

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3636

October 1, 1986

The Honorable James E. Clyburn
Commissioner, South Carolina Human
Affairs Commission
Post Office Drawer 11300
Columbia, South Carolina 29211

Re: Your Opinion Request Of July 24, 1986

Dear Commissioner Clyburn:

You have asked for an official opinion of this Office concerning the South Carolina Human Affairs Commission's (SHAC) position that limiting "give-away" promotions in the time-share business on the basis of age is unlawful under South Carolina law when doing so adversely affects persons who are at least 40 but less than 70 years of age. Furthermore SHAC is processing complaints of age discrimination against these time-share developers under Section 1-13-90 (e) of the South Carolina Human Affairs Law (HAL), Code of Laws of South Carolina, 1976, as amended.

As appears from analysis of the HAL, although the chapter is primarily addressed to the evil of employment discrimination, and the administrative and judicial sanctions it provides can only be applied to employment discrimination, provisions are also made for addressing and "alleviating" all other forms of discrimination on the protected bases, and, indeed, for addressing any kind of "problem concerning human affairs". From the extreme breadth of the policy concerns addressed by the HAL, and the variety of procedures it provides, it appears that, in Section 1-13-20, the General Assembly used "unlawful" in its broadest meaning of "unauthorized"; that the more liberal rules of grammatical/statutory construction should apply, and that it intended to and did declare all forms of discrimination on the basis of the protection classes to be "unlawful" in the broader sense of "unauthorized".

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Black's Law Dictionary, Fifth Edition, defines "unlawful" as "[t]hat which is contrary to, prohibited or unauthorized by law...". It defines "unlawful act" as "...[a] violation of some prohibitory law and includes all willful, actionable violations of civil rights, and is not confined to criminal acts. State v. Hailey, 350 Mo. 300, 165 S.W.2d 422, 427". (Emphasis added).

The primary rule of statutory construction is to give effect to the will of the legislature which is to be ascertained primarily from the plain and ordinary meaning of the language used in the statute. 82 CJS, Statutes, §322 at p. 571, Anders v. S.C. Parole and Community Corrections, 279 S.C. 206, 305 S.E.2d 229 (1983); Bankers Trust of S.C. v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980); Bouie v. City of Columbia, 378 U.S. 347 (1964); Bohlen v. Allen, 228 S.C. 135, 89 S.E.2d 49 (1959). Sections 1-13-20, 30 (c), 40 (a), 70 (f) and (n), 90 (e) and 100 of the HAL contain indications of the General Assembly's intent concerning these matters.

Section 1-13-20. "Declaration of Policy".

This chapter is an expression of the concern of the State for the promotion of harmony and the betterment of human affairs. The General Assembly hereby declares the practice of discrimination against any individual because of race, religion, color, sex, age or national origin as a matter of State concern and declares that such discrimination is unlawful and in conflict with the ideals of South Carolina and the nation, as such discrimination interferes with opportunities of the individual to receive employment and to develop according to his own ability and is degrading to human dignity. The General Assembly further declares that to alleviate such problems a State agency is created which shall seek to eliminate and prevent discrimination because of race, religion, color, sex, age, or national origin as is hereinafter provided.

The language of Section 1-13-20 baldly states that discrimination on one of the protected bases is "unlawful", and words used in a statute are to be given their plain and ordinary meaning. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980). "Opportunities of the individual to receive employment" indicates employment discrimination is the type prohibited or made unlawful. "[A]nd to develop according to his own ability" with the conjunctive "and" would indicate reference solely to employment discrimination under strict grammatical construction, but, under the more liberal

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rules of grammatical construction which are appropriate in construing remedial statutes of this nature, this "and" would not require that the discrimination addressed interfere with both employment and developmental opportunities. This "developmental opportunity", consistent with its more ordinary usage could well refer to educational and training discrimination. By the same token, "and is degrading to human dignity" would definitely refer to employment discrimination but could well apply to any form of discrimination on one of the protected bases.

Time-share "give-away" promotions would not generally be considered one of life's more important opportunities, or important societal problems, or very closely related to human development or dignity. Discrimination in these promotions would, nonetheless, fall into the general concern and policy of Section 1-13-20 and would conflict with the ideals of South Carolina as set forth briefly but directly in Section 1-13-20 and by implication in Sections 1-13-40 (a), 70 (f) and (n), and 90 (e).

Section 1-13-30 (c) defines "age" to mean "at least forty but less than seventy years"; consequently the SHAC's position that limiting time-share "give-aways" on the basis of age when it adversely affects those who are at least 40 but less than 70 is unlawful under the HAL is consistent with rules of grammatical and statutory construction, especially the liberal rules appropriate to construing remedial statutory schemes such as the HAL's.

Section 1-13-40 (a) provides that the SHAC is created "to encourage fair treatment for, and eliminate and prevent discrimination against, any member of a group protected by this chapter", which supports this broad construction, as does Section 1-13-70 (f), which gives the SHAC the power to create or recognize such advisory agencies and councils as will aid in effectuating the purposes of the HAL and the South Carolina Constitution's provisions for equal protection of the laws. SHAC may empower such agencies and councils to study problems of discrimination in all or specific fields of human affairs or in specific instances of discrimination. This Section clearly refers to the whole gamut of discriminatory acts which have or could arise in South Carolina. Section 1-13-70 (n) empowers the SHAC to hold hearings and issue reports and recommendations concerning the broad range of human and discriminatory problems addressed by the HAL.

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Section 1-13-90 (e) provides the procedures by which the Human Affairs Commission is to seek to eliminate and prevent discrimination against members of protected classes which is not declared unlawful by Section 1-13-80 (employment discrimination), Consequently the position stated in your July 24, 1986, letter regarding your processing of time-share "give-away" age discrimination complaints is correct under the HAL.

Section 1-13-90 (e)'s reference to "those discriminatory practices declared unlawful by § 1-13-80", in conjunction with Section 1-13-100, demonstrates that, whereas the HAL declares specific forms of employment discrimination to be unlawful in its narrower and more forceful meaning of "actionable violations of civil rights"; other forms of discrimination on the basis of the protected characteristics are only made unlawful in its broadest meaning.

Section 1-13-100 unequivocally states that the HAL creates no cause of action except for certain kinds of employment discrimination by certain employers. Consequently it is clear that the Section 1-13-20 declaration that discrimination per se against the protected classes is unlawful, could not be read to create any cause of action against the perpetrator. Age discrimination in time-share give-aways would not be actionable under the HAL and there is no other South Carolina statutory or common law cause of action for such discrimination.

Section 27-32-110, et seq., of the Code, as amended, regulates Vacation Time Sharing Plans, including promotions and sales. Section 27-32-110. "Certain Practices Prohibited". regulates advertising and promotional devices in particular, especially where false and misleading, but does not refer to discrimination. Sections 120 and 130 provide for penalties for violation of, and enforcement of, the time-sharing chapter, which does not refer to discrimination. Section 190 provides that the Commissioner may issue certain orders and revoke registrations upon notice, hearing and determination of violations of the chapter, or of certain other offenses which would not reasonably include age discrimination in "give-aways". Finally Sections 210 and 220 provide for recovery from a Vacation Time Sharing Recovery Fund of actual losses under certain conditions. Although "claim" is defined by Section 27-32-10 (20) as a monetary loss sustained by a person due to the wrongdoing of a licensee, "loss" is not defined and the detailed conditions for recovery do not specifically refer to discrimination or "give-aways", reading

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the relevant sections of Time Sharing chapter in pari materia (with reference to each other) would indicate that recoverable losses would be those caused by violation of the provisions of the chapter, which do not include discrimination.

Since age, per se, is not a handicap or disability within the meaning of the South Carolina statutes addressing handicapping conditions and disabilities, the provisions of the Bill of Rights for Handicapped Persons, Section 43-33-510, et seq., of the Code, as amended, would not apply, even if handicapped persons' rights to public accommodation "guaranteed" by Section 43-33-520 of the Code, could be stretched to include the free accommodations which are sometimes part of time sharing promotional "give-aways".

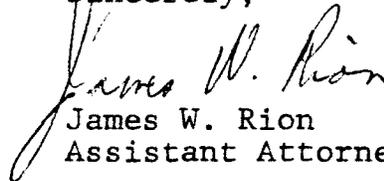
Consequently age discrimination in such "give-away" promotions is not unlawful under South Carolina law in the sense that it is specifically prohibited by any statute, regulation or judicial decision, or is actionable under South Carolina law. It is only unlawful to the extent that the General Assembly's "Declaration of Purpose", for the HAL, Section 1-13-20, states that it is, when read with reference to the provisions of Sections 1-13-30 (c), 40 (a), 70 (f) and 90 (e).

In addition to the foregoing, the construction that such discrimination is unlawful in this sense is further supported by the rule of statutory construction that the longstanding contemporaneous construction of a statute by the agency charged with administration and enforcement of that statute is most significant, Shasta Beverages v. S. C. Tax Commission, 310 S.E.2d 655, 659, n. 1 (1983), citing Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 540, 230 S.E.2d 219, 221 (1976) and Etiwan Fertilizer Co. v. South Carolina Tax Commission, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950), is entitled to the most respectful consideration, and "extra authoritative weight", should not be overruled absent compelling reasons, Emerson Electric Co. v. Robert C. Wasser, et al., ___ S.C. ___, ___ S.E.2d ___ (S.Ct. Op. # ___, filed 1/6/86), citing Faile, supra and Stone Manufacturing Co. v. South Carolina Employment Security Commission, 219 S.C. 239 64 S.E.2d 644 (1951); 3 Davis, Admin. Law Treatises § 7.14 (2d ed. 1979); Craig v. Bell, 211 S.C. 473, 46 S.E.2d 52 (1948), and is of controlling weight unless plainly erroneous, United States v. Moore, 95 U.S. 760, 763 (1877) and Bowles v. Seminole Rock and Sand Co., 325 U.S. 410, 414 (1945), in the interpretation of that statute and is "one of the most definite and reliable sources of statutory meaning. Sutherland,

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Statutory Construction, § 49.04. Since its creation in 1972, the SHAC has always interpreted the HAL to declare that all discrimination on the protected bases is unlawful, but that the only remedy for discrimination which is not employment related is the investigation and voluntary conciliation provided by Section 1-13-90 (e), or the investigation, hearing, report and recommendation provided by Section 1-13-70 (n). Since this is consistent with the plain and ordinary meaning of the words used in the HAL, it is unlikely that a court would overrule this interpretation. It appears that the position stated in your letter of July 24, 1986, is correct.

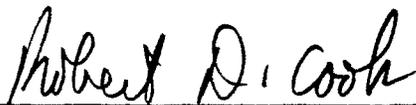
Sincerely,



James W. Rion
Assistant Attorney General

JWR:ppw

REVIEWED AND APPROVED BY:



ROBERT D. COOK
Executive Assistant for Opinions