Labor and Employment Law for South Carolina Lawyers

Fifth Edition

Volumes I & II
2023-2024 Supplement

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[563] *Id.* at 118.

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♦ Replace the citation in footnote 579 to read:

[579] 1992 U.S. App. LEXIS 14449 (4th Cir. June 19, 1992) (unpub'd).

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♦ Revise the citation in footnote 580 to read:

[580] *Id.* at 10.

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General Update

Following the landmark Supreme Court decision in *Bostock v. Clayton County*, employers must remember that sex, as protected under Title VII of the Civil Rights Act of 1964, now includes sexual orientation and gender identity. 42 U.S.C. §§ 2000(e) *et seq.*; *Bostock v. Clayton Cty.*, 590 U.S. ___, 140 S. Ct. 1731, 1737 (2020).

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♦ Add a second paragraph as follows:

While word-of-mouth recruitment is not illegal *per se*, note that the EEOC strongly disfavors word-of-mouth recruiting when a workforce is overly homogenous and the recruitment furthers that homogeneity, regardless of the makeup of the staff.[621.1]

[621.1] *See Prohibited Employment Policies/Practices*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/prohibited-employment-policiespractices (last accessed Jun. 27, 2023); *see also* U.S. Equal Emp. Opportunity Comm'n, EEOC Notice 915.005, EEOC Enforcement Guidance on National Origin Discrimination (2016) (explaining

that if "current staff is ethnically or racially homogenous, relying largely on word-of-mouth recruitment may operate to exclude applicants of other races or ethnicities and therefore be a prohibited practice").

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- Add to end of footnote 626 as follows:

See also Patterson v. Boeing Co., No. CV 16-7613-GW (SKX), 2018 U.S. Dist. LEXIS 228041, at *54-55 (C.D. Cal. Apr. 4, 2018) (citing *Holder* and noting that while nepotism alone does not violate Title VII, the presence of family preferences in hiring may be "evidence upon which an inference of invidious motive may be drawn").

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- Footnote 632 should be revised as follows:

[632] *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 367 (1977).

- Footnote 633 should be revised as follows:

[633] *Id.* at 367 ("A nonapplicant must show that he was a potential victim of unlawful discrimination."); *see also see also Hailes v. United Air Lines*, 464 F.2d 1006, 1008 (5th Cir. 1972) (holding that "to be aggrieved under this subsection a person must be able to demonstrate that he has a real, present interest in the type of employment advertised. In addition, that person must be able to show he was effectively deterred by the improper ad from applying for such employment"); *Stevens v. Charles Cty.*, No. TDC-20-3522, 2022 U.S. Dist. LEXIS 116739, at *20 (D. Md. June 30, 2022) (citing *Brown v. McLean*, 159 F.3d 898, 902 (4th Cir. 1998)) (holding that a plaintiff alleging racially discriminatory non-promotion failed to show that he was "generally deterred" from applying for the job because he stated that "he would not have applied in any event").

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- Replace the sentence in the second full paragraph on the page, "Given the prohibition found in section 704(b), help wanted advertisements should include only race-neutral and sex-neutral terms" with the following:

"Based on EEOC online guidance, employers should refrain from publishing job advertisements showing a preference for or against <u>any</u> class protected

by Title VII, including race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information."[637]

- Revise footnote 637 as follows:

> [637] *See* U.S. Equal Emp. Opportunity Comm'n, Vol. 3, N:3229, EEOC Policy Guidelines on Sex-Referent Language in Job Advertising (BNA) (advising the use of sex-neutral terms and explaining that while the use of a word like "patrolman" does not violate *per se* Title VII, it is a "suspect" term); *See Prohibited Employment Policies/Practices*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/prohibited-employment-policiespractices (last accessed Jun. 27, 2023).

- The text of 29 C.F.R. § 1625.4, which precedes footnote 640, should be updated as follows, in accordance with the language of the regulation:

> (a) Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as over age 60, retirees, or supplement your pension.
>
> (b) Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate the Act. But because asking applicants to state their age may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals, employment notices or advertisements that include such requests will be closely scrutinized to assure that the requests were made for a lawful purpose.

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- Add to the end of footnote 643 the following new cases:

> In a workplace age discrimination claim under the ADEA, a federal district court noted that an employer's use of terms such as "maturity" and "experience," although facially related to age, did not intimate age discrimination because the plaintiff failed to produce context that would prove that the terms were used in a discriminatory manner. *Long v. Forsyth Cnty. Dep't of Soc. Servs.*, No. 1:15-CV-683, 2016 U.S. Dist. LEXIS 180234, at n. 5 (M.D.N.C. Dec. 30, 2016).

Distinct from that case, however, the Superior Court of Washington, D.C. denied a defendant's motion to dismiss and found that the plaintiff had sufficiently pleaded an ADEA age discrimination claim when he showed that defendant's age-related job announcements deterred him from applying for an open position. *Moeller v. Kane*, No. 2018 CA 004172 B, 2018 D.C. Super. LEXIS 10, at *9-10 (D.C. Super. Ct. Oct. 18, 2018) (explaining that defendant's "use of the term 'recent law school graduate' created the implication that persons older than the normal 'recent law school graduate' need not apply," thereby limiting the access of older lawyers to the positions and deterring them from applying").

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♦ Add to the end of footnote 645 the following new case:

See Bauer v. Lynch, 812 F.3d 340, 352 (4th Cir. 2016) (citing *Griggs* for the proposition that disparate impact discrimination occurs when a facially neutral employment practice has a significantly discriminatory effect).

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♦ Add to the end of footnote 650 the following:

See Hunter-Rainey v. N.C. State Univ., No. 5:17-CV-46-D, 2018 U.S. Dist. LEXIS 32480, at *10 (E.D.N.C. Feb. 28, 2018), *aff'd*, 744 Fed. Appx. 801, 802 (4th Cir. 2018) (citing *Adeyemi* in finding that plaintiff's disability-related claims failed).

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♦ Add to the end of footnote 655 the following:

Relying on the heightened pleading standard required by *Twombly/Iqbal*, and consistent with its own jurisprudence, the Fourth Circuit affirmed the district court's dismissal of a Title VII disparate-treatment claim in a case where plaintiff had not pleaded facts sufficient to make plausible an inference of discriminatory firing and personnel decisions when she merely alleged that her termination was based on race. *Squire v. Identity, Inc.*, No. 21-2410, 2022 U.S. App. LEXIS 31945, at *4-5 (4th Cir. Nov. 17, 2022). The *Squire* court noted that while plaintiff's termination may have been "*consistent* with discrimination, it [did]

not alone support a *reasonable inference* that the decisionmakers were motivated by bias." *Id.* at *4 (emphasis in original) (quoting *McCleary-Evans*, 780 F.3d at 586); *see also Britt v. Dejoy*, No. 20-1620, 2022 U.S. App. LEXIS 26204, at *13 (4th Cir. Sept. 14, 2022) ("Given the dearth of relevant facts, there is no plausible inference that retaliatory animus caused Britt's termination. The factual allegations contained within the complaint as to Britt's retaliation claim therefore fail to raise a right to relief above the speculative level" (internal citations omitted) (quotations omitted).).

♦ Add to the end of footnote 658 the following:

See also Lyons v. City of Alexandria, 35 F.4th 285, 289 (4th Cir. 2022) (following *Reeves'* articulation of the burden-shifting framework in Title VII cases).

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♦ Add to the end of footnote 663 the following:

But cf. Jackson v. Sprint/United Mgmt. Co., No. RDB-21-0426, 2022 U.S. Dist. LEXIS 182323, at *14 (D. Md. Oct. 4, 2022) (distinguishing from *Evans*, 80 F.3d at 960, and finding that plaintiff sufficiently established a *prima facie* case of Title VII discrimination through "testimony based on personal experience, discussing specific alleged comments by her managers").

♦ Add to the end of footnote 664 the following:

See also Norman v. Call-a-Nurse, LLC, 738 Fed. App'x. 307, 308 (4th Cir. 2019) (quoting and following *Anderson*, 406 F.3d at 272, in concluding that "Norman asks us to question the wisdom of the decision to terminate her. However, we do not sit as a super-personnel department weighing the prudence of employment decisions made by the defendants." (internal quotations omitted)).

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♦ Revise footnote 671 as follows:

[671] *EEOC v. BMW Mfg. Co.*, No. 7:13-1583-HMH, 2015 U.S. Dist. LEXIS 125367, at *5 (D.S.C. July 30, 2015); *see also Abdus-Shahid v. Mayor & Balt.*, 674 Fed. App'x. 267, 275 (4th Cir. 2017).

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- Add the following to the end of footnote 672:

  See de Reyes v. Waples Mobile Homes Park L.P., 903 F.3d 415, 419 (4th Cir. 2018) ("[T]he plaintiff must demonstrate a robust causal connection between the defendant's policy and the disparate impact.").

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- Revise footnote 683 to the following:

  [683] https://www.govinfo.gov/content/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1607.xml. (last accessed Apr. 8, 2024)

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- Add to the following to the end of footnote 687:

  Davis v. Kendall, No. TJS-21-2593, 2022 U.S. Dist. LEXIS 225959, at 23 (D. Md. Dec. 14, 2022).

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- Add the following to the end of footnote 721:

  See, e.g., *Bryan v. Gov't of the V.I.*, 916 F.3d 242, 248 (3d Cir. 2019); *O'Brien v. Caterpillar*, 900 F.3d 923, 932 (7th Cir. 2018); *Eggers v. Wells Fargo Bank, N.A.*, 899 F.3d 629, 633 (8th Cir. 2018) for an employer's defense of citing a reasonable factor other than age.

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- Add to the end of footnote 722 the following:

  Phillips v. Georgetown Cty., No. 2:16-cv-1612-PMD-MGB, 2018 U.S. Dist. LEXIS 43416, at *14 (D.S.C. Jan. 24, 2018) (citing *Martin*, 48 F.3d at 1354, in explaining that plaintiff claiming constructive discharge must "prove two elements: (1) the deliberateness of the County's actions, and (2) the intolerability of the working conditions." (cleaned up)).

- Revise footnote 723 to the following:

  [723] *Lee v. Belvac Prod. Mach., Inc.*, No. 20-1805, 2022 U.S. App. LEXIS 27675, at *7 (4th Cir. Oct. 4, 2022) (cleaned up).

♦ Revise footnote 724 to the following:

> [724] *Lacasse v. Didlake, Inc.*, 712 Fed. App'x. 231, 239 (4th Cir. 2018) (quoting *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 378 (4th Cir. 2006)).

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♦ Revise the final paragraph of the section on Constructive Discharge as follows:

> In 2016, the District Court for the District of South Carolina dismissed a constructive discharge claim in which the plaintiff alleged that she had been branded a troublemaker and referred to as a "bitch," although she had not heard anyone make the comment. Plaintiff had been dissatisfied with her work, even though the assignments given to her were within her job description. In its dismissal, the court drew an important line as to Title VII's role in workplace discrimination: "Title VII is not a general civility code, and its proper use filters out complaints that happen in the ordinary tribulations of work, such as occasional use of bad language and teasing."[725]

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♦ The corresponding footnote 725 should be revised as follows:

> [725] *McLaughlin v. CSX Transp.*, 211 F. Supp. 3d 770, 791 (D.S.C. 2016) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

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♦ Footnote 728 should be revised as follows:

> [728] *Polk v. AMTRAK Nat'l R.R. Passenger Corp.*, 66 F.4th 500, 507 (4th Cir. 2023).

♦ Add to the end of footnote 729 the following:

> *See Randa v. Garland*, 855 Fed. App'x 874, 876 (4th Cir. 2021) ("In considering whether an employee was meeting her employer's legitimate performance expectations, it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff" (quotations omitted).).

♦ Add to the end of footnote 730 the following:

> *See Randa v. Garland*, 855 Fed. App'x 874, 876 (4th Cir. 2021) ("In considering whether an employee was meeting her employer's legitimate performance expectations, it is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff" (quotations omitted)).

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- Add to the end of footnote 732 the following:

  But see Tinsley v. City of Charlotte, 854 Fed. App'x. 495, 500-01 (4th Cir. 2021) ("A comparator's conduct need not be identical to the plaintiff's, or involve precisely the same set of work-related offenses occurring over the same period of time and under the same set of circumstances" (quotations omitted)).

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- In footnote 741, add to the existing citation as follows:

  Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 901 (4th Cir. 2017) (when an employer articulates a reason for discharging the plaintiff that the statute does not proscribe, "it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination.") (quoting *DeJarnette v. Corning Inc*., 133 F.3d 293, 299 (4th Cir. 1998)).

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- In footnote 750, add to the existing citation as follows:

  Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) ("[U]nauthorized disclosures of confidential information to third parties are generally unreasonable" and not "opposition" protected by Title VII).

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- In footnote 760, add to the existing citation as follows:

  Ray v. International Paper Company, 909 F.3d 661, 670 (4th Cir. 2018) (The "standard for establishing an adverse employment action under Title VII's anti[-]retaliation provision is more expansive than the standard for demonstrating a tangible employment action under the statute's anti[-]discrimination provisions."); *Bouknight v. S.C. Dep't of Corr*., 487 F. Supp. 3d 449, 467 (D.S.C. 2020) (same).