



When is a posted job requirement not required?

By David W. Garland and
Jerrold J. Wohlgemuth

It is not unusual for employers to promote employees who do not possess each of the qualifications set forth in a formal job posting. A recent decision of the 3rd U.S. Circuit Court of Appeals, however, shows that doing so may increase the employer's risk of liability for discrimination.

In *Scheidemantle v. Slippery Rock University*, 470 F.3d 535 (3d Cir. 2006), the court held that a plaintiff asserting a Title VII failure-to-promote claim need not prove as part of her *prima facie* case that she was qualified for the position where the employee selected also lacked the required qualifications.

The facts

Plaintiff Judy Scheidemantle worked for the defendant, Slippery Rock University (Slippery Rock), as a labor

foreman. In March 2003, Slippery Rock posted a vacancy for a locksmith position that specifically stated applicants must have two years of locksmithing experience. Scheidemantle, who did not have the required experience, nevertheless applied for the position along with three male applicants who also did not possess the required experience.

Slippery Rock selected one of the male applicants, Calvin Rippey, even though he did not meet the posting requirement of two years' locksmithing experience, because he had more relevant experience than either Scheidemantle or the other applicants.

Scheidemantle filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging age and gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

(Title VII), and the Pennsylvania Human Rights Act, 43 P.S. §951, *et seq.* The EEOC dismissed the claims, finding that Scheidemantle could not establish a cause of action for discrimination because Slippery Rock had selected what it believed to be the most qualified candidate. Scheidemantle then filed a lawsuit in U.S. District Court for the Western District of Pennsylvania.

Thereafter, in April 2004, Slippery Rock promoted Rippey and again posted the position for applicants. On this occasion, the posting reflected that three years' experience in locksmithing was required. Scheidemantle again applied despite the fact that she did not meet the experience qualification. 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 for the 2004 failure to promote, and added a claim that the 2004 failure to promote was retaliation for her 2003 EEOC complaint.

District Court decision

The district court granted Slippery Rock's motion for summary judgment and dismissed Scheidemantle's complaint. That 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

with respect to either promotion decision. Scheidemantle appealed to the 3rd Circuit on the dismissal of her gender discrimination claims.

Title VII

Under Title VII, it is an “unlawful employment practice” for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. §2000e-2(a)(1).

Third Circuit opinion

In reversing the decision of the district court, the 3rd Circuit identified two guiding principles. First, the court observed “Title VII is a remedial statute, so it must be interpreted broadly.” Second, the court found “there is a low bar for establishing a *prima facie* case of employment discrimination.”

The 3rd Circuit then observed 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*, 411 U.S. 792 (1973). Under the *McDonnell Douglas* analysis, a plaintiff has the burden of demonstrating that: (1) she was a member of a protected class; (2) she was qualified for the position in question; and (3) a person outside of the protected class was treated more favorably. 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 the reason is merely a pretext for discrimination.

Slippery Rock argued before the Court of Appeals that Scheidemantle did not satisfy the second prong of the *prima facie* case because she lacked the required objective qualifications for the position

“[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.”

in question — two or three years of experience. Scheidemantle argued she was not required to meet the objective qualifications of the job postings because she was at least as qualified as the male employees selected for the positions, and that Slippery Rock had waived its right to rely on those qualifications when it filled the positions with the employees who also failed to meet the qualifications criteria.

In finding for Scheidemantle, the 3rd Circuit began its analysis by looking for guidance in its 2005 opinion in *Hugh v. Butler County Family YMCA*, 418 F.3d 265 (3d Cir. 2005), *cert. denied*, 126 S.Ct. 1065 (2006). In *Hugh*, the employer promoted a woman despite the fact 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 she could not establish a *prima facie* case because she failed to establish that she was qualified for the job in question. The 3rd 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 she had been promoted despite her lack of qualifications was sufficient to establish an inference that she was “qualified” for the job in the employer’s eyes.

Applying its holding in *Hugh*, the *Scheidemantle* court observed 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 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 therefore reversed the decision of the district court based on its conclusion that “[b]ecause Slippery Rock placed similarly ‘unqualified’ males in the



David W. Garland co-chairs the Employment and Labor Practice Group at Sills Cummis Epstein & Gross in Newark. He can be reached at (973) 643-6390.



Jerrold J. Wohlgenuth is of counsel to the firm. Reach him at (973) 643-5392.

locksmith position, it could no longer point to the job posting’s objective qualifications as a valid reason for refusing to promote Scheidemantle.”

Conclusion

The decision in *Scheidemantle* makes it clear employers must critically analyze their job postings to ensure the postings contain only those qualifications upon which they intend to rely in making their selections. It also is 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. ☉