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## **The Perils of Subjective Hiring And Promotion Criteria**

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Most employers, if given the choice, would prefer to hire individuals who are intelligent, articulate, responsible, have positive attitudes, and who exercise initiative. After all, wouldn't such individuals perform any job better than those who lack such qualities?

Recent court cases highlight the perils of using such subjective criteria in selecting individuals for employment. Unconscious stereotypes can easily infect the job selection process when decisions are based on subjective personality traits rather than objective indicators of individuals' job-related skills and abilities.

The case law makes clear that while subjective hiring criteria are permissible; they will be carefully scrutinized when employment discrimination claims arise. An employer can defend a hiring or promotion decision based on such criteria only if it can produce a factual basis for its assessment of the candidate.

In *Chapman v. AI Transport*, the plaintiff, John Chapman, applied for an open position in his company as a "Casualty Claims Manager". Chapman was 61 years old at the time. He was denied the job and subsequently filed a lawsuit under the Age Discrimination in Employment Act.

One of the explanations offered by AI Transport for rejecting Chapman was his poor interview performance. One official who interviewed Chapman stated that he did not "get a real feeling of confidence" from him. That official thought that another candidate (who was younger) "made a better presentation of himself and his skills". The other official who interviewed Chapman stated that he was not very concise with the answers, did not take an aggressive approach in asking questions about the position, and did not provide "sharp" answers.

The court made clear that while subjective reasons can justify adverse employment decisions, an employer must articulate a *clear and reasonably specific factual basis* upon which it based its decision. In other words, an employer must provide objective evidence supporting its subjective assessment of the candidate. The court offered as an example of an insufficient explanation "poor appearance". A sufficient explanation would be "his hair was uncombed and he had dandruff all over his shoulders", or "he came to the interview wearing short pants and a T-shirt".

In Chapman's case, the court ruled that AI Transport's subjective explanation was sufficiently specific to justify its decision not to hire him.

Other court decisions provide additional guidance as to whether subjective criteria can justify hiring and promotion decisions. In *Aka vs. Washington Hospital Center*, the plaintiff claimed that Washington Hospital Center's decision not to hire him for a pharmacy technician job violated the Age Discrimination in Employment Act and the Americans with Disabilities Act. Aka had worked at the hospital for 19 years and had earned two degrees while on the job. After his bypass surgery, he was unable to perform his job and applied for other positions. The person selected for the pharmacy technician job had worked at the hospital for less than a year as a laundry-folder.

The hospital offered a mixture of objective and subjective explanations for its hiring decision. Its objective explanations — that the selectee had greater experience in pharmacy services and knowledge of medical terminology — were found not to be true. Thus, the case hinged on whether its subjective explanation — plaintiff's lack of enthusiasm — was legitimate.

The court noted that the interviewer did not comment at all on Aka's enthusiasm (or the lack thereof) on the interview summary sheet, weakening her claim that this motivated her decision. The court further stated that an employer's reliance on subjective assessments of candidates may mask discrimination, particularly where, as here, a jury could reasonably find that the plaintiff was otherwise significantly better qualified than the successful applicant. Thus, the court concluded that there was enough evidence to create a jury question as to whether the hospital acted with discriminatory intent.

The Eighth Circuit reached a similar conclusion in *McCullough v. Real Foods, Inc.*. McCullough, who was African American, was passed over for a promotion to "deli manager", in favor of a white individual who had less experience and inferior educational qualifications. Real Foods did not set up formal criteria for this employment decision, but rather relied on subjective criteria such as his perception of each of the two employees' abilities, work ethic, and dedication to the job.

The court stated that subjective criteria for promotions are particularly easy for an employer to invent in an effort to mask discrimination. It concluded that McCullough presented sufficient evidence to support a reasonable inference that Real Foods' failure to promote her to the position of deli manager was motivated by racial bias.

In *Carter v. Three Springs Residential Treatment*, the Eleventh Circuit took an even less accommodating position with regard to subjective hiring criteria. The plaintiff, who was African American, was rejected for a promotion in favor of a white individual. In comparing the candidates, the court only considered criteria, which could be objectively assessed. It stated that requirements such as the possession of "initiative and judgement capabilities" and the ability "to relate to people in a manner to win confidence and establish support" are incapable of objective evaluation and therefore cannot be relied upon by an employer seeking to show that the plaintiff was less qualified than the applicant chosen for promotion.

What are the lessons of these decisions?

- In making hiring and promotion decisions, employers should assess the candidates' objective, job-related skills and experience.
- Additional subjective criteria can be considered if there is a clear and reasonably specific factual basis to support the subjective assessments.

- Interviewers should document their assessments of candidates' objective and subjective qualifications.
- Subjective criteria are not likely to justify a challenged hiring or promotion decision if the complainant is otherwise significantly better qualified than the selectee.

How can you ascertain a factual basis for assessing personality traits of job candidates?

- Ask the candidate to describe instances in which he or she exhibited the trait at issue.
  - o **Example:** If you are looking for a candidate who exercises initiative, ask the individual to describe instances in which he or she spearheaded work projects.
  - o **Example:** If you are looking for a candidate who has a positive attitude, ask the candidate to describe how he or she has dealt with situations that required the performance of undesirable job tasks.
- Ask the candidate to carry out or describe how he or she would carry out a task that requires the trait at issue.
  - o **Example:** If creativity is sought, ask the candidate how he or she would address a problem that might arise in the job and that requires a creative solution.
- Take careful notes at the time of the interview or immediately afterwards describing to what extent the candidate exhibited the desired traits.
  - o **Example:** If you are looking for enthusiasm and/or articulateness, describe in the interview notes the degree to which the candidate demonstrated those traits.

In conclusion, hiring and promotion decisions should primarily be based on objective assessments of candidates' job-related skills, abilities, and experience. Vague assessments of personality characteristics can be affected by unconscious stereotypes. Thus, to the extent that a job requires traits that cannot be objectively measured, careful thought should be given to how to determine the degree to which candidates possess those qualities.

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