

1980 WL 121114 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 21, 1980

**\*1 Re: Certificates of Eligibles**

Mr. John B. Dotterer, Jr.  
State Merit System Supervisor  
State Personnel Division  
Interagency Merit System  
1205 Pendleton Street  
Columbia, South Carolina 29211

Dear Mr. Dotterer:

You have recently asked this Office whether there is any legal prohibition against noting the race and sex of candidates on certificates of eligibles. My research has not uncovered a statute which would prohibit the action outlined in your letter. However, for reasons given below, it is recommended that notations concerning an applicant's race or sex should not be listed on certificates of eligibles.

Firstly, the Equal Employment Opportunity Commission, hereinafter EEOC, recommends that records concerning an applicant's race or ethnic identity be maintained separately from the records available to a person who will make an employment decision concerning the applicant. 1 CCH Empl. Prac. Guide, #426. You will find enclosed the EEOC's Reporting and Recordkeeping Rule, [29 C.F.R. § 1602.13](#) which recommends the separation of personnel records.

Secondly, the EEOC regulations provide that an employer may ask for an indication of an applicant's sex if the inquiry is made for a nondiscriminatory purpose, e.g., when sex is a necessary qualification for the particular job or for information required for the completion of EEOC reports. [29 C.F.R. § 1604.7](#), EEOC Pre-employment Inquiries as to Sex, provides:

A pre-employment inquiry may ask 'Male . . . , Female . . . ' ; or 'Mr., Mrs., Miss', provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

As you know very few positions exist which require sex as a bona fide occupational qualification. Therefore, only in such rare circumstances should an appointing or hiring authority be informed in advance of an interview of the sex of an applicant. One court has held that it is improper for an employer to carry notations of a persons sex in personnel records which are used for 'bumping, promotions, and so forth.' [Ostapowicz v. Johnson Bronze Co.](#), 369 F.Supp. 522, 537 (W.D. Pa. 1973), 541 F.2d 394 (3rd. Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

Thirdly, the standard state application form requests information concerning applicants race and sex for EEOC 'reporting and personnel research requirements.' The form states that the requested information will not be used to evaluate the application, and that the tab containing such information would be removed before the application is forwarded to the interviewer. One can infer that a promise is made to an applicant that an interviewer will not be informed of an applicants race, sex, age, etc. prior to the interview. This promise would be unkept if such information were supplied on a certificate of eligibles from which persons are selected for interviews and ultimately persons are hired.

\*2 You may want to remind an agency requesting race and sex data on a certificate of eligibles that if it gives due consideration to the top ten available candidates it is likely to ascertain the requested information. See, Procedures for the Administration of the Merit System Rule, IV Certification, § G.

Sincerely yours,

Barbara J. Hamilton  
State Attorney

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