Laws

There are no additional statewide leave laws in South Dakota.

XV. STATE WAGE AND HOUR LAWS

Under S.D. CODIFIED LAWS § 60-11-9, every employer shall pay all wages due to employees at least once each calendar month unless otherwise provided by law, or on regular agreed pay days designated in advance by the employer, in lawful money of the United States. An employer may pay wages by check, cash, or direct deposit to the employee's bank account, unless an employer and employee agree to another form of payment.

In any action for the breach of an obligation to pay wages, where a private employer has been oppressive, fraudulent, or malicious, in his refusal to pay wages due to the employee, the measure of damages is double the amount of wages for which the employer is liable. S.D. CODIFIED LAWS § 60-11-7.

No employee may be discharged for making a complaint that he has not been paid wages. S.D. CODIFIED LAWS § 60-11-17.1.

A. Current Minimum Wage in State

The current minimum wage is $11.20 per hour; minimum wage for tipped workers is $5.60 per hour (effective Jan. 1, 2024). *See* S.D. CODIFIED LAWS § 60-11-3.

B. Deductions from Pay

South Dakota does not have any law regarding what may or may not be deducted from an employee's paycheck.

C. Overtime Rules

South Dakota does not have any law regarding compensatory time or overtime.

D. Time for Payment upon Termination

Whenever an employee not having a written contract for a definite period quits or resigns that employment, or is terminated, the wages or compensation earned are due and payable not later than the next regular stated pay day for which those hours would have normally been paid or as soon thereafter as the employee returns to the employer all property of the employer in the employee's possession. S.D. CODIFIED LAWS § 60-11-10; 60-11-11.

E. Breaks and Meal Periods

South Dakota does not have any law regarding breaks or meal periods.

F. Employee Scheduling Laws

South Dakota does not have any law regarding employee scheduling.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

It is a petty offense to smoke tobacco product or carry any lighted tobacco product in a public place or place of employment in South Dakota. S.D. CODIFIED LAWS § 34-46-14. Smoking is permitted in certain licensed establishments where alcohol is sold and certain retail tobacco stores. S.D. CODIFIED LAWS § 34-46-18 and 19. Tobacco product includes vapor products. S.D. CODIFIED LAWS § 34-46-20.

B. Health Benefit Mandates for Employers

According to the South Dakota Department of Labor, there is no law requiring employers to carry workers' compensation insurance. South Dakota law does not require that employers provide any disability or medical insurance benefits. If benefits are provided, those plans may be subject to ERISA, COBRA, or HIPAA regulations.

C. Immigration Laws

South Dakota follows federal guidelines for immigration under the Immigration and Nationality Act of 1952, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. South Dakota does require proof of citizenship or immigration documents for sex offender registration. S.D. CODIFIED LAWS § 22-24B-8.

D. Right to Work Laws

In South Dakota, any attempt to form an agreement with, deny, or coerce a person into not working is a violation of the S.D. Const. art. VI § 2 and is a misdemeanor. S.D. CODIFIED LAWS § 60-8-3 through 8-8.

E. Lawful Off-Duty Conduct – Tobacco Products

Under S.D. CODIFIED LAWS § 60-4-11, it is a discriminatory or unfair employment practice for an employer to terminate the employment of an employee due to that employee's engaging in any use of tobacco products off the premises of the employer during nonworking hours unless such a restriction:

> (1) Relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
> (2) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

Notwithstanding any other provisions of that chapter, the sole remedy for any person claiming to be aggrieved by a discriminatory or unfair employment practice as defined in this section shall be as follows: the person may bring a civil suit for damages in circuit court, and may sue for all wages and benefits which have been due up to and including the date of the judgment had the discriminatory or unfair employment practice not occurred. However, that person is not relieved from the obligation to

mitigate damages. It is not a discriminatory or unfair employment practice pursuant to this section for an employer to offer, impose or have in effect a health or life insurance policy that makes distinctions between employees for the type of coverage or the cost of coverage based upon the employees' use of tobacco products.

An employer may discharge any employee, whether engaged for a fixed term or not, if the employee is guilty of misconduct in the course of service or of gross immorality though unconnected with the misconduct. S.D. CODIFIED LAWS § 60-4-9. This also includes conduct prior to being hired. S.D. CODIFIED LAWS § 60-4-10. There is no case law defining misconduct or immorality under this section.

F. Gender/Transgender Expression

It is discriminatory to discharge or fail to hire an employee in South Dakota based on sex. S.D. CODIFIED LAWS § 20-13-10. Wage discrimination by sex is also prohibited. S.D. CODIFIED LAWS § 60-12-15. There is currently no South Dakota law protecting transgender expression. Title VII of the Civil Rights Act has afforded the only protection for transgender employees in the State of South Dakota.

G. Other Key Statutes

1. Lie Detector Tests

There are no laws regulating polygraph tests in South Dakota.

2. Volunteer Activities and Reports

There are no laws concerning volunteer activities in South Dakota.

3. Commission Sales Representatives

There are no laws concerning commission sales representatives in South Dakota.

4. Commercial Motor Vehicle Operators

Responsibilities of employers of individuals operating motor vehicles are listed in S.D. CODIFIED LAWS§ 32-12A-5.

5. Abortion

No physician, nurse, or other person who performs or refuses to perform or assist in the performance of an abortion shall, because of that performance or refusal, be dismissed, suspended, demoted, or otherwise prejudiced or damaged by a hospital or other medical facility with which he is affiliated or by which he is employed. S.D. CODIFIED LAWS § 34-23A-13.

6. Local Ordinances

There are no notable local employment ordinances in South Dakota.

7. Medical Marijuana

Medical marijuana is legal in South Dakota. The original law stated that:

> No employer is required to allow the ingestion, possession, transfer, display, or transportation of cannabis in any workplace or to allow any employee to work while under the influence of cannabis. No employer is prohibited from establishing and enforcing a drug free workplace policy that may include a drug testing program that complies with state and federal law and acting with respect to an applicant or employee under the policy.

S.D. CODIFIED LAWS § 34-20G-24. Moreover, a registered qualifying patient who uses cannabis for a medical purpose shall be afforded all the same rights under state and local law, as the person would be afforded if the person were solely prescribed a pharmaceutical medication, as it pertains to:

> (1) Any interaction with a person's employer;
> (2) Drug testing by a person's employer; or
> (3) Drug testing required by any state or local law, agency, or government official.

S.D. CODIFIED LAWS § 34-20G-22.

As of February 12, 2024, the law was modified to provide that employers may take adverse employment action against an employee, based solely on a positive test result for cannabis metabolites, if the person is employed in a safety-sensitive job. Similarly, employers may refuse to hire a person based solely on a positive test result for cannabis metabolites, if the person is seeking employment in a safety-sensitive job. S.D. CODIFIED LAWS § 34-20G-22 (as amended). Also, no cause of action is created for employment discrimination or wrongful termination arising from an employer's enforcement of a drug-free workplace policy in compliance with this chapter. S.D. CODIFIED LAWS § 34-20G-24 (as amended).

The medical marijuana law does not apply to the extent that it would conflict with an employer's obligations under federal law or regulation or to the extent that they would disqualify an employer from a monetary or licensing-related benefit under federal law or regulation. S.D. CODIFIED LAWS § 34-20G-23.