

## Court rules that employer liable for negative job reference

The Tenth Circuit Court of Appeals (which covers Colorado) recently decided that a negative job reference may constitute an “adverse employment action” under Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. It also prohibits retaliation against an employee for filing a discrimination complaint.

### The Case

Terrie Hillig, an African American woman, worked for the Defense Accounting Finance Service (DFAS) in a clerical position since 1993. In 1995 and 1996, Hillig filed racial discrimination complaints against her employer with the Equal Employment Opportunity Commission (EEOC). Hillig alleged that two of her supervisors had given her negative performance appraisals and had delayed her request to take annual leave. The complaints were settled in 1996 when DFAS agreed to promote Hillig retroactively and remove negative information from her personnel file.

In 1998, Hillig interviewed for a job at the Department of Justice (DOJ). When the DOJ called DFAS to check Hillig’s references, the two supervisors named in the EEOC case gave her negative references. The DOJ did not offer the job to Hillig, but claimed that their reasons for hiring another candidate were not related to the negative references.

Hillig sued DFAS in district court under Title VII for discrimination and retaliation. A jury found that Hillig’s negative references were not motivated by racial discrimination, but that they were made in retaliation for her EEOC complaints. The jury awarded Hillig \$25,000 in damages even though she could not prove that she would have been offered the DOJ job without the negative references. The district court then cancelled the jury’s award because—according to the jury—Hillig had not suffered a tangible adverse employment action.

Hillig appealed. The Tenth Circuit Court of Appeals held that the district court judge had erred by requiring Hillig to show that she would have received the DOJ position but for the negative references. The appeals court said that Hillig had suffered an adverse employment action that could affect her future job opportunities. The fact that the negative references were oral is irrelevant. The negative references were communicated to the DOJ, a potential employer, and would likely preclude her from obtaining employment there in the future. The appeals court reversed the district court’s decision and reinstated the jury verdict for \$25,000 in damages.

The appeals court explained that they liberally defined the phrase “adverse employment action” to include actions beyond monetary losses from wages or benefits. The court said that one factor that strongly indicates an adverse employment action is an action that causes harm to future employment prospects.

### What this Case Means for Counties

According to this decision, an ex-employee can now show that a negative job reference is an “adverse employment action.” Counties should take care not to use references in a way that retaliates against former employees. Both oral and written documentation of references may be subject to disclosure under this ruling and the Colorado Open Records Act.

Counties can decrease their chance of lawsuits by implementing a policy that restricts the number of people who are allowed to give job references, directing all requests for job references to designated qualified human resource professional(s), and training those people regarding the proper way to give job references. References should never be given by those who may be biased or whose impartiality may be fairly questioned on the facts. For more information, contact CTSI at 303-861-0507.

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### **County Technical Services, Inc.**

800 Grant St., Suite 400  
Denver CO 80203

303.861.0507  
FAX: 303.861.2832

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