

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Marcia S. Krieger

Case No. 999-MK-9999 (XXX)

JANE ROE,

Plaintiff,

v.

SMITH CORP., and  
JACK SMITH,

Defendant.

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**SAMPLE MOTION TO DISMISS<sup>1</sup>**

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**COME NOW** Defendants Smith Corp. and Jack Smith, who move to dismiss the Plaintiff's First and Second Claims for Relief in the Complaint (# **XX**) for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

The Defendants certify that, pursuant to D.C. Colo. L. Civ. R. 7.1(A),<sup>2</sup> counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiff on February 30, 2009. Plaintiff's counsel opposes the relief requested herein.

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<sup>1</sup>*This document provides a sample of a motion to dismiss that sufficiently complies with the requirements of Section V.I.1.b of the Practice Standards for Judge Marcia S. Krieger. Because there is minimal legal argument made in this particular example, a supporting brief is not necessary. When the motion turns on more complex legal issues, parties shall briefly identify the proposition of law in the motion and refer to supporting authority in a separate brief.*

<sup>2</sup>*Although compliance with Local Rule 7.1(A) is not required for Rule 12 motions, the Court nevertheless encourages parties to confer in advance of filing to attempt to narrow the scope of issues in dispute, especially where the motion is directed at pleading deficiencies that could be cured by amendment of the complaint.*

## FACTS<sup>3</sup>

The Complaint alleges two causes of action: (i) the Plaintiff was allegedly terminated from her employment with Smith Co. on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Complaint, ¶ 15, 19); and (ii) that Defendant Jack Smith defamed the Plaintiff by stating that she was “a common thief” during a disciplinary meeting.

## ARGUMENT

### 1. Title VII claim

A. Burden of proof: The Plaintiff has the burden of production to come forward with facts demonstrating a *prima facie* case. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993).

B. Elements: The Plaintiff must allege that: (i) she is a member of a protected class; (ii) she was qualified for the position she held; (iii) she suffered an adverse employment action; (iv) that adverse action occurred in circumstances giving rise to an inference of discrimination. *Id.* at 506. The Defendants concede that the Plaintiff has plead sufficient facts to establish the first and third elements.

C. Elements not supported by Complaint:

**element (ii)**: The Complaint does not allege that the Plaintiff met the minimum qualification standards for the position she held.

**element (iv)**: The Complaint does not allege any facts demonstrating that the Plaintiff was terminated in circumstances giving rise to an inference of discrimination. The Complaint does not state that the Plaintiff was replaced by a person outside the protected class,

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<sup>3</sup>*Because the motion is brought pursuant to Fed. R. Civ. P. 12(b)(6), only the specific facts alleged in the Complaint are properly before the Court. Extended factual recitation is unnecessary and duplicative of the Complaint itself.*

see e.g. *St. Mary's*, 509 U.S. at 506, nor any other facts suggesting that the termination was in any way related to her sex.

## 2. Defamation claim

A. Burden of proof: The Plaintiff has the burden of proof by clear and convincing evidence. *Barnett v. Denver Publishing Co.*, 36 P.3d 145, 147 (Colo. App. 2001).

B. Elements: To state a claim for defamation under Colorado law, a plaintiff must allege: (i) a defamatory statement; (ii) published to a third party; (iii) the existence of special damages or actionability absent special damages; and (iv) actual malice. *Card v. Blakeslee*, 937 P.2d 846, 850 (Colo. App. 1996); *Barnett*, 36 P.3d at 147. The Defendants concede that the Plaintiff has plead sufficient facts to establish elements (i) and (iii).

C. Elements not supported by the Complaint:

**element (ii)**: The Plaintiff has not alleged that the statement was published to a third party. Paragraph 7 of the Complaint states that the alleged defamatory statement was made by Defendant Jack Smith during a disciplinary meeting with the Plaintiff and Lisa Doe, Smith Corp.'s Human Resources Manager. As a matter of law, Ms. Doe is not a "third party" because she is an employee and agent of Defendant Smith Corp. and its owner, Jack Smith. See *Johnson v. Made-Up Case*, 000 P.2d 999 (Colo. 2000). Thus, even when taken as true, the alleged publication of the statement to Ms. Doe is insufficient to state a claim for defamation.

**element (iv)**: The Plaintiff has not alleged facts showing that the statement was made with actual malice.

## CONCLUSION

For the foregoing reasons the Defendants' Motion to Dismiss should be granted and the First and Second Claims for Relief should be dismissed.

Dated: \_\_\_\_\_

Respectfully submitted,

\_\_\_\_\_

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**SAMPLE RESPONSE TO SAMPLE MOTION TO DISMISS**

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**COMES NOW** Plaintiff Jane Roe, through undersigned counsel, in opposition to the Defendants' Motion to Dismiss (# XY). The Plaintiff contends that she has alleged sufficient facts in the Complaint to state claims for both sex discrimination under Title VII and common-law defamation.

**1. Title VII claim**

A. Burden of proof: The Plaintiff concedes that she bears the burden of production of a *prima facie* case.

B. Elements: The Plaintiff agrees with the Defendants' identification of the elements of a *prima facie* case.

C. The Complaint sufficiently alleges elements (ii) and (iv):

**element (ii)**: Paragraph 4 of the Complaint, which states "At all times herein, the Plaintiff has been a competent and capable employee," sufficiently alleges that the Plaintiff was qualified for her position. In addition, paragraph 11 of the Complaint alleges that "Smith Corp. has never had any cause to question the Plaintiff's ability to perform her job."

Both statements, construed in the light most favorable to the Plaintiff, allege that the Plaintiff had the minimum qualifications for the position.

**element (iv):** Paragraph 6 of the Complaint alleges that Defendant Jack Smith repeatedly commented that “girls aren’t cut out for this kind of work” and that, referring to the Plaintiff and Mary Clark, “I don’t know why Tom hired these bitchy little crybabies in the Receiving Department.” These comments, some directed specifically at the Plaintiff, are direct evidence of sex-based discrimination. Such comments can give rise to an inference of discrimination. *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10<sup>th</sup> Cir. 2000).

## **2. Defamation claim**

A. Burden of proof: The Plaintiff disputes that she must prove her defamation claim by clear and convincing evidence. The Defendants’ citation to *Barnett v. Denver Publishing Co.*, 36 P.3d 145, 147 (Colo. App. 2001) is misplaced, as that case involves a claim against a public figure. Because there is no claim that the Plaintiff here is a public figure, she need only prove her defamation claim by a preponderance of the evidence. *Id.*

B. Elements: The Plaintiff disputes the Defendants’ recitation of the elements of the claim. Specifically, the Plaintiff denies that element (iv), actual malice, is an element of a defamation claim involving a private person. *Id.*

C. The Complaint states the necessary elements of defamation:

**element (ii):** The Plaintiff denies that Ms. Doe’s employment with Smith Corp. makes her the agent of Defendant Smith as a matter of law. *See Different Made-Up Case v. Hanrahan*, 000 P.3d 100 (Colo. App. 2001). Moreover, even assuming that publication of the statement to Ms. Doe is insufficient, paragraph 16 of the Complaint alleges that “Defendant Smith made this statement in a loud voice such that others outside the office could hear it.” Paragraph 19 states that “Thereafter, Mary Clark told the Plaintiff that she had heard that Jack

Smith had accused Plaintiff of being a thief.” These statements are sufficient to allege that Defendant Smith published the false statements to third parties.

**element (iv):** The Plaintiff denies that actual malice is required to state a claim of defamation by a private party. *Barnett*, 36 P.3d at 147. In the alternative, the Plaintiff contends that the comments alleged in paragraph 6 sufficiently demonstrate Defendant Smith’s actual malice towards the Plaintiff.

Accordingly, the Plaintiff requests that the Defendants’ Motion to Dismiss be denied.

Dated: \_\_\_\_\_

Respectfully submitted,

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