

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**Appeal from Richland County
Circuit Court**

The Honorable Robert E. Hood, Circuit Judge

Appellate Case No. 2017-000052

Marion E. Crocker, Jr.,..... Appellant,

v.

South Carolina Department of Health and Environmental Control,.....Respondent.

RECORD ON APPEAL

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SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Marion E. Crocker, Jr.,

Plaintiff,

v.

South Carolina Department of Health and
Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-01951

**ORDER DENYING
PLAINTIFF'S MOTION TO
ALTER OR AMEND**

RICHLAND COUNTY
2016 DEC 13 PM 12:03
JEROME B. H. & G.S.

On November 16, 2016,¹ this Court granted the Motion for Summary Judgment the Defendant South Carolina Department of Health and Environmental Control ("DHEC"), under Rule 56, SCRCP. Plaintiff brought his claim² under the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10 *et seq.*, and accused DHEC of age discrimination. The Court granted the motion and dismissed the case on the following grounds:

1. There is no private right of action under S.C. Code Ann. § 1-13-90(c).
2. To the extent Plaintiff sought to proceed under S.C. Code Ann. § 1-13-90(d), the claim was barred by the Statute of Limitations set forth in S.C. Code Ann. § 1-13-90(d)(6).
3. Plaintiff was not authorized to file a lawsuit under the South Carolina Human Affairs Law under the authority of the Notice of Right to Sue issued by the U.S. Equal Employment Opportunity Commission (EEOC).
4. DHEC did not enter into a "conciliation agreement" with the Plaintiff.

¹ Plaintiff stated in his Motion to Alter or Amend that he was served with the written notice of the Order on November 21, 2016. In any event, I find that Plaintiff's Motion to Alter or Amend is timely under Rule 59(e), SCRCP, which provides that the motion "shall be served not later than 10 days after receipt of written notice of the entry of the order."

² Plaintiff originally brought a second claim for "retaliation," which he voluntarily dismissed with prejudice at oral argument.

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5. Plaintiff's argument that a plain application of S.C. Code Ann. § 1-13-90(d)(6) led to "absurd" results was unavailing.
6. Plaintiff was not entitled to equitable tolling of the Statute of Limitations.
7. Plaintiff's claim was not "novel" in the sense that it could not be adequately addressed in a Motion for Summary Judgment.

PLAINTIFF'S MOTION TO ALTER OR AMEND

In Plaintiff's Motion to Alter or Amend, he appears to restate the arguments made in his original filings with the Court or at oral argument, summarized as follows:

1. The Statute of Limitations under S.C. Code Ann. § 1-13-90(d)(6) does not apply to claims brought under S.C. Code Ann. § 1-13-90(c). Plaintiff is bringing his claim under S.C. Code Ann. § 1-13-90(c).
2. DHEC cannot argue that there is no private right of action under S.C. Code Ann. § 1-13-90(c), since it addressed that issue at oral argument but did not do so in its original motion.
3. The issue raised by Plaintiff was novel and should not have been decided by dispositive motion.

As a legal matter, a motion under Rule 59(e), SCRCP, is essentially viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004).

DECISION

While Plaintiff is permitted to repeat arguments made in his briefs or at oral argument in his motion under Rule 59(e), SCRCP, he has raised no issue that the Court finds persuasive. For

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the reasons stated in the Court's order granting DHEC's Motion for Summary Judgment, Plaintiff's Motion to Alter or Amend is denied.

Further, Plaintiff's argument that DHEC has waived its right to address the absence of a private right of action under S.C. Code Ann. § 1-13-90(c) has no basis in law or fact. The issue was clearly addressed, at length, in (1) Plaintiff's Response to DHEC initial motion, (2) DHEC's Reply Memorandum, and (3) at oral argument before this Court. Further, Plaintiff cites no authority to support this contention, nor can he, as Rule 56 provides that a "party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 56(b), SCRCP (emphasis added).

CONCLUSION

For the reasons stated above, the Plaintiff's Motion to Alter or Amend under Rule 59(e), SCRCP, is DENIED, and Plaintiff's claims are dismissed with prejudice, with each side to bear its own costs and fees.

AND IT IS SO ORDERED.

Re Hood

The Honorable Robert E. Hood
Presiding Judge
Fifth Judicial Circuit

Dec 8, 2016
Columbia, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Marion E. Crocker, Jr.,

Plaintiff,

v.

South Carolina Department of Health and
Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-01951

**ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT OF THE
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL**

RICHLAND COUNTY
FILED
2016 NOV 21 PM 12:41
JANETTE B. HARRIS
C.C.P. & G.S.

This matter came before this Court on October 26, 2016 for a hearing on the Motion for Summary Judgment of the Defendant South Carolina Department of Health and Environmental Control (“DHEC”), under Rule 56, SCRCP. The Motion argued that Plaintiff’s claim¹ – which is brought under the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10 *et seq.* – is barred by the applicable Statute of Limitations. At argument, the parties also disputed whether the South Carolina Human Affairs Law provided a private right of action against a state agency under S.C. Code Ann. § 1-13-90(c).

For the reasons stated below, the Motion is GRANTED, and Plaintiff’s claims are dismissed with prejudice.

FACTUAL RECORD

1. Plaintiff is a former employee of DHEC.
2. In September 2012, DHEC posted the position of Agency Chief Information Officer for which Plaintiff applied. Another DHEC employee, Dakin MacPhail, received a

¹ Plaintiff originally brought a second claim for “retaliation.” At the hearing, Plaintiff voluntarily dismissed the claim with prejudice. Even if he had not, the claim would be dismissed for the same reasons articulated in this Order.

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courtesy interview, even though he did not meet the technical minimum qualifications for the position.

3. A three-member panel conducted interviews of the candidates, including Plaintiff, and recommended the top three (3) applicants to Ms. Barbara Derrick, DHEC's then Director of Administration. Plaintiff was not one of the top three applicants, but Dakin MacPhail was.

4. Although MacPhail did not technically meet the minimum qualifications of the position, Ms. Derrick chose him because he performed best in his interview. At the time of the selection, Dakin MacPhail was 45 years old, and Plaintiff was 55 years old.

5. On August 7, 2013, Plaintiff submitted a Charge of Discrimination to the South Carolina Human Affairs Commission ("SHAC"), alleging that DHEC discriminated against him on the basis of his age by denying him the promotion, and noting that MacPhail "did not meet minimum hiring requirements for the advertised position was selected."

6. On July 1, 2015, the EEOC found that "there is reasonable cause to believe [Plaintiff] was denied a promotion to Agency Chief Information Officer[] because of his age." DHEC vehemently disagreed with the EEOC's finding, and so notified the EEOC. Thereafter, the EEOC engaged in legally-required "conciliation" efforts between the parties that ultimately failed.

7. On February 11, 2016, the EEOC issued a "Notice of Conciliation Failure" to the parties. On the same date, the EEOC also issued a "Notice of Right to Sue" to the Plaintiff. Under the heading applicable to the federal Age Discrimination in Employment Act ("ADEA"), the notice state as follows:

"[y]ou may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**, or your right to sue based on this charge will be

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lost. (The time limit for filing suit based on a claim under state law may be different.)

(emphasis in the original).

8. On March 28, 2016, Plaintiff filed this action in the Court of Common Pleas of Richland County. He brought the action against DHEC, stated under the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10 *et seq.*, alleging that DHEC discriminated against him because of his age “when he was denied the position of Agency Chief Information Officer.” He was allegedly denied this position on or about January 31, 2013.

9. Notably, Plaintiff did not bring any claim against DHEC under ADEA, as referenced in the Notice of Right to Sue.

10. DHEC timely answered Plaintiff’s Complaint and asserted several defenses, including a defense based on the Statute of Limitations contained in the South Carolina Human Affairs Law. Specifically, S.C. Code § 1-13-90(d)(6) states as follows:

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

(emphasis added).

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OPINION

I. THERE IS NO PRIVATE RIGHT OF ACTION UNDER S.C. CODE § 1-13-90(C).

There is only one way for a Plaintiff to file a private civil action in this Court under the "SCHAL," and that avenue is solely provided by S.C. Code Ann. § 1-13-90(d)(6). There is no other authority within the entirety of the SCHAL's statutory scheme that permits a person to bring a private right of action.

S.C. Code Ann. § 1-13-90 provides two statutory schemes for enforcing the provisions of the SCHAL:

- S.C. Code Ann. § 1-13-90(c) provides the statutory procedure for "complaints asserting expressly or in substance a violation [of the SCHAL] by a state agency or department or local subdivisions of a state agency or department."
- S.C. Code Ann. § 1-13-90(d) provides the statutory procedure for "complaints asserting expressly or in substance a violation of [the SCHAL] by employers, employment agencies or labor organizations, including municipalities, counties, special purpose districts, school districts, and local governments, but not including employers, employment agencies or labor organizations covered by § 1-13-90(c)."

DHEC is undoubtedly an agency of the State of South Carolina, and it appears that Plaintiff may only proceed under S.C. Code Ann. § 1-13-90(c) the procedure shall be as follows

Most notably, under S.C. Code Ann. § 1-13-90(c), there is no private right of action.²

Rather, the only "hearing" conducted under S.C. Code Ann. § 1-13-90(c) is one conducted

² It is not unique, or even unusual, for a statutory scheme not to provide a plaintiff with a private right of action. For instance, under the anti-retaliation provisions of the state's Occupational Safety and Health code, S.C. Code Ann. § 41-15-520, some complaints may only be filed in civil court by the Director of the S.C. Department of Labor, Licensing & Regulation ("LLR") ("If upon such investigation the director determines the provisions of Section 41-15-510 have been violated, he shall institute an action in the appropriate court of common pleas against such person. In any such action the court of common pleas shall have jurisdiction for cause shown to restrain violations of Section 41-15-510 and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.").

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before SHAC, not the Court, and must be ordered by one of the Commission's supervisory commission members. S.C. Code Ann. § 1-13-90(c)(5).

Because there is no private right of action under S.C. Code § 1-13-90(c), Plaintiff cannot rely on it to bring a private right of action against DHEC. For that reason alone, his claim must be dismissed with prejudice.

II. PLAINTIFF'S REMAINING CLAIM UNDER THE SOUTH CAROLINA HUMAN AFFAIRS LAW IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Even if Plaintiff claims to proceed under S.C. Code § 1-13-90(d) instead of S.C. Code § 1-13-90(c), his claim under S.C. Code § 1-13-90(d) is barred by the applicable statute of limitations.

"The cardinal rule of statutory construction is to ascertain the intent to the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (internal citations omitted). Where a statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

The Statute of Limitations that applies to a claim under S.C. Code § 1-13-90(d) of the South Carolina Human Affairs Law is plain, unambiguous, and conveys a clear, definite meaning. The statute in question states that:

The action must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier...

S.C. Code § 1-13-90(d)(6). The meaning of the limitation is clear. If a plaintiff wishes to bring a civil action in circuit court under the South Carolina Human Affairs Law under S.C. Code § 1-

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13-90(d), he or she must do so:

- Within one year for the date of the alleged violation, OR
- Within one hundred twenty (120) days from the date the complainant's charge is dismissed,
- Whichever occurs earlier.

S.C. Code § 1-13-90(d)(6). In the instant case, Plaintiff complains about his non-selection for a promotion at DHEC, which occurred in January 2013, and under the plain language of the statute, the Statute of Limitations on Plaintiff's claim ran in **January 2014**. For this reason alone, any claim made under S.C. Code Ann. § 1-13-90(d) must be dismissed. *Harrison-Jenkins v. Med. Univ. of S. Carolina*, 2012 WL 1533046, at *4 (D.S.C. Apr. 9, 2012), *R&R adopted*, 2012 WL 1534711 (D.S.C. May 1, 2012), *aff'd sub nom. Harrison-Jenkins v. Med. Univ. of S. Carolina*, 479 F. App'x 449 (4th Cir. 2012);

III. PLAINTIFF'S ARGUMENTS IGNORE THE DIFFERENCES BETWEEN A CLAIM UNDER THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) AND A CLAIM UNDER THE SOUTH CAROLINA HUMAN AFFAIRS LAW, S.C. CODE ANN. § 1-13-10, ET SEQ.

The Notice of Right to Sue clearly applies, by its own terms, only to claims brought under the federal law and not the SCHAL. *Brown v. Lexington Cty. Health Servs. Dist., Inc.*, 2013 WL 5467623, at *5 (D.S.C. July 11, 2013), *R&R adopted*, 2013 WL 5467626 (D.S.C. Sept. 27, 2013) (South Carolina's doctrine of equitable tolling does not rescue a plaintiff's claim under the South Carolina Human Affairs Law where she waited until after the EEOC issued a right-to-sue letter before filing her state law claims).

In this case, the Notice of Right to Sue may have authorized Plaintiff to file a lawsuit under ADEA, 29 U.S.C. § 621 *et seq.*, but has no bearing on the right of a plaintiff to file a civil

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action under the South Carolina Human Affairs Law.³

Plaintiff has also argued that he should be permitted to file a SCHAL claim pursuant to the EEOC's Notice of Right to Sue because "[n]either Mr. Crocker, the plaintiff herein, nor DHEC objected" when the South Carolina Human Affairs Commission waived deferral of Plaintiff's charge of discrimination, and declared that it "will not be involved in the investigation or resolution of this Charge." This argument is without merit. First, Plaintiff makes no effort to identify a reason that DHEC must object to SHAC's decision to waive participation in the investigation and resolution of Plaintiff's charge. Indeed, if Plaintiff wished to preserve SHAC's opportunity to institute proceedings under S.C. Code § 1-13-90(c), Plaintiff should have voiced his concerns when SHAC declared that it "will not be involved in the investigation or resolution of this Charge." Second, if he wished to attempt to file a lawsuit against DHEC under S.C. Code § 1-13-90(d)(6), Plaintiff could and should have done so by filing a claim within one year of the alleged violation, especially if SHAC did not participate in the claim's investigation or dismissal.

In short, the EEOC's Notice of Right to Sue governs when a plaintiff may file a lawsuit under federal law. In this case, the Notice of Right to Sue may have authorized Plaintiff to file a lawsuit under ADEA, 29 U.S.C. § 621 *et seq.*, but has no bearing on the right of a plaintiff to file a civil action under the SCHAL.

IV. PLAINTIFF WRONGLY ARGUES THAT DHEC ENTERED INTO A CONCILIATION AGREEMENT WITH THE EEOC AND PLAINTIFF.

Plaintiff argued that the "Commission's delegate, EEOC, DHEC, and Mr. Crocker **did** enter into a conciliation agreement" (emphasis in original), and that as a consequence, the Statute

³ "There is no basis under South Carolina law to attribute a dismissal by the EEOC to SHAC, because South Carolina requires that the dismissal be by its own agency". *Whitten v. Fred's, Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) *abrogated on other grounds by Vance v. Ball State Univ.*, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013) (emphasis in the original).

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of Limitations was tolled. Quite simply, there is no evidence anywhere in the record that DHEC entered into a conciliation agreement with Plaintiff. For this reason alone, the argument has no merit.

V. PLAINTIFF'S ARGUMENT THAT A PLAIN READING OF S.C. CODE § 1-13-90(D)(6) LEADS TO ABSURD RESULTS IS UNAVAILING.

Plaintiff argues that a plain reading of S.C. Code § 1-13-90(d)(6) would necessarily leave a plaintiff with only five days to file a complaint, which he described as an "absurd" result. The argument is not accurate, and in any event, is unavailing.

Plaintiff's argument fails for the following reasons:

- If a complainant wishes to file a lawsuit, and SHAC has not filed an action, entered into a conciliation agreement to which the complainant is a party, or dismissed the charge within 180 days after he filed the charge, the would-be plaintiff need only file his lawsuit as directed by the statute within one year of filing the charge.
- If SHAC dismisses the charge prior to the 180-day period, the would-be plaintiff may still file a lawsuit, but his limitations period is shortened to 120 days following SHAC's dismissal.

Further, Plaintiff makes no effort to square his "absurdity" argument with the ruling in *Harrison-Jenkins v. Med. Univ. of S. Carolina*, 2012 WL 1533046, at *4 (D.S.C. Apr. 9, 2012), *R&R adopted*, 2012 WL 1534711 (D.S.C. May 1, 2012), *aff'd sub nom. Harrison-Jenkins v. Med. Univ. of S. Carolina*, 479 F. App'x 449 (4th Cir. 2012), which clearly adopts and enforces the limitations provisions of S.C. Code § 1-13-90(d)(6) to SCHAL claims.

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VI. PLAINTIFF HAS MADE NO SHOWING THAT HE IS ENTITLED TO EQUITABLE TOLLING OF THE LIMITATIONS PERIOD.

Plaintiff's argument that he is entitled to "equitable tolling" of the limitations misinterprets the law of equitable tolling and ignores previous rulings on that subject, including those involving S.C. Code § 1-13-90(d)(6).

As an initial matter, the party claiming that a statute of limitations should be subject to equitable tolling "bears the burden of establishing sufficient facts to justify its use...[and equitable tolling] should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115-117, 687 S.E.2d 29, 32-33 (2009).

The cases cited by Plaintiff all reference an affirmative act by the defendant that made "sparing" use of the equitable tolling doctrine appropriate. In *Hopkins v. Floyd's Wholesale*, 299 S.C. 127, 382 S.E.2d 907 (1989), the court tolled the running of the statute of limitations for the time when the employer induced the employee to believe his claim would be taken care of without filing a workers' compensation claim. Likewise, in *Hooper*, the defendant's failure to properly list its registered agent for service with the Secretary of State as required by state law hindered Hooper's pursuit of service. 386 S.C. at 117-18, 687 S.E.2d at 33-34.

Contrarily, Plaintiff fails to point to any "act" by DHEC of this kind. Instead, Plaintiff faults DHEC for:

- Participating "fully in the lengthy administrative process" compelled by the EEOC.
- "[N]ever intimating [presumably, to Plaintiff] that it intended to rely on an obscure and inapplicable time limit [presumably, the plain and clear language of S.C. Code Ann. § 1-13-90(d)(6)]..."
- "[N]ever suggest[ing] to Crocker that it would disregard EEOC's regulation Notice of Right to Sue..."

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These “reasons” are thoroughly unavailing. First, DHEC had no choice but to participate in the EEOC’s administrative process, and certainly could not refuse to do so.

Second, DHEC is not – and could not be – required to notify Plaintiff of its intent to defend itself against a lawsuit that Plaintiff might file in the future, including the assertion of a clearly stated “statute of limitations.”

Third, Plaintiff is the only party in this case that has apparently ignored the provisions of the EEOC’s Notice of Right to Sue. By its own terms, the Notice governs when a plaintiff may file a lawsuit under federal law. *Whitten*, 601 F.3d at 241. In this case, the Notice of Right to Sue may have authorized Plaintiff to file a lawsuit under ADEA, 29 U.S.C. § 621 *et seq.*, but has no bearing on the right of a plaintiff to file a civil action under the SCHAL.

Finally, Plaintiff fails to address the fact that his argument concerning equitable tolling has already been tried and rejected. In *Brown v. Lexington Cty. Health Servs. Dist., Inc.*, *supra*, the plaintiff explicitly argued that the limitations period under S.C. Code Ann. § 1-13-90(d)(6) “should be equitably tolled because she reasonably waited until after the EEOC issued a right-to-sue letter before filing the instant lawsuit.” 2013 WL 5467623, at *5. However, the court rejected the argument, rightly noting that “South Carolina’s doctrine of equitable tolling does not rescue a plaintiff in such circumstances.” *Id.*

VII. THERE IS NOTHING PARTICULARLY “NOVEL” ABOUT PLAINTIFF’S ALLEGATIONS OR ARGUMENTS.

As set forth in *Brown*, there is nothing particularly new or even remarkable about Plaintiff’s allegations or arguments. Resolution of the dispositive motion requires nothing more than a review of the exhibits at hand, the arguments of the parties, and the applicable law. There is also nothing particularly uncommon about (1) the absence of a private right of action, (2) a

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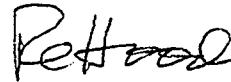
plaintiff's failing to abide by a limitations period, or (3) a plaintiff's failing to file a proper claim under the terms of a Notice of Right to Sue. For these reasons, there is no cause to delay further the resolution of this case.

CONCLUSION

For the reasons stated above, Plaintiff's lawsuit must be dismissed because (1) there is no private right of action under S.C. Code Ann. § 1-13-90(c), and (2) under S.C. Code Ann. § 1-13-90(d), his claim is barred by the applicable Statute of Limitations.

For this reason, I hereby GRANT the motion of DHEC and DISMISS this lawsuit with prejudice, with each side to bear its own costs and fees.

AND IT IS SO ORDERED.



The Honorable Robert E. Hood
Presiding Judge
Fifth Judicial Circuit

NOV 16, 2016
Columbia, South Carolina

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Marion E. Crocker, Jr.,)
)
Plaintiff,)
)
vs.)
)
South Carolina Department of Health)
and Environmental Control,)
)
Defendant.)
_____)

IN THE CIRCUIT COURT
Civil Action No. 2016-CP-40- 01951

COMPLAINT

RICHLAND COUNTY
FILED
2016 MAR 28 PM 2:02
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Plaintiff, Marion E. Crocker, Jr., would show to the court as follows:

NATURE OF THE ACTION

1. This is an action for damages, and such other relief as the court may deem appropriate, caused by the Defendant's violation of the South Carolina Human Affairs Law, Code Section 1-13-10, et seq., Section 1-13-80; 1-13-90, et seq., South Carolina Code of Laws, and age retaliation in the ways as set forth below.

JURISDICTION AND VENUE

2. The unlawful practices described herein were committed in the State of South Carolina, Richland County.
3. Plaintiff, at all times relevant, was an employee of Defendant.
4. Defendant, at all times relevant to the acts complained of, is an agency of the State of South Carolina, and owns property and does business in Richland County, South Carolina.

5. Defendant is a "person" and an "employer" as provided in Section 1-13-30 (d) (e).
6. This court has jurisdiction over the facts alleged herein.

PARTIES

7. Plaintiff is a resident of Richland County, South Carolina.
8. Defendant is an agency of the State of South Carolina.
9. Plaintiff was employed by Defendant from on or about January 4, 1980, as an I.T. Manager, until his termination, on or about September 17, 2013.
10. During the years Plaintiff was employed by Defendant, he had three job titles; a. Manager Operational Systems; b. Director IT Operations; and, c. IT Project Manager. All three job titles were internal to Defendant. Plaintiff remained classified under the State Human Resources classification system as an IT Manager 1.
11. During his employment, Plaintiff was an excellent employee.

FACTUAL BACKGROUND

12. In 1972, the General Assembly declared the practice of discrimination in employment on the basis of race, religion, color, sex, age, national origin, or disability to be a matter of state concern, and declared employment discrimination to be unlawful, and against the public policy of South Carolina. Section 1-13-20.
13. On or about September 27, 2012, Defendant advertised an opening for the position of Agency Chief Information Officer.

14. Defendant's job position announcement set forth, among other things: a. the Job Responsibilities, b. the Minimum and Additional Requirements, c. Preferred Qualifications, and d. Additional Comments.
15. Plaintiff's academic achievements, and work experience far exceeded all requirements of the job position.
16. Plaintiff made a timely application for the job position.
17. Several other individuals, perhaps 3 or 4 others, also applied for the position.
18. Soon thereafter, the chosen applicant was named.
19. The person named for the job position was an individual well known to Plaintiff, as he had formerly worked under Plaintiff's supervision.
20. Plaintiff knew the selected person did not meet the minimum qualifications for the position, nor did the selected person meet the preferred job qualifications.
21. The selected person was many years younger than Plaintiff.
22. Plaintiff knew he was far more qualified, by credentials and experience, for the job position than the selected person; and, believed he had been discriminated against in the job selection process on the basis of his age.
23. Plaintiff was then 55 years old, date of birth November 12, 1956.
24. Plaintiff filed a formal grievance with Defendant concerning the selection process for the Agency Chief Information Officer position.
25. On March 18, 2013, Defendant denied Plaintiff's grievance, stating the nature of his grievance did not fall within the provisions of the State Employee Grievance Procedure Act.

26. On August 7, 2013, Plaintiff filed his Charge of Discrimination on the basis of Age with both the South Carolina Human Affairs Commission (SHAC), and the Equal Employment Opportunity Commission (EEOC), under the provisions of the South Carolina Human Affairs Law, and the Age Discrimination in Employment Act of 1967 (as amended).
27. SHAC has a cooperation agreement with the EEOC to cooperate one with the other in order to achieve the purposes of the state and federal discrimination laws. Section 1-13-70 (k).
28. On August 9, 2013, Plaintiff's Complaint, SHAC # 3-13-212A, and, EEOC Charge Number 14C-2013-00583, was deferred by SHAC to the EEOC for investigation.
29. As a result of deferral, SHAC forwarded all information concerning Plaintiff's Complaint to the EEOC. SHAC took no further action concerning the Complaint.
30. On July 1, 2015, the EEOC issued its Determination in which it concluded that Plaintiff had been wrongfully denied the position of Agency Chief Information Officer on the illegal basis of age discrimination. The position had been awarded to a less qualified, younger person.
31. Whenever the EEOC finds that there is reasonable cause to believe that a violation of the discrimination law has occurred, the EEOC attempts to eliminate the alleged unlawful practice by informal methods of conference, conciliation, and persuasion. 29 CFR Section 1601.24.
32. Conciliation is voluntary.

33. On February 11, 2016, the EEOC determined that efforts to conciliate this Charge had been unsuccessful. The EEOC notified the parties, and issued its Notice of Right to Sue to Plaintiff.
34. The Notice of Right to Sue provides that a charging party may file suit in state or federal court within ninety days of their receipt of this Notice.
35. This Summons and Complaint is timely filed.

FIRST CLAIM FOR RELIEF – AGE DISCRIMINATION

36. Plaintiff incorporates by reference each and every allegation contained above.
37. The South Carolina Human Affairs Law, South Carolina Code Section 1-13-30(c), protects persons who are at least forty years old from age discrimination.
38. Plaintiff was 55 years old at the time he was wrongfully discriminated against in the job position selection process because of his age.
39. It is illegal in South Carolina to discriminate against any person, forty years of age or older, because to the persons age; The South Carolina Human Affairs Law, South Carolina Code Sections 1-13-20; 1-13-30; 1-13-80; 1-13-90, et seq.
40. Plaintiff is informed and believes he was the victim of age discrimination when he was denied the position of Agency Chief Information Officer.

SECOND CLAIM FOR RELIEF – AGE DISCRIMINATION RETALIATION

41. Plaintiff incorporates by reference all paragraphs above as fully as if set forth herein.

42. At all times, Plaintiff's credentials, work experience, and work performance with Defendant were exemplary.
43. Defendant hired a younger, less qualified person for the position of Agency Chief Information Officer.
44. The selected person did not even meet the minimum job requirements for the position.
45. Plaintiff filed an agency grievance concerning the job selection process. His grievance was disallowed as not being within the State Employee Grievance Procedure Act.
46. On August 7, 2013, Plaintiff filed his Complaint of Age Discrimination with the SHAC.
47. On September 17, 2013, Plaintiff was terminated for the pretextual reason of reduction in force.
48. Plaintiff is informed and believes his termination was in retaliation for complaining of age discrimination.
49. Plaintiff was retaliated against for exercising his rights of filing a complaint of age discrimination under the South Carolina Human Affairs Law.

PRAYER FOR RELIEF


WHEREFORE, as to Plaintiff's Claim For Relief for Age Discrimination, and in Retaliation for exercising his anti-discrimination rights, Plaintiff requests:

- a. That the court award him an appropriate amount of actual damages as shall be shown at trial for all monetary damages, including lost back pay, and lost

front pay, the value of insurance benefits, and all other employment benefits
he has suffered as a result of the violation of his rights under the age
discrimination provisions of the South Carolina Human Affairs Law;

- b. A reasonable attorney's fee and the costs of this action;
- c. prejudgment interest; and,
- d. Such other and further relief as the Court may deem proper.

Attorney For Plaintiff


Gerald F. Smith

1229 Lincoln Street
Columbia, SC 29201
803-765-1155
gsmith52@aol.com

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Marion E. Crocker, Jr.,

Plaintiff,

v.

South Carolina Department of Health and
Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-01951

ANSWER OF DEFENDANT

NOW COMES Defendant South Carolina Department of Health and Environmental Control ("DHEC"), by and through counsel, and answers the Plaintiff's Complaint, denying all allegations not specifically admitted, as follows:

PARTIES AND JURISDICTION

1. In Paragraphs 1 through 11 of Plaintiff's Complaint, Plaintiff attempts to set forth the identity of the parties and to address issues of jurisdiction and venue. To the extent that Plaintiff's allegations concerning these issues are not supported by the record in this case, they are denied. Furthermore, to the extent that the claims brought by Plaintiff are not justiciable, this Court should exercise jurisdiction and venue only to the extent that it declares the claims are not justiciable. Unless otherwise admitted, the allegations in Paragraphs 1 through 11 of Plaintiff's Complaint are denied.

GENERAL ALLEGATIONS

2. In Paragraphs 12 through 35 of Plaintiff's Complaint, Plaintiff attempts to set forth allegations concerning his work record, the purported actions of DHEC, his unsupported allegation that he a superior candidate for the position of Agency Chief Information Officer, the

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history of his grievance and his Charge of Discrimination. Unless otherwise admitted, the allegations in Paragraphs 12 through 35 of Plaintiff's Complaint are denied.

FOR A FIRST CAUSE OF ACTION
(AGE DISCRIMINATION)

3. Defendants incorporate their responses to the allegations in Paragraphs 1 through 35 of Plaintiff's Complaint as if fully set forth herein.

4. In Paragraphs 36 through 40 of Plaintiffs' Complaint, Plaintiff attempts to set forth allegations supporting his discrimination claim. The allegations in Paragraphs 36 through 40 of Plaintiff's Complaint are denied.

FOR A SECOND CAUSE OF ACTION
(AGE DISCRIMINATION RETALIATION)

5. Defendants incorporate their responses to the allegations in Paragraphs 1 through 40 of Plaintiff's Complaint as if fully set forth herein.

6. In Paragraphs 41 through 49 of Plaintiffs' Complaint, Plaintiff attempts to set forth allegations supporting a retaliation claim. The allegations in Paragraphs 41 through 49 of Plaintiff's Complaint are denied.

NOW THEREFORE, having fully answered the allegations in Plaintiff's Complaint, Defendant DHEC now sets forth its DEFENSES:

FOR A FIRST DEFENSE

1. Plaintiff's Complaint fails to state facts sufficient to constitute any cause of action or any claim upon which relief may be granted against the Defendant under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

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FOR A SECOND DEFENSE

2. At all times, the Defendants acted toward Plaintiff in good faith and in a reasonable manner.

FOR A THIRD DEFENSE

3. Plaintiff's claims may be barred by the doctrines of collateral estoppel, *res judicata*, waiver, and/or estoppel.

FOR A FOURTH DEFENSE

4. Plaintiff's claims are barred under the applicable statute of limitations. Specifically, S.C. Code § 1-13-90(d)(6) states as follows:

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

(Emphasis added). Because Plaintiff has failed to file an action within the time required, this lawsuit must be dismissed.

FOR A FIFTH DEFENSE

5. Plaintiff has failed to mitigate any damages he has allegedly suffered. Plaintiff can also show no damages related to any of his claims.

FOR A SIXTH DEFENSE

6. To the extent Plaintiff's allegations exceed the scope of his original charge of discrimination, they must be dismissed.

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FOR A SEVENTH DEFENSE


7. To the extent Plaintiff's request for damages exceeds the statutory limitations set for these claims, they must be dismissed.

WHEREFORE, having fully answered Plaintiff's Complaint herein, the Defendant South Carolina Department of Health and Environmental Control requests that:

1. the relief sought by Plaintiff be denied in each and every respect;
2. the claims asserted by Plaintiff be dismissed in their entirety with prejudice; and,
3. Defendant be awarded costs and attorneys' fees under applicable case and statutory laws and such other and further relief as this Court may deem just and proper.

Dated this the 25th day of April, 2016.

RICHARDSON PLOWDEN & ROBINSON, P.A.



Eugene H. Matthews
Post Office Drawer 7788
Columbia, South Carolina 29202
T: (803) 771-4400
F: (803) 779-0016
Email: gmatthews@RichardsonPlowden.com

**COUNSEL FOR DEFENDANT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL
CONTROL**

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Marion E. Crocker, Jr.,

Plaintiff,

v.

South Carolina Department of Health and
Environmental Control,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-40-01951

**MOTION FOR SUMMARY JUDGMENT OF THE
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL**

NOW COMES Defendant South Carolina Department of Health and Environmental Control (“DHEC”), by and through counsel, and files this Motion for Summary Judgment, under Rule 56, SCRCP, on grounds that Plaintiff’s claims – which are brought under the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10 *et seq.* – are barred by the applicable Statute of Limitations. For this reason, Plaintiff’s claims must be dismissed with prejudice.

In support of this motion, DHEC states as follows.

FACTUAL RECORD

1. Plaintiff is a former employee of DHEC. (Plaintiff’s Complaint, ¶ 2).
2. In September 2012, DHEC posted the position of Agency Chief Information Officer, and solicited applications for the position. (Plaintiff’s Complaint, ¶ 13).
3. Plaintiff submitted his own application. In fact, several persons, including five (5) internal DHEC employees, also submitted their applications. As a courtesy, one DHEC employee, Dakin MacPhail, received a courtesy interview, even though he did not meet the technical minimum qualifications for the position. (DHEC’s Response to Equal Employment Opportunity Commission’s (“EEOC”) RFI, attached as Exhibit “A”).

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4. A three-member panel conducted interviews of five (5) candidates, including Plaintiff, and recommended the top three (3) applicants to Ms. Barbara Derrick, DHEC's then Director of Administration. Plaintiff was not one of the top three applicants. (DHEC's Response to EEOC's RFI, attached as Exhibit "A").

5. Ms. Derrick selected Dakin MacPhail, who was an internal DHEC candidate for the position. Although he did not technically meet the minimum qualifications, DHEC chose him because he performed best in his interview. At the time of his selection for the position, Dakin MacPhail was 45 years old. Plaintiff was 55 years old at the time. (DHEC's Response to EEOC's RFI, attached as Exhibit "A"; Plaintiff's Complaint, ¶ 23).

6. On July 11, 2013, DHEC instituted a reduction-in-force ("RIF") that affected both Plaintiff's employment area and Plaintiff's specific position. Plaintiff was notified shortly thereafter that his position would be eliminated in the RIF. (RIF Approval from the South Carolina Budget & Control Board, attached as Exhibit "B").

7. After being notified of the RIF, on August 7, 2013, Plaintiff submitted a Charge of Discrimination to the South Carolina Human Affairs Commission, alleging a claim of age discrimination, claiming that "younger person that did not meet minimum hiring requirements for the advertised position was selected." (Plaintiff's Complaint, ¶ 26; First EEOC Charge of Discrimination, #14C-2013-00583C, attached as Exhibit "C").

8. On September 17, 2013, DHEC's RIF officially eliminated Plaintiff's position. (Plaintiff's Complaint, ¶ 47).

9. Shortly thereafter, on September 23, 2013, Plaintiff filed another Charge of Discrimination with the EEOC, this time alleging that he was laid off in retaliation for filing his

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EEOC charge on August 7, 2013. (Second EEOC Charge of Discrimination, #436-2013-01133, attached as Exhibit "D").

10. On April 23, 2014, the EEOC issued a "Dismissal and Notice of Rights" to Plaintiff regarding his retaliation Charge #436-2013-01133 (attached as Exhibit "E"). The Notice specific stated that:

"[y]ou may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed **WITHIN 90 DAYS** of your receipt of this notice, or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

(emphasis in the original).

11. On July 1, 2015, the EEOC found that "there is reasonable cause to believe [Plaintiff] was denied a promotion to Agency Chief Information Officer[] because of his age." (EEOC Determination attached as Exhibit "F"). DHEC vehemently disagreed with the EEOC's finding, and so notified the EEOC.

12. Thereafter, the EEOC engaged in legally-required "conciliation" efforts between the parties that ultimately failed. On February 11, 2016, the EEOC issued a "Notice of Conciliation Failure" to the parties (attached as Exhibit "G").

13. On the same date, the EEOC also issued a "Notice of Right to Sue" to the Plaintiff (attached as Exhibit "H"). Under the heading applicable to the federal Age Discrimination in Employment Act ("ADEA"), the notice state as follows:

"[y]ou may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**, or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

(emphasis in the original).

14. On March 28, 2016, Plaintiff filed this action in the Court of Common Pleas of Richland County. He brings two claims against DHEC, each stated under the South Carolina Human Affairs Law, S.C. Code Ann. § 1-13-10 *et seq.*

- a. His first claim alleges that DHEC discriminated against him because of his age “when he was denied the position of Agency Chief Information Officer.” He was allegedly denied this position on or about January 31, 2013.
- b. His second claim alleges that “his termination was in retaliation for complaining of age discrimination.” Plaintiff was notified about the RIF in July 2013, and his position was eliminated on or about September 17, 2013.

15. Plaintiff has not brought any lawsuit against DHEC under ADEA, as referenced in the Notices of Right to Sue mentioned above.

16. DHEC timely answered Plaintiff’s Complaint and asserted several defenses, including a defense based on the Statute of Limitations contained in the South Carolina Human Affairs Law. Specifically, S.C. Code § 1-13-90(d)(6) states as follows:

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

(emphasis added). As explained more fully below, because Plaintiff has failed to file an action within the time required, this lawsuit must be dismissed.

LEGAL ARGUMENT

I. PLAINTIFF’S CLAIMS UNDER THE SOUTH CAROLINA HUMAN AFFAIRS LAW ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

“The cardinal rule of statutory construction is to ascertain the intent to the legislature.”

Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Revenue, 388 S.C. 138, 147-48, 694 S.E.2d 525,

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529 (2010) (internal citations omitted). Where a statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

The Statute of Limitations that applies to a claim under the South Carolina Human Affairs Law is plain, unambiguous, and conveys a clear, definite meaning. The statute in question states that:

The action must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier...

S.C. Code § 1-13-90(d)(6) (emphasis added). The meaning of the limitation could not be clearer. If a plaintiff wishes to bring a civil action in circuit court under the South Carolina Human Affairs Law, he or she must do so:

- Within one year for the date of the alleged violation, OR
- Within one hundred twenty (120) days from the date the complainant's charge is dismissed,
- **Whichever occurs earlier.**

In the instant case, Plaintiff complains about (1) his non-selection for a promotion at DHEC, which occurred in January 2013, and (2) his termination, which occurred in September 2013. Under the plain language of the statute, the Statute of Limitations on Plaintiff's first claim ran in **January 2014**, and on his second claim in **September 2014**. For this reason alone, Plaintiff's complaint must be dismissed. *Harrison-Jenkins v. Med. Univ. of S. Carolina*, 2012 WL 1533046, at *4 (D.S.C. Apr. 9, 2012), *R&R adopted*, 2012 WL 1534711 (D.S.C. May 1, 2012), *aff'd sub nom. Harrison-Jenkins v. Med. Univ. of S. Carolina*, 479 F. App'x 449 (4th Cir. 2012);

Further, it does not matter that the EEOC has submitted separate Notices of Right to Sue

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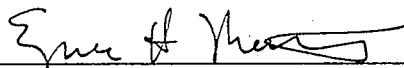
in this case. *Brown v. Lexington Cty. Health Servs. Dist., Inc.*, 2013 WL 5467623, at *5 (D.S.C. July 11, 2013), *R&R adopted*, 2013 WL 5467626 (D.S.C. Sept. 27, 2013) (South Carolina's doctrine of equitable tolling does not rescue a plaintiff's claim under the South Carolina Human Affairs Law where she waited until after the EEOC issued a right-to-sue letter before filing her state law claims). By their own terms, these notices govern when a plaintiff may file a lawsuit under federal law. In this case, the Notices of Right to Sue may have authorized Plaintiff to file a lawsuit under ADEA, 29 U.S.C. § 621 *et seq.*, but have no bearing on the right of a plaintiff to file a civil action under the South Carolina Human Affairs Law.¹

CONCLUSION

For the reasons stated above, Plaintiff's claims are barred by the applicable Statute of Limitations. For this reason, this lawsuit must be dismissed with prejudice.

Dated this the 7th day of July, 2016.

RICHARDSON PLOWDEN & ROBINSON, P.A.



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Email: gmatthews@RichardsonPlowden.com

**COUNSEL FOR DEFENDANT SOUTH CAROLINA
DEPARTMENT OF HEALTH AND ENVIRONMENTAL
CONTROL**

¹ "There is no basis under South Carolina law to attribute a dismissal by the EEOC to SHAC, because South Carolina requires that the dismissal be by its own agency". *Whitten v. Fred's, Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) *abrogated on other grounds by Vance v. Ball State Univ.*, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013) (emphasis in the original).

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REQUEST FOR INFORMATION

Charging Party: Marion E. Crocker, Jr.
Respondent: SC Department of Health & Environmental Control
Charge No: EEOC charge # - 14C-2013-00583
FEPA charge # 3-13-212A

Mr. Crocker filed a charge claiming that he was denied a promotion to Chief Information Officer (CIO), in November 2012, by Director of Administration, Barbara Derrick. He claims that a younger person that did not meet the minimum hiring requirements for the position was selected. He also claims that a younger person with less experience was promoted to the Director of Technology Operations in January 2013. He claims that this was the position that he held at the time but that he had to interview for the position to allow for a salary increase. Please see our responses and position statement outlined below.

1. Give the correct name and address of the facility named in the charge.

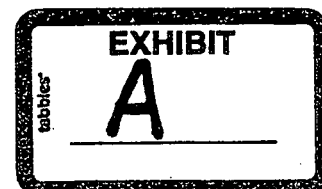
SCDHEC, 2600 Bull Street, Columbia, SC 29201

2. State the total number of persons who were employed by your organization during the relevant period. Include both full and part-time employees. How many employees are employed by your organization at the present time? **We have 3,264 full-time employees and 515 temporary employees.**
 3. Supply an organizational chart, statement, or documents which describe your structure, indicating, if any, the relationship between it and superior and subordinate establishments within the organization.
 4. Supply a statement or documents, which identify the principal product or service of the named facility.
- The South Carolina Department of Health and Environmental Control provides services to residents of South Carolina that promote public health and protect the environment.**
5. State the legal status of your organization, i.e. corporation, partnership, tax-exempt non-profit, etc. If incorporated, identify the state of incorporation.

The South Carolina Department of Health and Environmental Control is a South Carolina State agency.

6. State whether your organization has a contract with any agency of the federal government or is a subcontractor on a project, which receives federal funding. Is your organization covered by the provisions of Executive Order 11246? If your answer is yes, has your organization been the subject of a compliance review by the OFCCP at any time during the past two years?

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The South Carolina Department of Health and Environmental Control has federal contracts and is governed by Executive Order 11246. We have not been the subject of a compliance review by OFCCP at any time during the last two years.

7. Agency's Position Statement:

The Agency Chief Information Officer position was posted on September 27, 2012 through October 8, 2012. Five applicants were interviewed. Mr. Croker was one of the applicants afforded an interview. The interview was conducted by a three member panel. The panel then submitted the top three applicants to Ms. Barbara Derrick, Director of Administration. Mr. Crocker was not one of the top three applicants. A white male, age 45, was selected for the position. It is the agency's position that Mr. Crocker was afforded the opportunity to participate in the interview process but was not found to be one of the best applicants by the interview panel. Ms. Derrick made her selection from the top three applicants that were presented to her by the panel.

The Information Technology Manager II position was posted on December 13, 2012 through December 23, 2012. Mr. Crocker was one of the applicants afforded an interview. The interview panel consisted of three people, 2 white females ages 56 and 67 and 1 white male age 45. Mr. Crocker was ranked third of five applicants. The applicant selected was a white female age 53.

Mr. Crocker is claiming that this was the position that he held at the time but that he had to interview for the position to allow for a salary increase. This is not correct. The agency has undergone some restructuring and the Information Technology Manager II position was one of the positions that emerged out of that process. The Information Technology Manager II position supervises six functional areas. Three of these areas were created as a result of the centralization and restructuring of the Information Technology area.

It is the agency's position that Mr. Crocker was afforded the opportunity to participate and compete for the two positions identified above. However, he was not found to be the best fit for either position. The decisions were based on the scores each applicant received during the interview and both of the candidates selected were over age 40.

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STATE OF SOUTH CAROLINA



HUMAN AFFAIRS COMMISSION

Raymond Buxton, II
Commissioner

2611 Forest Drive, Suite 200, Post Office Box 4490
Columbia, South Carolina 29240
(803) 737-7800 FAX: (803) 253-4191

To file complaints dial (803) 737-7800
or 1-800-521-0725 (In-State Only)

August 9, 2013

RECEIVED

AUG 13 2013

PERSONNEL

Mr. Jon Fisher- Personnel Director
SCDHEC
2600 Bull Street
Columbia, SC 29201

RE: SHAC # 3-13-212A

EEOC # 14C-2013-00583C

Marion E. Crocker vs. SCDHEC

Dear Mr. Fisher:

In accordance with Section 706 of Title VII of the U.S. Civil Rights Act of 1964, as amended, the South Carolina Human Affairs Commission (SHAC) has waived deferral of the above-referenced complaint. Accordingly, this agency will not be involved in the investigation or resolution of this charge. This action enables the U.S. Equal Employment Opportunity Commission (EEOC) to proceed with the processing of this complaint. You are requested to forward to EEOC the attached Receipt for Copy of Charge of Discrimination within five (5) days, and your position statement within fifteen (15) days, of your receipt of this notice.

All future contacts regarding this complaint should be directed to EEOC at the following address:

Ms. Patricia B. Fuller, Local Director
Greenville Local Office
U.S. Equal Employment Opportunity Commission
301 N. Main Street, Landmark Building, Suite 1402
Greenville, SC 29601
(864) 241-4400 or (866) 408-8075

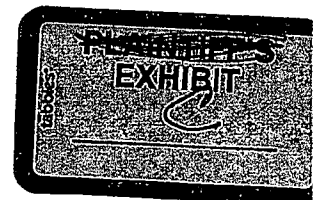
Sincerely,

Shetara Williams
Intake & Referral Division

cc: Raymond Buxton, Commissioner
Patricia B. Fuller, Local Director

14C_SHAC 2022_lrg_DOC.doc

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SOUTH CAROLINA HUMAN AFFAIRS COMMISSION
Post Office Box 4490
Columbia, South Carolina 29240
(803) 737-7800 Fax (803) 253-4191

RECEIPT FOR COPY OF CHARGE OF DISCRIMINATION
(To be completed by Respondent upon receipt of Charge of
Discrimination and returned to the SHAC representative named below.)

Charge Number(s): 3-13-212A

Respondent: SCDHEC

Complainant: Marion E. Crocker, Jr.

I hereby acknowledge receipt of a copy of the charge(s) of discrimination identified above, alleging employment discrimination in violation of the South Carolina Human Affairs Law. The signing of this receipt does not constitute admission of violation of the Human Affairs Law or any other Law.

Signature

Title

Date

CERTIFICATION: I certify that I personally mailed delivered a copy of the charge identified above to the respondent.

Sullivan

8/9/2013

Signature

Title

Date

NEGOTIATED SETTLEMENT

Charge Number(s): 3-13-212A

Respondent: SCDHEC

Complainant: Marion E. Crocker, Jr.

INSTRUCTIONS: Please complete the part of this form that represents the Respondents decision as to negotiated settlement in the above-referenced charge and return it within five (5) working days of receipt. Except as to offers made in an effort to settle this matter, information or documents submitted may be used in subsequent proceedings.

1. I represent the Respondent in this matter. We do wish to resolve the charge by the negotiated settlement process. We will offer the Complainant:

_____ in order to resolve this matter.

Signature

Title

Date

2. I represent the Respondent in this matter. We decline to consider resolution of the charge by the negotiated settlement process.

Signature

Title

Date

EXH
C

U.S. Equal Employment Opportunity Commission

Mr. Jon Fisher
 Personnel Director
 SCDHEC
 2600 Bull Street
 Columbia, SC 29201

PERSON FILING CHARGE

Marion E. Crocker, Jr.

THIS PERSON (check one or both)

- Claims To Be Aggrieved
 Is Filing on Behalf of Other(s)

EEOC CHARGE NO.
 14C-2013-00583

FEPA CHARGE NO.
 3-13-212A

NOTICE OF CHARGE OF DISCRIMINATION IN JURISDICTION WHERE A FEP AGENCY WILL INITIALLY PROCESS
(See the enclosed for additional information)

THIS IS NOTICE THAT A CHARGE OF EMPLOYMENT DISCRIMINATION UNDER

- Title VII of the Civil Rights Act (Title VII) The Equal Pay Act (EPA) The Americans with Disabilities Act (ADA)
 The Age Discrimination in Employment Act (ADEA) The Genetic Information Nondiscrimination Act (GINA)

HAS BEEN RECEIVED BY

- The EEOC and sent for initial processing to _____
(FEP Agency)
- The South Carolina Human Affairs Commission
(FEP Agency) and sent to EEOC for dual filing purposes.

While EEOC has jurisdiction (upon expiration of any deferral requirement if this is a Title VII, ADA or GINA charge) to investigate this charge, EEOC may suspend its investigation and await the issuance of the Agency's final findings and orders. These findings and orders will be given weight by EEOC in making its own determination as to whether reasonable cause exists to believe that discrimination has occurred.

You are therefore encouraged to cooperate fully with the Agency. All facts and evidence provided by you to the Agency will be considered by EEOC when it reviews the Agency's final findings and orders. In many cases EEOC will take no further action, thereby avoiding the necessity of an investigation by both the Agency and EEOC. This likelihood is increased by your active cooperation with the Agency.

As a party to the charge, you may request that EEOC review the final findings and orders of the above-named Agency. For such a request to be honored, you must notify EEOC in writing within 15 days of your receipt of the Agency's final decision and order. If the Agency terminates its proceedings without issuing a final finding and order, you will be contacted further by EEOC. Regardless of whether the Agency or EEOC processes the charge, the Recordkeeping and Non-Retaliation provisions of the statutes as explained in the enclosed information sheet apply.

For further correspondence on this matter, please use the charge number(s) shown above.

Enclosure(s): Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

- Race Color Sex Religion National Origin Age Disability Retaliation Genetic Information Other

See enclosed copy of charge of discrimination. This charge is also filed under the SC Human Affairs Law, as amended.

Date August 9, 2013	Name / Title of Authorized Official Reuben Daniels, JR, District Director	Signature
----------------------------	---	-----------

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

FEPA

EEOC

14C-2013-00583

South Carolina Human Affairs Commission

and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)

Mr. Marion E. Crocker, Jr.

Home Phone (Incl. Area Code)

(803) 708-5977

Date of Birth

11-12-1956

Street Address

2 Hawks Ridge Court, Chapin, SC 29036

City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name

SCDHEC

No. Employees, Members

500 or More

Phone No. (Include Area Code)

(803) 898-3582

Street Address

2600 Bull Street, Columbia, SC 29201

City, State and ZIP Code

Name

No. Employees, Members

Phone No. (Include Area Code)

Street Address

City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)

- RACE COLOR SEX RELIGION NATIONAL ORIGIN
 RETALIATION AGE DISABILITY GENETIC INFORMATION
 OTHER (Specify)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest

Latest

11-26-2012

01-31-2013

CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I was denied promotion to Chief Information Officer (CIO) on November 26, 2012, by Director Administrator, Barbara Derrick. A younger person that did not meet the minimum hiring requirements for the advertised position was selected.

On or about on January 31, 2013, I learned that another less experienced person was promoted to Director Division of Technology Operations. This is the position that I held and had to interview for again, to allow a salary bump. A younger person was selected for the position.

I, therefore, believe that I was discriminated and retaliated against because of my age (56) in violation of the South Carolina Human Affairs Law, as amended, and the Age Discrimination in Employment Act of 1967, as amended

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - When necessary for State and Local Agency Requirements

Charles McMillen

I declare under penalty of perjury that the above is true and correct.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

Marion E. Crocker, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

Aug 7, 2013
Date

Marion E. Crocker, Jr.
Charging Party Signature

My Commission Expires December 48, 2018

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REQUEST FOR INFORMATION

Charging Party: Marion E. Crocker, Jr.

Respondent: SCDHEC

EEOC Charge No.: 14C-2013-00583

1. Give the correct name and address of the facility named in the charge.

2. State the total number of persons who were employed by your organization during the relevant period. Include both full and part-time employees. How many employees are employed by your organization at the present time?

3. Supply an organizational chart, statement, or documents which describe your structure, indicating, if any, the relationship between it and superior and subordinate establishments within the organization.

4. Supply a statement or documents which identify the principal product or service of the named facility.

5. State the legal status of your organization, i.e., corporation, partnership, tax-exempt non-profit, etc. If incorporated, identify the state of incorporation.

6. State whether your organization has a contract with any agency of the federal government or is a subcontractor on a project which receives federal funding. Is your organization covered by the provisions of Executive Order 11246? If your answer is yes, has your organization been the subject of a compliance review by the OFCCP at any time during the past two years?

7. Submit a written position statement on each of the allegations of the charge, accompanied by documentary evidence and/or written statements, where appropriate. Also include any additional information and explanation you deem relevant to the charge.

8. Submit copies of all written rules, policies and procedures relating to the issue(s) raised in the charge. If such does not exist in written form, explain the rules, policies and procedures.

000038



U.S. Equal Employment Opportunity Commission
Greenville Local Office

301 North Main St
Suite 1402
Greenville, SC 29601
(864) 241-4401
TTY (864) 241-4403
FAX (864) 241-4416

Charge Number: 14C-2013-00583

Marion E. Crocker, Jr.
2 Hawks Ridge Court
Chapin, SC 29036

Charging Party

SC Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Respondent

DETERMINATION

I issue the following determination on the merits of the subject charge. Respondent is an employer within the meaning of the Age Discrimination in Employment Act of 1967, as amended (ADEA). Timeliness, deferral and all other requirement for coverage have been met.

Charging Party alleges Respondent denied him promotions to the positions of Agency Chief Information Officer and Technology Manager II in violation of the ADEA by promoting applicants who were less qualified and significantly younger than he. Respondent denies the allegation. Examination of the evidence supports Charging Party's claim as it relates to the position of Agency Chief Information Officer.

Charging Party applied for the position of Agency Chief Information Officer in a timely manner. His educational background and work experience met Respondent's preferred qualification standards for the position. He was ranked among the top five applicants and was referred for interview, however was not referred for selection. The selectee was substantially younger than Charging Party and admittedly failed to meet the minimum qualification for the position. Based on this analysis, there is reasonable cause to believe Charging Party was denied promotion to the position of Agency Chief Information Officer, because of his age.

There is insufficient evidence to support Charging Party claim of age discrimination in promotion for the position of Information Technology Manager II. The selectee was qualified for the position and is not substantially younger in age. This does not certify that the respondent is in compliance with the statute.

Upon finding that there is reason to believe a violation has occurred, the Commission attempts to eliminate the alleged unlawful practice by informal methods of conciliation.

Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. The confidentiality provisions of the Age Discrimination in Employment Act of 1967, as amended, and Commission Regulations apply to information obtained during the conciliation. If the Respondent declines to discuss settlement or when, for any reason, a settlement acceptable to the Office

000039

EXHIBIT

F

Determination

Charge No.: 436-2008-00929

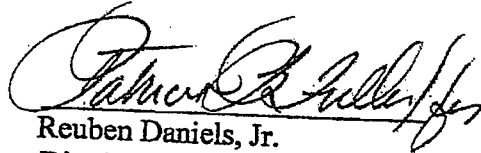
Page 2 of 2

Director is not obtained; the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission Charge representative will contact each party in the near future to begin conciliation.

On Behalf of the Commission:

JUL 01 2015

Date



Reuben Daniels, Jr.
District Director

cc: Gloria Tyler
Assistant Director of Personnel
SCDHEC Office of Personnel Services
2600 Bull Street
Columbia, SC 29201

000040



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Greenville Local Office

RECEIVED

FEB 16 2016

Landmark Building
301 North Main Street, Suite 1402
Greenville, SC 29601
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Greenville Status Line: (866) 408-8075
Direct Dial: (864) 241-4401
TTY (864) 241-4403
FAX (864) 241-4416
Website: www.eeoc.gov

EEOC Charge No: 14C-2013-00583

Marion E. Crocker, Jr.
2 Hawks Ridge Court
Chapin, SC 29036

South Carolina Department of Health and Environmental Control
Office of Personnel Services
2600 Bull Street
Columbia, SC 29201

NOTICE OF CONCILIATION FAILURE

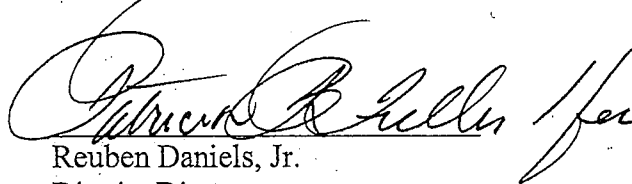
The Equal Employment Opportunity Commission has determined that efforts to conciliate the above referenced charge as required by the Age Discrimination in Employment Act, as amended (ADEA), have been unsuccessful. This letter constitutes the notice required by Section 1601.25 of the Equal Employment Opportunity Commission's Procedural Regulations, which provides that the Commission shall notify a Respondent in writing when it determines that further conciliation efforts would be futile or non-productive.

No further efforts to conciliate this case will be made by the Equal Employment Opportunity Commission.

On behalf of the Commission:

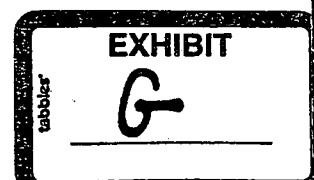
FEB 11 2016

Date


Reuben Daniels, Jr.
District Director

cc: Eugene H. Matthews, Esq.
RICHARDSON, PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, SC 29201

000041



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE
(CONCILIATION FAILURE)

To: Marion E. Crocker, Jr.
2 Hawks Ridge Court
Chapin, SC 29036

From: Greenville Local Office
301 North Main St.
Suite 1402
Greenville, SC 29601

On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
14C-2013-00583	Andrew C. Davis Jr. Investigator	(864) 241-4427

TO THE PERSON AGGRIEVED:

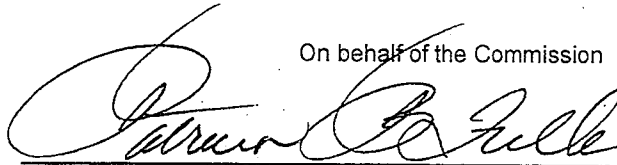
This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission


FEB 11 2016

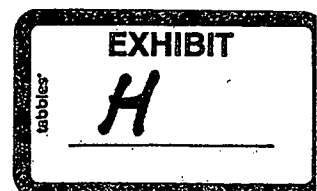
Enclosures(s)

Patricia B. Fuller,
Local Office Director

(Date Mailed)

CC: Eugene H. Matthews, Esq.
RICHARDSON, PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, SC 29201

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**INFORMATION RELATED TO FILING SUIT
UNDER THE LAWS ENFORCED BY THE EEOC**

*(This information relates to filing suit in Federal or State court under Federal law.
If you also plan to sue claiming violations of State law, please be aware that time limits and other
provisions of State law may be shorter or more limited than those described below.)*

**PRIVATE SUIT RIGHTS -- Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA),
the Genetic Information Nondiscrimination Act (GINA), or the Age
Discrimination in Employment Act (ADEA):**

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you receive this Notice**. Therefore, you should **keep a record of this date**. Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was mailed to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS -- Equal Pay Act (EPA):

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit **before 7/1/10 -- not 12/1/10** -- in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

ATTORNEY REPRESENTATION -- Title VII, the ADA or GINA:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, assist you in obtaining a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 days.

ATTORNEY REFERRAL AND EEOC ASSISTANCE -- All Statutes:

You may contact the EEOC representative shown on your Notice if you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which U.S. District Court can hear your case. If you need to inspect or obtain a copy of information in EEOC's file on the charge, please request it promptly in writing and provide your charge number (as shown on your Notice). While EEOC destroys charge files after a certain time, all charge files are kept for at least 6 months after our last action on the case. Therefore, if you file suit and want to review the charge file, **please make your review request within 6 months of this Notice**. (Before filing suit, any request should be made within the next 90 days.)

IF YOU FILE SUIT, PLEASE SEND A COPY OF YOUR COURT COMPLAINT TO THIS OFFICE.

000043

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Marion E. Crocker, Jr.,)
)
Plaintiff,)
)
vs.)
)
South Carolina Department of Health)
and Environmental Control,)
)
Defendant.)
_____)

IN THE CIRCUIT COURT
Civil Action No. 2016-CP-40-01951

PLAINTIFF'S MEMORANDUM IN
RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

2016 AUG -8 AM 9:46
JENNIFER W. MORRIS
C.C.P. & S.S.
RICHLAND COUNTY
FILED

This case rises from the plaintiff's allegation that he was denied a promotion in his employment with DHEC because of his age, and that the promotion was awarded to a person younger than plaintiff, who did not meet the minimum qualifications for the job position, all in violation of the age discrimination provisions of the South Carolina Human Affairs Commission Act.

The plaintiff filed a complaint with the State Human Affairs Commission, under the South Carolina Human Affairs Law, SC Code Ann. Section 1-13-10, *et seq.* Plaintiff's Exhibit A.

The General Assembly declares the practice of discrimination against an individual because of ... age... is a matter of state concern and declares that this discrimination is unlawful... SC Code Ann. Section 1-13-20.

It is an unlawful employment practice for an employer... to fail or refuse to hire, bar, discharge from employment or otherwise discriminate against an individual with respect to the individual's compensation, or terms, conditions, or privileges of employment because of the individual's ... age... SC Code Ann. Section 1-13-80(A)(1). Exhibit B.

1.
The limitation period relied upon by DHEC does not apply in the case of a discrimination claim filed against a State agency.

The General Assembly created two very different procedures for processing discrimination claims against various employers, depending upon whether the employer is a State agency, on the one hand, or any other employer, on the other hand. Discrimination claims filed against State agencies are processed under the terms of Subsection 1-13-90 (c), while claims filed against private employers, municipalities, counties, special purpose districts, school districts, etc., are processed under Subsection 1-13-90 (d). The procedure mandated for processing claims against State agencies is far more elaborate than the procedure created for dealing with claims against any other kind of employer (including instrumentalities of local government such as counties, etc.). The two procedures are different in kind.

Claims against a State agency under Subsection (c) are processed with all the same elements of pretrial discovery found in the Circuit Court. After discovery is completed, and if conciliation efforts have failed, the claim is tried before a panel of the Commission under the Administrative Procedures Act. If the Commission finds in favor of the State agency and dismisses the complaint, the complainant may appeal to the Administrative Law Court, and then to the Court of Appeals. No action is filed in Circuit Court by the complainant. The complainant's remedy is by appeal.

If the complaint is lodged under Subsection (d) against any employer other than a State agency, the procedure is much simpler. The complainant is not entitled to pretrial discovery, although the Commission itself has a limited authority to require the production of documents. There is no hearing. After the claim has been investigated, a single Commissioner decides whether to dismiss the complaint or whether the Commission shall file an action in Circuit Court. If the single Commissioner decides to dismiss the complaint, the complainant is authorized to file an action in Circuit Court.

In the case of a complaint against a State agency, such as DHEC, the complainant faces a single period of limitation. If after trial the Commission dismisses the complaint, the complainant must appeal to the Administrative Law Court within thirty days of receipt of the order of dismissal. SC Code Ann. Section 1-13-90-(c)(19)(ii).

The statute of limitations upon which DHEC bases its motion for summary judgment is found in subsection (d), which specifies the procedures applicable to a complaint against

an employer other than a State agency. It has no application to a claim against a State agency.

If a charge filed with the commission by a complainant pursuant to this chapter is dismissed by the commission, or if within one hundred eighty days from the filing of the charge the commission has not filed an action under this chapter or entered into a conciliation agreement to which the complainant is a party, the complainant may bring an action in equity against the respondent in circuit court. The action must be brought within one year from the date of the violation alleged, or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier, except that the period may be extended by written consent of the respondent. SC Code Ann. Section 1-13-90(d)(6).

SC Code Section 1-13-90(d)(6) has no application to a claim against a State agency.

And yet, this is not an appeal to the Administrative Law Court from an order dismissing the complaint. It is an action filed by the complainant after the Equal Employment Opportunity Commission ("EEOC") dismissed his claim. This anomaly is explained by the fact that the underfunded State Human Affairs Commission, rather than the procedure specified in Subsection 1-13-90(c), routinely transfers claims filed against State agencies to the Federal EEOC for investigation and resolution under the rules and regulations of that agency. In effect, the EEOC acts as the delegate of the South Carolina Human Affairs Commission and processes the claim under the rules and regulations applicable to Federal discrimination claims. See Section 1-13-70(k):

The Commission shall have the power... (k) to cooperate with the United States Equal Employment Opportunity Commission created by the Civil Rights Act of 1964 (78 Stat. 241) in order to achieve the purposes of that act...

At the very beginning of this case investigation process, SHAC stated that it ...would not be involved in the investigation or resolution of this charge... This action enables the EEOC to proceed with the processing of this complaint...all future contacts regarding this complaint should be directed to EEOC..." Exhibit C.

Neither Mr. Crocker, the plaintiff herein, nor DHEC objected to this method of processing Mr. Crocker's claim. Both parties were content to have the complaint handled by the EEOC.

The District Director of the EEOC reached his Determination that the evidence supported Mr. Crocker's claim that he was denied a promotion to a higher level job position because of age discrimination. The parties agreed to attempt to conciliate Mr. Crocker's age discrimination claim.

After a period of time, the EEOC determined that efforts to conciliate the claim had been unsuccessful and that further attempts would be non-productive. Exhibit E. EEOC's procedure ended with that agency's issuance to Mr. Crocker of a letter authorizing him to bring an action for age discrimination in either State or Federal court within ninety days, which he has done. Exhibit F. Thus, under the substituted procedure to which both sides consented, Mr. Crocker has filed his action within the only deadline established by that procedure.

II.

Even if the limitation period set forth in Subsection (d)(6) were deemed to apply, the plaintiff's action is timely.

The one-year limitation period found in Subsection (d) (dealing with complaints filed against non-State agency employers) does not begin to run where the Commission and the parties have entered into what is called a "conciliation agreement."

If a charge filed with the commission by a complainant pursuant to This chapter is dismissed by the commission, or if within one Hundred eighty days from the filing of the charge the commission has not filed an action under this chapter **or entered into a conciliation agreement to which the complainant is a party**, the complainant may bring an action in equity against the respondent in circuit court...
SC Code Ann. Section 1-13-90(d)(6) (emphasis added).

The Commission's delegate, EEOC, DHEC, and Mr. Crocker **did** enter into a conciliation agreement. The one-year limitation period specified in the second sentence of

Subsection (d)(6) applies only where there was no conciliation agreement. The statute does not lay down a limitation period in cases where the parties **did** enter into a conciliation agreement. The limitation period is therefore the three-year statute of limitations of Section 15-3-530, which applies where no other statute specifies a different period.

III.

Even if the limitation period set forth in subsection (d)(6) were deemed to apply, the one-year time limit would be tolled while the Commission's delegate, EEOC, was actively investigating the claim.

Construing the statute as the Defendant advocates would lead to the absurd result of gutting the administrative process mandated by the General Assembly as the keystone of the South Carolina Human Affairs Law. The anti-discrimination provisions of the law would be an empty shell, since the administrative process which a serious claim must follow is often not completed within a year of the violation.

The statute allows a complainant 180 days after the alleged violation in which to file a complaint with the Commission. Section 1-13-90(a). Under Subsection 1-13-90(d)(6), relied upon by DHEC, the complainant may not file a court action during the first 180 days after the complaint is filed and while the Commission is investigating. If the one-year limitation were applied literally, the complainant would then have a 5-day window (365 days, minus 180 days, minus 180 days) in which to commence an action. The General Assembly could not possibly have intended such an absurd result.

The statutory language must be construed in light of the intended purpose of the statute... This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.
See Lancaster Cnty. Bar Assn. v. S.C. Comm. on Indigent Defense, 380 S.C. 219, 222, 670 S.E. 2d 371, 373 (2008).

See also, *Tempel v. South Carolina, State Election Comm.*, 400 S.C. 374, 735 S.E.2d 453, 455 (2012). This absurd result is avoided by sensibly interpreting the statute to mean impliedly that the one-year from the violation time period is tolled during the time the Commission is investigating the complaint. The time taken by the Commission

investigating the complaint should not be counted against the complainant. To do otherwise, will inherently lead to the absurd results of which the Court speaks.

If the one-year limit is tolled while the EEOC is investigating the claim, then the 120-day limit applies, and the time limit is easily met, even if Subsection 1-13-90(d)(6) were deemed to apply, which it does not.

IV.

Even if the limitation period set forth in Subsection (d)(6) were deemed to apply, the doctrine of equitable tolling would prevent the running of the statute.

Our Supreme Court adopted the doctrine of "equitable tolling" in the case of *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 386 S.C. 108, 687 S.E.2d 29 (2009). The Court described the doctrine:

"...In order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations," 54 C.J.S. *Limitations of Actions* Section 115 (2005). "Equitable tolling is a non-statutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture.*, 135 N.M. 539, 91 P. 3d 58, 66 (2004).

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Rodriguez v. Superior Court*, 176 Cal. App. 3d 728 (2009). "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness.'" *Id.* at 736.

In the *Hooper* case, the defendant failed to maintain the statutorily required agent for service of process, making it impossible to effect service of process within the period of the statute of limitations. Among the authorities relied upon by the Court and cited with approval is the case of *Machules v. Dept. of Admin.*, 523 So.2d 1132, 1134 (Fla. 1988). The Court cited this case for the principle that "...the doctrine of equitable tolling... serves to ameliorated the harsh results that sometimes flow from a strict literalist application of administrative time limits...." *Id.* at 33. The Court held that the time limit was tolled during the time that the plaintiff searched in vain for the defendant's nonexistent agent for service.

The Court noted that it had held much the same thing in an earlier case, although it did not use the term "equitable tolling."

"We have previously tolled a statute of limitations based on equitable considerations. In *Hopkins v. Floyd's Wholesale*, 299 S.C. 127, 381 S.E.2d 907 (1898), a workers' compensation case, we tolled the running of the statute of limitations for the time that the employee was induced by the employer to believe the claim would be taken care of without filing a claim (the reliance period). In reaching this result, we considered two methods of considering the claim: (1) requiring that the claim be filed a "reasonable time" after the reliance period, or, (2) tolling the statute of limitations during the reliance period. *Id.* at 129, 382 S.E. 2d 908-09. We held the better rule was to toll the running of the statute during the reliance period, as this "rule estopping employers from asserting the statute of limitations" provided greater certainty and gave the employee the greatest benefit of the equitable rule." *Id.* at 130, 382 S.E. 2d at 909.

The Court concluded:

"The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in the view of all circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hausman v. Hausman*, 199 S.W. 3d 38, 42 (Tex. App 2006).

In the case at bar, DHEC participated fully in the lengthy administrative process, never intimating that it intended to rely on an obscure and inapplicable time limit if and when the Commission's delegate, the EEOC, dismissed Mr. Crocker's complaint. Further, DHEC never suggested to Crocker that it would disregard EEOC's regulation Notice of Right to Sue which dismissed Mr. Crocker's administrative complaint, and gave him 90 days in which to file suit in either federal or state court if he chose to proceed. Under these circumstances, as in the *Hooper* case, cited above..."relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other."

V.

**The resolution of a novel issue
should await a full record if the answer is in doubt**

The facts of this case are complicated. The administrative process is often obscure. For example, only those persons who deal with claims like that of Mr. Crocker would know that the Human Affairs Commission never follows the elaborate process spelled out in Subsection (c) of the statute when processing a claim of discrimination by an employee of a state agency. Instead, the Commission delegates the handling of the claim entirely to the Federal EEOC and never touches the file again. Thereafter, the EEOC processes the claim according to the relevant federal rules as set forth in the Code of Federal Regulations.

The manner in which DHEC acquiesced in this mode of regulation, and participated in the EEOC's lengthy processing of the claim, will require detailed evidence.

It remains as true today as it was in 1973 when our Supreme Court stated:


We are asked by the appellants to decide, only on the basis of the pleadings, a question of clearly novel impression in this jurisdiction. The rule announced in the case of *Springfield v. Williams Plumb. Supply Co.* 249 S.C. 130, 153 E.S.2d 184, is applicable here: "to so hold would involve the decision, on demurrer, of novel impression, the decision of which could have far reaching effects. Under all of the circumstances and in justice to the parties, as well as future litigants, we think these questions should not be decided on demurrer.

In the instant case, justice, not only to the litigants but to the general public, requires that the case be tried on the merits and the case be fully developed before we are called upon to decide the novel question presented. *Revis v. Martin*, 260 S.C. 347, 195 S.E.2d 715(1973).

If the Court is in any doubt of the correct answer to the question presented, the plaintiff asks the court to defer resolution until a full record has been established.

However, the plaintiff submits that there is no genuine question about the fact that, for all the reasons given, this action is not barred by the passage of time.


Respectfully submitted,


Gerald F. Smith
Attorney For Plaintiff
1229 Lincoln Street
Columbia, SC 29201
803-765-1155

August 8, 2016

I certify that I served a copy of this document on Defendant by mailing a copy to counsel addressed as follows, on August 8, 2016, postage pre-paid, with return address clearly visible.

Eugene H. Matthews
Richardson, Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201


Gerald F. Smith

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To:

Agency(ies) Charge No(s):

FEPA
 EEOC

14C-2013-00583

South Carolina Human Affairs Commission

and EEOC

Name (indicate Mr., Ms., Mrs.)

State or local Agency, if any

Mr. Marion E. Crocker, Jr.

Home Phone (Incl. Area Code)

(803) 708-5977

Date of Birth

11-12-1956

Street Address

City, State and ZIP Code

2 Hawks Ridge Court, Chapin, SC 29036



Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Agency Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name

SCDHEC

No. Employees, Members

500 or More

Phone No. (Include Area Code)

(803) 898-3582

Street Address

City, State and ZIP Code

2600 Bull Street, Columbia, SC 29201

Name

No. Employees, Members

Phone No. (Include Area Code)

Street Address

City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)

RACE COLOR SEX RELIGION NATIONAL ORIGIN
 RETALIATION AGE DISABILITY GENETIC INFORMATION
 OTHER (Specify)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest

Latest

11-26-2012

01-31-2013

CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I was denied promotion to Chief Information Officer (CIO) on November 26, 2012, by Director Administrator, Barbara Derrick. A younger person that did not meet the minimum hiring requirements for the advertised position was selected.

On or about on January 31, 2013, I learned that another less experienced person was promoted to Director Division of Technology Operations. This is the position that I held and had to interview for again, to allow a salary bump. A younger person was selected for the position.

I, therefore, believe that I was discriminated and retaliated against because of my age (56) in violation of the South Carolina Human Affairs Law, as amended, and the Age Discrimination in Employment Act of 1967, as amended

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - When necessary for State and Local Agency Requirements

Charles Pickler

I declare under penalty of perjury that the above is true and correct.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

Marion Crocker

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

(month, day, year)

Aug 7, 2013 *Marion Crocker*

Date

Charging Party Signature

My Commission Expires December 08, 2018

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STATE OF SOUTH CAROLINA



HUMAN AFFAIRS COMMISSION

Raymond Buxton, II
Commissioner

2611 Forest Drive, Suite 200, Post Office Box 4490
Columbia, South Carolina 29240
(803) 737-7800 FAX: (803) 253-4191

To file complaints dial (803) 737-7800
or 1-800-521-0725 (In-State Only)

August 9, 2013

RECEIVED

AUG 13 2013

Mr. Jon Fisher- Personnel Director
SCDHEC
2600 Bull Street
Columbia, SC 29201

PERSONNEL

RE: SHAC # 3-13-212A

EEOC # 14C-2013-00583C

Marion E. Crocker vs. SCDHEC

Dear Mr. Fisher:

In accordance with Section 706 of Title VII of the U.S. Civil Rights Act of 1964, as amended, the South Carolina Human Affairs Commission (SHAC) has waived deferral of the above-referenced complaint. Accordingly, this agency will not be involved in the investigation or resolution of this charge. This action enables the U.S. Equal Employment Opportunity Commission (EEOC) to proceed with the processing of this complaint. You are requested to forward to EEOC the attached Receipt for Copy of Charge of Discrimination within five (5) days, and your position statement within fifteen (15) days, of your receipt of this notice.

All future contacts regarding this complaint should be directed to EEOC at the following address:

Ms. Patricia B. Fuller, Local Director
Greenville Local Office
U.S. Equal Employment Opportunity Commission
301 N. Main Street, Landmark Building, Suite 1402
Greenville, SC 29601
(864) 241-4400 or (866) 408-8075

Sincerely,

Shetara Williams
Intake & Referral Division

cc: Raymond Buxton, Commissioner
Patricia B. Fuller, Local Director

14C_SHAC 2022_lrg_DOC.doc

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FEB 16 2016

Landmark Building
301 North Main Street, Suite 1402
Greenville, SC 29601
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Greenville Status Line: (866) 408-8075
Direct Dial: (864) 241-4401
TTY (864) 241-4403
FAX (864) 241-4416
Website: www.eeoc.gov

EEOC Charge No: 14C-2013-00583

Marion E. Crocker, Jr.
2 Hawks Ridge Court
Chapin, SC 29036

South Carolina Department of Health and Environmental Control
Office of Personnel Services
2600 Bull Street
Columbia, SC 29201

NOTICE OF CONCILIATION FAILURE

The Equal Employment Opportunity Commission has determined that efforts to conciliate the above referenced charge as required by the Age Discrimination in Employment Act, as amended (ADEA), have been unsuccessful. This letter constitutes the notice required by Section 1601.25 of the Equal Employment Opportunity Commission's Procedural Regulations, which provides that the Commission shall notify a Respondent in writing when it determines that further conciliation efforts would be futile or non-productive.

No further efforts to conciliate this case will be made by the Equal Employment Opportunity Commission.

On behalf of the Commission:

FEB 11 2016

Date

Reuben Daniels, Jr.
District Director

cc: Eugene H. Matthews, Esq.
RICHARDSON, PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, SC 29201

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Determination

Charge No.: 436-2008-00929

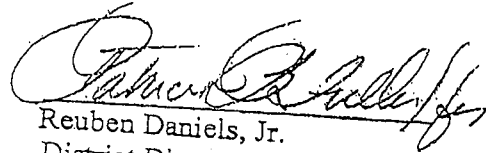
Page 2 of 2

Director is not obtained; the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission Charge representative will contact each party in the near future to begin conciliation.

On Behalf of the Commission:

JUL 01 2015

Date



Reuben Daniels, Jr.
District Director

cc: Gloria Tyler
Assistant Director of Personnel
SCDHEC Office of Personnel Services
2600 Bull Street
Columbia, SC 29201

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COMMISSION
NOTICE OF RIGHT TO SUE
(CONCILIATION FAILURE)

To: Marion E. Crocker, Jr.
2 Hawks Ridge Court
Chapin, SC 29036

From: Greenville Local Office
301 North Main St
Suite 1402
Greenville, SC 29601

On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
14C-2013-00583	Andrew C. Davis Jr. Investigator	(864) 241-4427

TO THE PERSON AGGRIEVED:

This notice concludes the EEOC's processing of the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the Respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

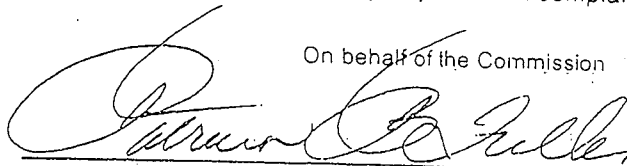
- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission



Patricia B. Fuller,
Local Office Director

Enclosures(s)

FEB 11 2016

(Date Mailed)

cc: Eugene H. Matthews, Esq.
RICHARDSON, PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, SC 29201

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Marion E. Crocker, Jr.,)
)
 Plaintiff,)
)
 v.)
)
 South Carolina Department of)
 Health and Environmental Control,)
)
 Defendant,)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

C/A No. 2016-CP-40-01951

**PLAINTIFF'S MOTION
 TO ALTER OR AMEND**

DEBORAH E. ROBERTS
 C.C.P. & G.S.
 2016 NOV 28 AM 9:23
 FILED

Plaintiff respectfully moves the Court to alter or amend the Order granting Defendant's Motion For Summary Judgment. Plaintiff was served with written notice of the entry of the Order by first-class mail dated November 21, 2016.

A. Generally:

1. The Plaintiff respectfully moves that the Court vacate the Order and adopt the order proposed by the Plaintiff; attached hereto and incorporated in this Motion as Exhibit A, denying Defendant's Motion For Summary Judgment.

B. Age Discrimination is an illegal practice in violation of the public policy of South Carolina:

2. The General Assembly declared the practice of employment discrimination against an individual because of various discriminatory practices, including age, to be a matter of State concern and declared that this form of discrimination is unlawful, and against the public policy of South Carolina, S. C. Code Section 1-13-20, et seq.
3. In furtherance of the public policy, S. C. Code Section 1-13-70(k) was passed so that the State Human Affairs Commission can enlist the assistance of the Equal Employment Opportunity Commission in the investigation and administration of

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discrimination complaints.

4. In this case, the State Human Affairs Commission deferred to the EEOC. All investigative matters and administrative determinations were conducted by the EEOC.

C. Background:

5. On March 28, 2016, Plaintiff filed his complaint in which he alleged damages as a result of Defendant's violation of the South Carolina Human Affairs Law, Section 1-13-10 et seq., Section 1-13-80, et. seq., 1-13-90, et. seq., for age discrimination.
6. On April 25, 2016, Defendant filed and served its Answer.
7. Defendant's Answer contained as a Fourth Defense, the allegation that: Plaintiff's claims are barred under the applicable statute of limitations.

Specifically, Defendant's Fourth Defense relied upon S. C. Code Section 1-13-90(d)(6) which states as follows:

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

8. On or about July 7, 2016, Defendant filed and served its Motion For Summary Judgment.
9. Defendant's Motion, at paragraph 16, alleges a defense based on the Statute of Limitations contained in the South Carolina Human Affairs Law. Specifically, S. C. Code Subsection 1-13-90(d)(6), quoted above.
10. In its Motion For Summary Judgment, Defendant argues that it is entitled to summary judgment because **"PLAINTIFF'S CLAIMS UNDER THE SOUTH CAROLINA HUMAN AFFAIRS LAW ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS."**

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D. The Limitations Period relied upon by Defendant, S. C. Code Section 1-13-90(d)(6), in its Motion For Summary Judgment

does not apply in the case of a discrimination claim filed against a State agency:

11. S. C. Code Section 1-13-90 applies to. Complaints, investigations, hearings and orders, generally.
12. Subsection 1-13-90(c) applies expressly to discriminatory allegations against a "... state agency or department or local subdivisions of a state agency or department..." and sets forth the procedure to be followed. Defendant is a State agency. This is the procedural provision applicable to this case.
13. Subsection 1-13-90(d) expressly applies..."For complaints asserting or expressly or in substance a violation (by other than a State agency)...by employers, employment agencies or labor organizations, including municipalities, counties, special purpose districts, school districts, and local governments, but not including employers... covered by Section 1-13-90(c)... (State agencies)"
14. Expressly, the statutory language provides that an employee is covered by either one or the other of these two subsections, (State agencies, and all other employers), but not by both.
15. Defendant argues that the "applicable statute of limitations is S. C. Code Subsection 1-13-90(d)(6)...", as quoted in paragraph 4, above.
16. A plain reading of Code Section 1-13-90(d), and Code Section 1-13-90(d)(6), make it clear that the Defendant has based its Motion For Summary Judgment on a statutory provision not applicable to State employees, State agencies, and to the facts of this case.
17. Plaintiff argues that S. C. Code Section 1-13-90(d)(6) does not apply to a State agency. Plaintiff argues that Subsection 1-13-90(c) is the Subsection that applies to Defendant, and State agencies, generally; therefore, Defendant has relied on an incorrect and inapplicable statute in seeking summary judgment on the basis of a violation of the statute of limitations.
18. In reliance on S.C. Code Section 1-13-90(d)(6), Defendant makes the argument that a complainant must bring an action within one year from the date of the

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violation alleged or within one hundred twenty days from the date the complainant's charge is dismissed, whichever occurs earlier; however, by its language, this subsection is not applicable to this employer.

19. S. C. Code Section 1-13-90(d)(6) has no application to a claim against a State agency.

E. S. C. Code Section 1-13-90(c) applies to State agencies, including the Defendant:

20. The General Assembly created two very different procedures for processing claims against various employers, depending upon whether the employer is a State agency, on the one hand, or any other employer, on the other hand.

21. The procedure mandated for processing claims against State agencies, S. C. Code Section 1-13-90(c), is far more elaborate than for the procedures applicable to other employers.

22. Claims against a State agency under Subsection (c) are processed with all the same elements as pretrial discovery in the Circuit Court. After discovery is completed, and if conciliation fails, the claim is tried before a panel of the commission under the Administrative Procedures Act. If the Commission finds in favor of the State agency, and the complaint is dismissed, the complainant may appeal to the Administrative Law Court, and then to the Court of Appeals.

F. S. C. Code Section 1-13-90(d)(6) applies to employers other than State agencies:

23. By its clear, plain meaning, S. C. Section 1-13-90(d) does not apply to State agencies.

24. Under the statute relied upon by Defendant in seeking summary judgment, claims are limited to private employers, municipalities, counties, special purpose districts, school districts, etc. Complaints filed against these various employers are processed under Subsection 1-13-90(d).

25. If a complaint is lodged against any other employer, under Subsection (d), the procedure is much simpler. There is no pre-trial discovery; there is no hearing.

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26. The statute of limitations, S.C. Code Subsection 1-13-90(d)(6), upon which Defendant bases its motion for summary judgment, is applicable to a complaint against an employer other than a State agency. It has no application to a claim against a State agency.

G. With Respect to the Determination of the correct statutory application:

27. Plaintiff respectfully moves the Court to find that S. C. Code Section 1-13-90(c) applies to complaints filed by public employees against a State agency.

28. Plaintiff respectfully moves the Court to find that S. C. Code Section 1-13-90(d) applies to complaints filed by employees against private employers, municipalities, counties, special purpose districts, school districts, etc.

29. Plaintiff respectfully moves the Court to find that S. C. Code Section 1-13-90(d)(6) is a statute of limitation that has an application limited to those employers identified in S. C. Code Section 1-13-90(d).

H. With respect to specific findings and conclusions contained in the Order:

30. Plaintiff respectfully moves the Court to alter and amend the Order by deleting all matters set forth in the Order that were not set forth in Defendant's Motion For Summary Judgment, specifically:

31. By deleting the statement that "At argument, the parties also disputed whether the South Carolina Human Affairs Law provided a private right of action against a state agency under S. C. Code Section 1-13-90(c)." Order, page 1, para. 1. Defendant's Motion For Summary Judgment does not include any argument or claim pertaining to S. C. Code Section 1-13-90(c). The Motion for Summary Judgment has but one legal argument, i.e., that Plaintiff's claim was barred by S. C. Code Section 1-13-90(d)(6), as applied to employers other than State agencies. This was the only issue properly before the Court at the motion hearing.

32. For the same reasons as set forth above, by deleting the portion of the Order, **Opinion, 1. There is no private right of action under S. C. Code 1-13-90(c)** should be deleted. Defendant moved for summary judgment on one ground, its

defense that Plaintiff's claim was barred by the provisions of S. C. Code Section 1-13-90(d)(6).

33. For the same reasons as set forth above, by deleting the portion of the Order pertaining to the Federal Age Discrimination in Employment Act, "ADEA", as that issue was not raised in Defendant's Motion For Summary Judgment. The ADEA was not properly before the Court at the motion hearing.
34. For the same reasons as set forth above, by deleting the portion of the Order pertaining to the EEOC's Notice of Right to Sue. This Notice was not within Defendant's Motion For Summary Judgment, and was not properly before the Court at the motion hearing.
35. For the same reasons as set forth above, by deleting the portion of the Order pertaining to the absurd results which occur from a plain reading of S. C. Code Section 1-13-90(d)(6). Plaintiff respectfully requests the Court to read plainly this Code Section, as Subsection 1-13-90(d) clearly states it applies to employers other than State agencies. A plain reading can only lead one to conclude that Subsection 1-13-90(d), and Subsection 1-13-90(d)(6) do not apply to State agencies, and to the facts of this case.
36. For the same reasons as set for above, by deleting the portion of the Order pertaining to Plaintiff not showing that he is entitled to equitable tolling of the limitations period. A plain reading of the relevant statutes, S. C. Code Sections 1-13-90(c), and 1-13-90(d)(6), might lead the Court to conclude the proper application of Subsection 1-13-90(c) as the provision applicable to State agencies.
37. If after a careful review of the cited statutes, the Court continues to be of the opinion that S. C. Code Section 1-13-90(d) is applicable to a complaint brought by a state employee against his State agency employer, the basis for this determination should be plainly stated.
38. On the other hand, if the Court is persuaded that S. C. Code Section 1-13-90(c) is the Code Section applicable to a complaint brought by a State employee against his State agency employer, the Court should vacate this Order, and adopt instead the order proposed by Plaintiff, attached to and incorporated into

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this motion as Exhibit A.

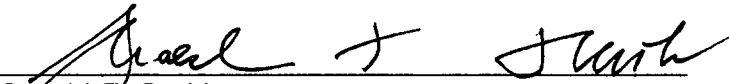
Respectfully submitted,

Gerald F. Smith
Smith Law Firm
1229 Lincoln Street
Columbia, SC 29201
803-765-1155
gsmith52@aol.com



Attorney For Plaintiff

I certify that I served a copy of this document with all exhibits on Defendant's counsel by U. S. Mail first class, postage prepaid on November 28, 2016.



Gerald F. Smith

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<u>Witness/Description</u>	<u>Page No.</u>
Certificate Page.	26

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>Ev.</u>
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No exhibits introduced.

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1 THE COURT: All right, Mr. Smith.

2 MR. SMITH: Yes, Your Honor. We had a motion, or I
3 had a motion to compel, and I advised Mr. Matthews this
4 morning that we were withdrawing that motion.

5 THE COURT: Okay. Great. All right, so we've got Mr.
6 Matthews's motion for summary judgement. Is that right?

7 MR. MATTHEWS: Yes, sir, Your Honor.

8 THE COURT: Okay, and so Mr. Crocker at some point in
9 time was an employee at state agency, maybe DHEC?

10 MR. SMITH: Yes, sir, Your Honor.

11 THE COURT: And then he was there for, like, more than
12 twenty-five or thirty years, and then a new position comes
13 open. He applies for the new position. Somebody else gets
14 it, which Mr. Crocker says that person wasn't qualified
15 based on what they put out, and in a little time he files
16 some form of complaint. I know I'm not using the right
17 term, and then he gets terminated, and then there's this --
18 they kind of go through these different boards. Then we
19 end up in a lawsuit.

20 Mr. Matthews, you're saying, number one, there's no
21 prior right of action. Number two, the one they could go
22 under if they going under, they're barred by the statute of
23 limitations and there's no tolling.

24 MR. MATTHEWS: Yes, sir.

25 THE COURT: Okay.

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1 MR. MATTHEWS: That, that sets it. I do have an
2 admission to make.

3 THE COURT: Okay.

4 MR. MATTHEWS: I was looking over my initial brief.
5 Page 2 at the top in paragraph 4 I stated: Three-member
6 panel conducted interviews of five candidates. That should
7 say five internal candidates. The total number of
8 candidates that were interviewed were ten.

9 THE COURT: Okay.

10 MR. MATTHEWS: I just wanted to -- Mr. Smith and I
11 have already discussed that point. I just wanted to make
12 sure -- if I may approach?

13 THE COURT: Yes, sir.

14 MR. MATTHEWS: This is some discovery we, we issued to
15 Mr. Smith.

16 THE COURT: Okay.

17 MR. MATTHEWS: That simply is the Department's
18 response to request for information which discusses exactly
19 that, that there were ten applicants that the three-member
20 panel reviewed, five of which were internal, one of which
21 was Mr. McPhale. And if I could, could focus your
22 attention on really an exhibit, it's Exhibit G.

23 MR. SMITH: Your Honor, if I, if I may? He -- because
24 you had mentioned that Mr. Crocker had terminated, and that
25 is a second cause of action to his complaint.

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THE COURT: Okay.

MR. SMITH: And we withdraw that cause of action. We have really one cause of action.

THE COURT: Okay.

MR. SMITH: Which is age discrimination.

THE COURT: Okay. Got it. Thank you, Mr. Smith.

MR. MATTHEWS: And, and, and with that said, and I appreciate my, my good colleague, you know, doing that. I want, I want to focus your attention if I could, sir, to Exhibit H, the notice of right to sue upon which Mr. Crocker filed his, his, his action.

THE COURT: So, that's when he's at the EEOC?

MR. MATTHEWS: Exactly.

THE COURT: Is that right, and the EEOC sends him a letter that says you have a -- I don't know if it's a right to go sue or you can go sue or ---

MR. MATTHEWS: Exactly so, Your Honor.

THE COURT: Okay.

MR. MATTHEWS: If I, if I may, there are actually two -- there's a, a state apparatus and a federal apparatus.

THE COURT: Right.

MR. MATTHEWS: You follow the state apparatus to bring a claim under the State Human Affairs law; you follow the federal apparatus to file a claim under the federal law. And in most cases because it's easy to do so, because the

1 statute of limitations frankly is not as severe, because
2 damages are usually more generous, because it's frankly
3 easier and you can file in federal court if you wish, most
4 people who claim age discrimination file under the federal
5 Age Discrimination Employment Act. And on Exhibit H you
6 can see this is a notice of right to sue under --- because
7 he's alleged age discrimination, the Age Discrimination
8 Employment Act, the ADEA, and the notice of right to sue
9 again says: You may file a lawsuit against respondents
10 under federal law based on this charge in federal or state.

11 And that's true. You can choose your, you can choose
12 your forum. Of course if he filed an ADEA claim, we could
13 have removed. But the reason that when you're suing a
14 state agency under the ADEA a plaintiff may have pause is
15 because they don't like the remedy. Under the U.S. Supreme
16 Court's decision in Kimmel, if you're, if you're suing a
17 state agency, the state agency retains a level of sovereign
18 immunity, which means although he could sue for injunctive
19 relief, he cannot sue for money damages. Sometimes you see
20 claims under the ADEA just for that, for injunctive relief.
21 But instead Mr. Crocker chose to file under the State Human
22 Affairs law, which incorporates a different set of -- an
23 entirely difference set of standards.

24 Now, the -- and perhaps it's best, instead of
25 referring to the motion, to refer to our reply and to Mr.

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1 Smith's response because I think that really will focus
2 your attention on the issues that require a decision.

3 Now, Mr. Smith at first argues in his reply that we
4 really shouldn't be talking about a statute of limitations
5 at all because he wishes to proceed under 1-13-90(c), and
6 1-13-90(c) is one of the provisions that you can use or
7 that can be used by the State Human Affairs Commission to
8 institute its own investigation and hearing into an action
9 by a state agency, but there's no private right of action
10 under subsection (c). And to his credit, Mr. Smith
11 actually includes that title as an exhibit to his response.
12 It's plaintiff's Exhibit B. It is -- I acknowledge it's
13 kind of heavy reading, but if you look at 1-13-90(c), it
14 sets forth that, in fact, there is a, a, kind of a unique
15 set of circumstances under which while there's no private
16 action, the commission may, if it chooses, if it chooses
17 to, convene a hearing involving the state agency.

18 The only private right of action that exists under the
19 State Human Affairs law is at 1-13-90(d), age
20 discrimination law, and that is the provision that, one,
21 would allow for a private right of action if one exists.
22 And (d)(6) is the provision that sets forth the way a
23 hearing can be -- when you can, when you can actually file
24 a private right of action, and it states:

25 A charge filed with the commission ---

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1 The State Human Affairs Commission.

2 --- by a complainant pursuant to this chapter is
3 dismissed by commission, or within 100 days of
4 the filing of a charge of commission has not
5 filed the action under this chapter, or entered
6 into a conciliation agreement to which the
7 complainant is a party, the complainant may bring
8 an action in equity against the respondent in
9 circuit court.

10 And here's the important part:

11 The action must be brought within one year from
12 the date of the violation alleged.

13 That's one way to do it.

14 Or within 120 days from the date the
15 complainant's charge is dismissed, whichever
16 occurs earlier.

17 So, you have under the wisdom of our legislature if --
18 to take Mr. Crocker's example, he's complaining about in
19 this case a promotion for which he believed he was entitled
20 and which was improperly awarded on the basis of age to
21 another person. If that is so and he wishes to file a
22 claim under the State Human Affairs law, he has one year
23 from that date to file his claim. Or if he files a claim
24 with the, with the State Human Affairs Commission, he has
25 180 days after they dismiss their, their complaint.

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1 Now, I am not here to tell you that that -- that is a
2 picture of legislative clarity, but it is the law. The --
3 because there's no prior right of action under (c), if he
4 wishes to bring an action at all in state court, he has to
5 do it under (d). The statute of limitations is, quite
6 frankly, crystal clear. I state in, in my reply there's
7 truly nothing odd or even unique about there not being a
8 prior right of action, and that the perfect example would
9 be the action under OSHA.

10 Now, I also talk in my reply about ignoring the
11 differences between the ADEA, the federal cause of action,
12 the state cause of action. They're simply different
13 animals. If Mr. Crocker had wished to bring a claim
14 pursuant to his notice of right to sue, which was Exhibit H
15 of the reply -- I'm sorry, of our initial motion, he could
16 have done so, but he didn't.

17 The, the plaintiff raises another issue: that we'd
18 entered into conciliation agreement. The record is clear.
19 We have not. And just so Your Honor is clear, when after
20 the EEOC issues a finding that they believe there's cause,
21 they attempt to, to get the parties to enter into a
22 conciliation agreement. The parties can consider whether
23 or not that's in their interest. In this case, the parties
24 did not believe it was in their interest and failed to
25 enter into such agreement which, frankly, prompted -- the

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1 fact that -- the notice of right to sue actually says
2 conciliation failure, which is an indication, I think, that
3 efforts failed.

4 And on page 5 of our reply, we try to address kind of
5 the, the pray of parables that plaintiff suggests would be
6 the case if the statute of limitations was applied as
7 written. And our response is, well, the legislature knows
8 what it's doing and, in fact, the courts presume the
9 legislature knows what it's doing when it's interpreting
10 statutes. If Mr. Crocker had wished to file a claim under
11 the SHAC law, he, in fact, had an opportunity to do so.

12 Now, in terms of, in terms of equitable tolling,
13 which, I mean, is the last argument the plaintiff makes --
14 and, and not to give my previous argument short shrift,
15 I'll just ---

16 THE COURT: So, your theory is that his suit should
17 have been filed when?

18 MR. MATTHEWS: Well.

19 THE COURT: By what date?

20 MR. MATTHEWS: Well, if it's true that he just was
21 not, he was not hired, let's resume -- I'm looking at page
22 2 of my initial motion. Paragraph 5 talks about the fact
23 that he was not selected for the position; I believe that
24 was in December of 2012. If he believed he was aggrieved
25 by that and that the reason was age and he wanted to file

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1 with the State Human Affairs Commission in order to pursue
2 this kind of specific claim under the state law, he, he
3 could have filed an action then, requested a notice of
4 right to sue, and either the earlier of 180 days after that
5 notice of right to sue or one year from that day. In that
6 case, it would have been December 2013 at the latest.

7 THE COURT: Because when was the decision that you
8 have 180 days to made?

9 MR. MATTHEWS: I believe -- and when I look to my
10 colleague, I believe that's December 2012. Does that sound
11 right to you?

12 MR. SMITH: That sounds correct.

13 MR. MATTHEWS: So, if, if we're going to use that, if
14 we're just going to posit December 31, 2012 ---

15 THE COURT: Add six ---

16 MR. MATTHEWS: Yes, sir.

17 THE COURT: Add six months, that would be June ---

18 MR. MATTHEWS: Well.

19 THE COURT: --- 2013.

20 MR. MATTHEWS: Well, or he could do one of two things.
21 He could do -- if -- he could file a complaint with the
22 SHAC after 180, immediately request a notice of right to
23 sue and immediately file it, or just have 120 days from
24 that date. Or if the commission held on to it and he
25 wanted to file it within that time period, if the

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1 commission still had it, he could simply file his claim
2 within that time period.

3 THE COURT: Okay.

4 MR. MATTHEWS: Now, my, my ---

5 THE COURT: But it says the earlier of the two.

6 MR. MATTHEWS: Yes, sir. It does say the earlier of
7 the two. Now, my, my good colleague does raise an issue of
8 estoppel, and I do feel like I, I, I should address that.
9 I did on my reply on page 6.

10 Now as a general matter, I'm going to point to the law
11 that says:

12 The party claiming the statute of limitations
13 should be subject to equitable tolling bears the
14 burden of establishing sufficient facts to
15 justify its use. It should be used only
16 sparingly and with the interest of justice to
17 compel its use.

18 And we would argue there's absolutely no evidence that
19 the Department did anything to lull him into any sense of,
20 of, of -- that, that he shouldn't -- he should sleep on his
21 rights. And on page 7 I'm going to address the argument
22 that he makes, and again it's the middle of the page where
23 we state: The plaintiff fails to point to any act of DHEC
24 of, of this kind.

25 And as I understand plaintiff's response on its page

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1 7, he says that we persisted -- he faults us for
2 participating fully in a lengthy administrative process.
3 That would be the part about the EEOC, to which we were
4 unwilling participants. We didn't file the claim; he filed
5 the claim. That we never intimated, presumably to the
6 plaintiff, that it intended to rely upon obscure and
7 inapplicable time limit. Well, we think it's neither
8 obscure nor inapplicable. We just think it's the law of
9 the state. That we never suggested to Crocker it would
10 disregard the EEOC's regulation notice of right to sue.
11 Well, we didn't disregard it. If, in fact, he had filed an
12 ADEA claim within the time under the, the Exhibit H, in a,
13 in a spirit of candor to the court, what we would have done
14 is move to dismiss the claim to the extent it requested
15 monetary damage. He would still, if he wished, would
16 probably move it also to federal court, but then we would
17 also either 12(c) motion or 12(b) motion move to dismiss
18 any claims for monetary damages pursuant under Kimmel,
19 which is the U.S. Supreme Court decision.

20 If Mr. Crocker then wished to proceed for injunctive
21 relief, we could have that case in court. What we -- but
22 again we think that argument improperly uses a federal EEOC
23 notice of right to sue as a stand-in for a notice from the
24 commission.

25 Now, there's one other point to which my colleague

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1 refers, and that is I believe when Mr., when Mr. Crocker
2 first filed his complaint, the state commission, for
3 reasons best known to itself, decided not to pursue it.
4 And we have yet to figure out why they didn't do anything,
5 and we stand before you not understanding why they do
6 things now. But whatever they decided, DHEC didn't decide
7 that. If the State Human Affairs Commission decides for
8 whatever reason that it's declining to pursue a matter, it
9 would be the same thing as if LLR decided that it was not
10 going to file a private right of action, or not going to
11 pursue a claim of worker safety. That it, for whatever
12 reason, decided it's not in the state's best interest.

13 In that case, you know, we -- I mean, and if you step
14 back from it, you know, on page 8 we make this point.
15 We're not aware about Mr. Crocker's intent to sue us under
16 which statute. Frankly in 2016, once the statute of
17 limitations, the SHAC had passed, you know, we were
18 anticipating if he wanted to file an action to file one
19 under the ADEA. Now again he would be limited, in our
20 view, to injunctive relief, so we would argue. But that is
21 -- if that's the remedy that the law provides to him,
22 that's the one he wishes to seek, then that's what's
23 available to him.

24 We don't understand really the argument that because
25 it's not fair, because I want monetary relief, I should get

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1 this. Well, if you're, if you're pursuing a statutory
2 remedy, you're limited by that statute, statute of
3 limitations, by the, by the -- you know, in the same way if
4 you filed a workers' comp retaliation claim but you were
5 frustrated that it only had a one-year statute of
6 limitations, or you were frustrated that it only allowed
7 for back pain, or was only available when you were
8 discharged or demoted and that frustrated you and you
9 thought that was unfair, that may be. But it's, it's the
10 wisdom of the legislature that we are bound to follow.

11 So with that said, and understanding the plaintiff's
12 arguments, we don't really think there's anything
13 particularly novel about them that would forbid you from
14 taking the action which we think the statutes require.

15 THE COURT: All right.

16 MR. MATTHEWS: We would urge you to rule our in favor.

17 THE COURT: Mr. Smith.

18 MR. SMITH: Your Honor, this SHAC law was passed in
19 1976. I mean, it was -- and at the time of its creation, I
20 had the fortune or misfortune of being on the other side of
21 them. They had, had quite a staff. They had
22 investigators. They had paralegals. They had a lot of
23 commissioners. Over the years with our various state
24 budget cuts, they haven't fared so well, and they are a
25 shell agency. There were a few people, and the reason that

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1 they can continue to work is because of section 1-13-70.
2 It's called Powers of the Commission, and it starts off:
3 The commission shall have the following powers. And it
4 ticks off and it comes down to power (k), and power (k)
5 gives SHAC the ability:

6 To cooperate with the United States Equal
7 Employment Opportunity Commission created by the
8 Civil Rights Act of 1964 for the purposes of that
9 act and with federal state and local agencies and
10 departments.

11 Mr. Matthews gave the impression that he couldn't
12 understand the Human Affairs Commission didn't keep Mr.
13 Crocker's complaint but dished it off. In fact, my
14 experience is that almost everything is now handed from
15 Human Appears to the EEOC. You start -- a person such as
16 Mr. Crocker starts by filing a complaint, and that's to be
17 filed with the South Carolina Human Affairs Commission.
18 From that point, two files are created. There is a file
19 created for the EEOC, and it has a separate number, and
20 there is a file created for the Human Affairs Commission,
21 and it has a separate number. But what, in fact, happens
22 is that within a very short period of time, the Human
23 Affairs Commission defers. That is, they choose not to
24 investigate the complaint, and they send the complaint to
25 the EEOC, and in this case the EEOC office in Greenville.

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1 In Mr. Crocker's instance, he filed complaints with
2 Human Affairs on August the 7, 2013. On August the 9,
3 2013, a letter was sent to DHEC from the -- a lady that's
4 called Intake and Refer -- Intake and Referral Division
5 with SHAC, and she sent this letter in which she gives the
6 name and address of the EEOC people in Greenville. And she
7 tells DHEC that SHAC was not going to investigate this, but
8 they were deferring it to the EEOC. This action enables
9 EEOC to proceed in the processing of his complaint. SHAC
10 has waived deferral, and this agency will not be involved
11 in the investigation or resolution of this charge. And
12 from that point forward, the EEOC conducted everything
13 about the investigation. Mr. Crocker had no contact after
14 April -- excuse me, after August 9th with SHAC.

15 Now, and all of that is done because of the enabling
16 legislation that's a part of the SHAC law that I referred
17 to as 1-13-70(k). And so as of August the 9th, it is
18 EEOC's complaint to investigate and to do with as they, as
19 they best see fit.

20 Now, the legislation that was passed in 1976 is -- was
21 nine pages of legislation, and it's got a lot of detail to
22 it, but the fact is that through this enabling legislation,
23 they have now handed this to the EEOC. The EEOC does not
24 work under the legislation of this SHAC legislation. They
25 work under the regulations in the federal code regulations.

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1 So, that's the rules under which EEOC works and SHAC knows
2 that. They, they know that EEOC is going to work according
3 to federal regulations, and they do and they do this all
4 the time, all the time.

5 So, Mr. Crocker was never advised by the people at
6 SHAC. Never advised really by the people at the EEOC that
7 he needed to do anything. He was a complainant; he filed a
8 complaint saying that he believed he had been discriminated
9 against on the basis of, of age.

10 Now, finally -- well, under, I might add, under the
11 EEOC regulations that they work under, there really is not
12 a statute of limitation. There is one limitation, and that
13 is that at the conclusion of the investigation and any
14 subsequent -- for instance, there's something called
15 conciliation. You will receive a right-to-sue letter.
16 Now, it's going to say ADEA. Whatever it, whatever it
17 says, these are the rules of the EEOC, but, but you receive
18 a letter from the EEOC, and once you do that, you have
19 ninety days in which to file a lawsuit in state or federal
20 court, and that's the right-to-sue letter that Mr. Matthews
21 has mentioned.

22 THE COURT: Time out. One second. I'll be right
23 back.

24 (OFF THE RECORD.)

25 THE COURT: All right. So, EEOC -- sit down. Sit

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1 down. You're making me nervous. EEOC sent a letter that
2 said you got a right to sue in ninety days. That's the
3 last thing I got.

4 MR. SMITH: And within the ninety days, within about
5 fifty days Mr. Crocker did bring suit, and that really is
6 the only statute of limitations that applies to this case
7 because SHAC deferred to EEOC. EEOC works under their
8 rules and regulations, and that is the sum total of their
9 rules and regulations time limitation.

10 Now, Mr. Matthews mentioned two -- well, there was one
11 time he brought this action under section -- and this is
12 the one he says the statute of limitations is violated, but
13 he brought it under section 1-13-90(d)(6). Now 1-13-90(d)
14 says this:

15 For complaints asserting expressly or in
16 substance a violation of a section -- by
17 employers, employment agencies, or labor
18 organizations, including ---

19 It goes on, municipalities. It names off just about
20 everything except for state agencies. It does not say that
21 for any complaint brought under a state -- against a state
22 agency, this is applicable. Local governments, employers,
23 employment agencies, and such, and then subsection (6) of
24 that section then talks about the statute of limitations.
25 There is nothing that says that this applies to complaints

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1 about -- brought against a state agency.

2 Now in the section immediately preceding that, that is
3 1-13-90(c), it, it says:

4 For complaints asserting expressly or in
5 substance a violation by a state agency or
6 department of local subdivisions.

7 And then it sets forth a procedure for a person to
8 follow. So, if there is a provision here that applies to a
9 state agency, DHEC, then it's 1-13-90(c). If it's one that
10 applies to almost every other employer in South Carolina,
11 it's 1-13-90(d), but only (d) includes a statute of
12 limitations to it. (C) does not include a statute of
13 limitations.

14 That said, I would still argue that what is really
15 applicable are the rules and regulations that apply to the
16 EEOC because under SHAC's enabling legislation, they have
17 agreements with EEOC. They deferred this to EEOC, and of
18 course EEOC works under their rules and regulations, and
19 there's never been any claim that, that their rules and
20 regulations were not followed in any sort of way or that
21 there was any -- anything out of the way or out of the
22 ordinary dealing with that.

23 Like I said, the only, only real statute of
24 limitations involved is the one that says that Mr. Crocker
25 had ninety days to file a lawsuit. After getting a notice

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1 of a right-to-sue letter, he did file within ninety days,
2 and there's been no violation of any statute of
3 limitations.

4 THE COURT: Okay. Anything else, Mr. Matthews?

5 MR. MATTHEWS: Yes, sir. I'm sensible of the time.

6 THE COURT: No, no. I'm fine.

7 MR. MATTHEWS: Well.

8 THE COURT: You talk as long as you need to.

9 MR. MATTHEWS: Let me begin with 1-13-70(k), Power of
10 the Commission. Well, as -- and if I'm -- if you know this
11 already, please stop me. The State Human Affairs
12 Commission exists under a deferral arrangement with the
13 EEOC. In the same way, when I was at LLR, the state ran an
14 OSHA program under the aegis of the federal OSHA program.
15 The State of South Carolina if it wishes, though it's not
16 required to, can run a, a, a -- essentially a, a
17 state-level EEOC, which we call the State Human Affairs
18 Commission. It's a cooperation agreement with the EEOC,
19 That statute simply embodies the state's decision to
20 establish an agency that operates under the cooperation
21 and, frankly, under the supervision of the EEOC and nothing
22 more.

23 The, the claims that -- in, in hearing my good friend,
24 I'm surprised, frankly, that we do disagree and how much we
25 do agree on. If it is true, as he states, that the only

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1 way a state agency can be sued under the State Human
2 Affairs law is subsection (c), then the case must be
3 dismissed because there is no private right of action under
4 subsection (c). We make that point in paragraph -- on page
5 2 of our, of our file. And again while the plaintiff may
6 find that inconvenient, it is certainly not unknown in the
7 state law. There are plenty of other areas where a right
8 is, is enshrined without enshrining a private right of
9 action. And, and again if subsection (d) applies, as he
10 seems to argue, with a private right of action, then the
11 statute of limitations would apply.

12 Now, my friend has also brought up the fact that the
13 notice of right to sue, which I again refer you as Exhibit
14 H to our additional motion, that does state a, a statute of
15 limitations: ninety days from the date of Mr. Crocker's
16 receipt of the notice. It applies to federal causes of
17 action and those alone. The EEOC has not the power,
18 authority in any regard to extend a state, a state statute
19 of limitations to -- for what is to it a foreign, a foreign
20 cause of action.

21 Moreover, in choosing remedies as the plaintiff has
22 done or choosing causes of action as, as is the provence of
23 the plaintiff, he could have, we agree, that Mr. Crocker
24 have filed an ADEA claim within the ninety days of his
25 receipt of this notice. We would have no reason to file a

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1 statute of limitations argument because it would have been
2 under -- you know, it would have been within the notice of
3 right to sue.

4 My friend also says there's no other statute of
5 limitations. That's actually not true. Any person who
6 files with the EEOC or whose claim is being processed by
7 the EEOC can after six months request their own notice of
8 right to sue and file their own lawsuit within ninety days
9 of having received that notice. But again those who
10 proceed under the EEOC's aegis do so seeking to file a
11 federal claim, in this case an ADEA claim.

12 If he wished to file an age discrimination claim under
13 the state law, he should have taken another route. He
14 should have gone to the commission and said I don't want, I
15 don't want the feds involved. I want you to do this, and
16 if the commission in its wisdom had said we think you're
17 right, we're going to proceed under subsection (c), that
18 was -- that, that, that, frankly, that belongs to the
19 commission and to no other person.

20 I understand the creativity, frankly, of the
21 plaintiff's argument here, but he's trying to shoehorn a
22 state remedy under a federal rubric, which is not allowed,
23 which the law doesn't contemplate. And again, as, as the
24 court examines the statutes and the exhibits, and I'm going
25 to draw again, draw your attention to right to sue. It

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1 could not be more clear.

2 This is a case where Mr. Crocker, having waited until
3 2016 to file a lawsuit, had limited his options, whether
4 out of ignorance or otherwise, to the ADEA. He chose not
5 to file a claim under the ADEA, and at that point to come
6 to you and say get me out of this is simply not lawful and
7 injurious to DHEC.

8 THE COURT: All right, anything further, Mr. Smith?

9 MR. SMITH: Only to reiterate, Your Honor, that, that
10 this is an enabling statute in 1-13-70(k) that gives the
11 Human Affairs Commission the authority to enter into
12 agreements with EEOC. They did so. Many years have
13 passed; many years have passed. The staff of the Human
14 Affairs Commission is a shadow of what it once was, and
15 they find this is a very convenient enabling piece of
16 legislation. The Human Affairs Commission uses the EEOC.
17 The EEOC is the chief investigative office for
18 discrimination complaints. The EEOC does not have a
19 statute of limitations aside from the ninety days, but the
20 EEOC does work under the federal rules, federal
21 regulations, and it could not possibly operate under this
22 state legislation.

23 Now aside from that, as Mr. Matthews, I, I think he
24 may have mentioned it, but this section that he brought
25 this statute or this claim -- this motion under does not

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1 include state agencies, does not include state agencies.

2 THE COURT: Thank you very much. I'll let y'all know
3 by the end of next week.

4 MR. SMITH: Thank you, Your Honor.

5 THE COURT: Okay. Thank you.

6 --- END OF TRANSCRIPT OF RECORD ---

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CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 28TH DAY OF OCTOBER, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/s/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

MARCH 26TH, 2017

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CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant hereby certifies that the foregoing Record on Appeal contains all matter designated by parties to this appeal and no other material.



Adam T. Silvernail

September 28, 2017

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