

1984 WL 250425 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 26, 1984

*1 The Honorable J. Verne Smith
Member
South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Smith:

This is in response to your request for an opinion as to whether proposed State Human Affairs Commission (Commission) Regulation 65–77 is a proper promulgation of the law embodied in Act 124, 1983 Acts and Joint Resolutions (The Bill of Rights for Handicapped Persons).

Section 3 of Act 124 prohibits discrimination against a handicapped person in any of four areas, to wit: employment, public accommodations, public services, or housing. Section 4 of the Act, speaking in general terms, prescribes injunctive relief and civil damages not to exceed \$5,000.00 actual damages for discrimination. Section 5, speaking only about employment discrimination, states that the provisions, procedures, and remedies of Title 1, Chapter 13 (The South Carolina Human Affairs Law) shall apply.

As Section 5 grants to the Commission jurisdiction over cases of employment discrimination, it is clear that the Commission has the authority to promulgate reasonable regulations to lawfully exercise that jurisdiction. (See [§ 1–13–70\(c\) CODE OF LAWS OF SOUTH CAROLINA](#), 1976 (1983 Cum.Supp.)) However, Section 4 makes no mention of the Commission or the laws applicable to it, thus State Human Affairs Commission regulations which attempt to interpret Section 4 would most probably be beyond the Commission's administrative authority.

Proposed Regulation 65–77 states:

“Section 5 of the Bill of Rights for Handicapped Persons provides that the ‘remedies of Chapter 13 of Title 1 shall apply to such unlawful employment practice(s) [as are prescribed by the Bill of Rights for Handicapped Persons and Chapter 13 of Title 1 (the Act)].’ Since the succeeding or later legislative pronouncement controls, the remedies prescribed by Chapter 13 of Title 1 (Sections 1–13–90(c) and (d) of the Act) shall apply to unlawful employment practices because of a handicap instead of the remedies prescribed by Section 4 of the Bill of Rights for Handicapped Persons. Consequently, a handicapped person cannot bring suit in the court of common pleas until the provisions of Section 1–13–90 have been satisfied and the civil damages awarded are not limited to five thousand dollars actual damages.”

On its face, proposed Regulation 65–77 attempts to interpret not only Section 5, but also Section 4. It is the opinion of this office that any attempt by the State Human Affairs Commission to interpret Section 4 and thereby limit its application is beyond the Commission's authority. Accordingly, the portions of the proposed regulation which attempt to interpret or limit Section 4 are most likely invalid.

The State Human Affairs Commission, by its proposed regulation, is apparently attempting to resolve what it perceives as a conflict between Section 4 and Section 5. Section 4 allows recourse to the courts for discrimination pursuant to the act; however, it imposes a \$5,000.00 ceiling on actual damages. Section 5 involves only cases of employment discrimination and provides that the remedies shall be as prescribed in Title 1, Chapter 13. Section 1–13–90(c)(16) allows monetary recovery against a state agency or department only for back pay, and such back pay liability shall not accrue from a date more than two years prior

to the filing of a charge. Section 1–13–90(d)(9) allows monetary recovery against an employer, employment agency, or labor organization (See Definitions, § 1–13–30) for back pay and such back pay liability shall not accrue from a date more than two years prior to the filing of a charge, and unemployment compensation, interim earnings, or an amount earnable with reasonable diligence shall reduce the back pay award. In either case the allowable back pay could exceed \$5,000.00. The question thus becomes: Is a back pay award which is specifically allowable under Section 5 limited by the \$5,000.00 ceiling found in Section 4?

*2 We believe that Section 4 does not limit relief pursuant to Section 5. First, the \$5,000.00 ceiling applies only to actual, civil damages. Sections 1–13–90(c)(16) and 1–13–90(d)(9) suggest that the back pay award would be in conjunction with the reinstatement or upgrading of an employee. The United States Court of Appeals for the Fourth Circuit in the case of [Burt v. Board of Trustees](#), 521 F.2d 1201 (4th Cir.1975), held that such an award is equitable in nature. The Court further indicated that an award of back pay alone would be within the discretion of an equity court. 521 F.2d at 1205, footnote 6. Thus as the award of back pay is an award in equity, it would not be affected by a limitation applying only to actual, civil damages. Secondly, the rules of statutory construction dictate that in the event of a conflict between two statutes, one general and the other specific, the more specific of the two should be given effect. [Wilder v. State Highway Department](#), 228 S.C. 448, 90 S.E.2d 635 (1955). On its face Section 4 is general as it applies to all types of discrimination and broadly speaks about the available remedies. Section 5, on the other hand, deals only with employment discrimination and mandates the jurisdiction, procedures, and remedies for such cases. As Section 5 is the more specific of the two, it should govern as to complaints filed with the Commission, and the back pay remedies incorporated into Section 5 and found in § 1–13–90 are applicable. Thus, it is the opinion of this office that the \$5,000.00 ceiling does not apply to complaints of employment discrimination brought under Section 5.

Sincerely,

James P. Hudson
Staff Attorney

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