

# CLIENT ALERT

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### Employers Must Use Care In Posting Job Requirements

It is not unusual for an employer to hire an individual for a position even though he or she does not possess every one of the posted required qualifications. A recent decision of the U.S. Court of Appeals for the Third Circuit, however, reveals that doing so may increase the employer's risk of liability for discrimination. In *Scheidemantle v. Slippery Rock University*, the court held that a plaintiff asserting a Title VII failure to promote or hire claim need not prove that he or she was qualified for the position where the employee selected for that position also lacked the required qualifications.

#### The Facts

Judy Scheidemantle worked for Slippery Rock University ("Slippery Rock") as a labor foreman. In March 2003, Slippery Rock posted a vacancy for a locksmith position. The posting reflected that the candidates must have two years of locksmithing experience. Scheidemantle did not have that required experience, but she nevertheless applied for the position along with three male applicants who also did not possess the required two years' experience. Slippery Rock selected one of the male applicants, Calvin Rippey, who had more relevant experience than Scheidemantle.

Scheidemantle filed a claim with the Equal Employment Opportunity Commission ("EEOC") alleging age and gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and Pennsylvania state law. The EEOC dismissed the claims on the grounds that Scheidemantle could not substantiate her claims of discrimination because Slippery Rock had selected the candidate with the most relevant experience or training.

Scheidemantle then filed a lawsuit in the district court.

Thereafter, in April 2004, Slippery Rock promoted Rippey, leaving the locksmith position vacant once again. When Slippery Rock posted the position, the posting reflected that three years' experience in locksmithing was required. Scheidemantle applied despite the fact that she again did not meet the experience qualification. On this occasion, Slippery Rock did not select an applicant to fill the position on a permanent basis, but instead informally assigned the job to another male employee, Bradley Winrader, who also did not meet the experience qualification.

Scheidemantle filed another complaint with the EEOC in October 2004, and the EEOC again dismissed the complaint. Scheidemantle then amended her federal court Complaint to assert age and gender discrimination claims against Slippery Rock for the 2004 failure to promote, and she also added a claim that the 2004 failure to promote was retaliation for her 2003 EEOC complaint.

#### The District Court Decision

The district court granted Slippery Rock's motion for summary judgment and dismissed Scheidemantle's Complaint. The court concluded that because Scheidemantle was not qualified for the position according to the "objective criteria listed in the position announcements," she could not establish a *prima facie* case of discrimination under Title VII. Scheidemantle then appealed the dismissal of her gender discrimination claims to the Third Circuit.

#### The Third Circuit Opinion

In its opinion reversing the decision of the district court, the Third Circuit identified two guiding principles. First, the court observed

that “Title VII is a remedial statute, so it must be interpreted broadly.” Second, the court concluded that “there is a low bar for establishing a *prima facie* case of employment discrimination.”

The court explained that to establish a gender discrimination claim for failure to promote under Title VII, a plaintiff must satisfy the three-step inquiry from the U.S. Supreme Court’s decision in *McDonnell Douglas Corp. v. Green*. The court further explained that if a plaintiff successfully establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the failure to promote. If the employer articulates such a reason, the burden then shifts back to the plaintiff to demonstrate that the reason is merely a pretext for discrimination.

Slippery Rock argued that Scheidemantle did not satisfy the second prong of the *prima facie* case because she lacked the required objective qualifications for the position in question (two or three years of experience). Scheidemantle argued that she was not required to meet the objective qualifications of the job postings because she was at least as qualified as the male employees who were selected for the positions.

In finding for Scheidemantle, the court began its analysis by looking at its 2005 decision in *Hugh v. Butler County Family YMCA* for guidance. In *Hugh*, the employer promoted a woman despite the fact that she lacked the objective posted qualifications for the job. When the employer subsequently terminated her employment and she sued for gender discrimination, the employer argued that she could not establish a *prima facie* case because she failed to establish that she was qualified for the job in question. The Third Circuit

rejected that argument, holding instead that the employee’s failure to meet the requirements under those circumstances did not preclude her from establishing a *prima facie* case because the fact that she had been promoted despite her lack of qualifications was sufficient to establish that she was “qualified” for the job in the employer’s eyes.

Applying its holding in *Hugh*, the court observed in *Scheidemantle* that “*Hugh* stands for the proposition that, by departing from a job posting’s objective criteria in making an employment decision, an employer establishes different qualifications against which an employee or applicant should be measured for the position.” According to the court, “[i]f an employer could, with impunity, appeal to objective qualifications to defeat any female job applicant’s challenge to its hire of an objectively unqualified male in her place, discrimination law would be reduced to bark with no bite.”

The court then looked to the qualifications of the employees selected over Scheidemantle “to determine whether Slippery Rock created the inference that something other than the posted objective qualifications was sufficient” to qualify for the position. Because both of the candidates selected for the job lacked the objective qualifications listed in the job postings, the court determined “that something other than the job postings’ two or three years of locksmithing experience” had satisfied the experience requirement. The court found that “by departing from the objective requirements in its hiring decisions, Slippery Rock thereby established different qualifications by which Scheidemantle – as a protected applicant who suffered an adverse employment decision – met the qualifications prong and completed her *prima facie* case of

discrimination.” The court therefore reversed the judgment of the district court and remanded the case for further proceedings.

### Conclusion

As the *Scheidemantle* decision makes clear, employers must critically assess the qualifications which they identify in job postings. Employers should carefully analyze the position in question in terms of the qualifications needed, and should include in the official job posting only those qualifications which they intend to rely upon in making their selections. It is also of critical importance for employers to recognize that selecting a candidate who does not satisfy each of the listed requirements may result in a waiver of the defense in a subsequent lawsuit that the complaining employee was not “qualified” for the position in question, as the opinion in *Scheidemantle* can be read to support an inference that the employer did not pay credence to the posting requirements in its selection process.

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