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April 2013

FAILURE TO PROMOTE

10th Circuit ‘chops’ Forest Service employee’s discrimination claims

by Lance D. Rich

If a proverbial tree falls in the forest, even though it may be bigger and taller than the trees around it, does anyone hear it? Now imagine that the tree isn’t a tree but a female U.S. Forest Service (USFS) employee applying for a management position. She wasn’t selected, even though she arguably was the most qualified applicant. Instead, the USFS broadened its search, eventually awarding the job to a man with different qualifications than the female USFS employee. Read on to find out whether a court allowed her claims to proceed to trial.

Tall timber

Laura Conroy is employed by the USFS in Ogden. She has served as a programming and technical expert for certain database systems and as the regional coordinator for a USFS database known as INFRA. She doesn’t have a college degree.

In the spring of 2001, the USFS announced an opening for a new position—INFRA program manager. The position was advertised as both an “administrative” series job (which doesn’t require a college degree) and a “professional” series job (which requires either a college degree or equivalent professional experience). The advertisement noted that “comprehensive knowledge and skills in ORACLE, SQL, and PC spreadsheet and database software” were required.

After an initial search, Conroy and one other applicant were found to be qualified, and their names were given to Larry Larson, the head of the group where the new position would be located. However, Larson decided to repost the position, supposedly to broaden the pool of applicants. The revised announcement, which replaced the words “comprehensive knowledge” with “knowledge of,” drew interest from more applicants, four of whom were deemed qualified for the position, including Conroy.

A peer review advisory panel of five individuals evaluated the four candidates and recommended to Chris Pyron, the selecting official, that Daniel Hager be hired for the position. Hager had applied for the position only after it was readvertised. Pyron followed the panel’s recommendation and hired him. In 2002, Conroy filed a formal grievance complaining of age and gender discrimination. She also made it known to Hager and others in the office that she wasn’t pleased that Hager had been awarded the job.

In 2004, after Hager left the INFRA program manager position, the job was advertised again. This time, it was advertised solely in the professional series. Although Conroy applied again, she was deemed unqualified, and another candidate was hired. She filed a second formal grievance alleging that the decision to advertise the position solely in the professional series was made to retaliate against her for filing her first grievance.

Conroy eventually sued the USFS in federal district court in Utah, asserting gender discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964. The district court dismissed each of her claims without a trial, and Conroy appealed to the U.S. 10th Circuit Court of Appeals (whose decisions apply to all Utah employers).

Cutting the qualified candidate

First, Conroy argued that she was discriminated against in violation of Title VII when the USFS selected Hager, a male, for the INFRA program manager position even though, according to her, she was the more qualified candidate. She also claimed that the decision to relax the qualification standards and readvertise the job—after she had applied and was deemed qualified—constituted illegal discrimination.

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To reach a trial on those claims, Conroy first was required to establish a basic discrimination claim, which the USFS didn't dispute she had done. Next, she had to show that her employer's explanations for not selecting her for the position and readvertising the position were a pretext (cover-up) for illegal discrimination.

The USFS explained that it didn't select Conroy for the position because even though she had significant technical experience, technical skills were less critical to the position than other skills. Specifically, the agency stated it gave more weight to leadership and program management skills and the ability to communicate and coordinate with officials from the many different disciplines of the USFS than it did to technical skills. Conroy asserted four arguments to show that the proffered reason was a pretext for discrimination:

- (1) She was overwhelmingly more qualified than Hager.
- (2) The explanation was inconsistent and contradictory.
- (3) The selection process exhibited procedural irregularities.
- (4) The agency relied on subjective factors in the selection process.

The court addressed and rejected each of Conroy's arguments. It started by pointing out that pretext can be shown when there is an overwhelmingly disparity between candidates' qualifications for a position. However, Conroy hadn't shown such a disparity. The court noted that the USFS valued leadership and program management experience more than other skills, and Conroy hadn't argued she was overwhelming more qualified than Hager in that regard because Hager had significant leadership and program management experience.

The 10th Circuit also rejected Conroy's argument that Hager lacked the minimum technical skills for the position. That's because his application highlighted experience with the requisite software systems and a USFS HR specialist certified him as qualified for the position. Additionally, while Conroy's technical skills were vastly superior to Hager's, she failed to show that overall, she was overwhelmingly more qualified, taking into account all the factors the agency found relevant.

Although an employee may establish pretext by showing that an employer's explanation was implausible, incoherent, or inconsistent, the court concluded that Conroy hadn't met that standard. She argued that the USFS' explanation for selecting Hager over her was questionable because the panel didn't unanimously recommend him. The court rejected that argument because she couldn't show that a unanimous recommendation was required. The panel strongly recommended Hager, and Pyron even checked with Conroy's supervisor, who agreed that Hager was the better candidate.

The court also rejected Conroy's third pretext argument regarding procedural irregularities in the selection process. Although disturbing procedural irregularities, including deviation from normal company procedure, can demonstrate pretext, the court found there was nothing irregular or disturbing in the USFS' hiring process. Conroy argued that it neglected to contact the references in her application but contacted those in Hager's. Additionally, she asserted that her supervisor, who wasn't listed as a reference, shouldn't have been contacted.

The court noted that USFS policy gives selecting officials discretion in choosing whether to contact references, and no policy prohibits contacting an applicant's supervisor when the applicant is a USFS employee. One of the panel members had attempted to contact several of Conroy's references, and Conroy had marked "Yes" to the application question "May we contact your current supervisor?"

Finally, Conroy argued that the USFS' use of subjective criteria in the hiring process showed pretext. When an evaluation process is entirely subjective, pretext may be shown. The court emphasized, however, that some subjectivity is to be expected in every hiring decision. In this case, the panel assessed the candidates' qualifications based on five "knowledge, skills, and abilities" criteria. The candidates were aware of the criteria and submitted narratives explaining why their skills and experience met the requirements.

The evaluation system was transparent, and each candidate was evaluated using the same criteria. Thus, the court upheld the trial court's decision and concluded that Conroy wasn't entitled to a trial on her first discrimination claim.

Increasing the pool of candidates

The court likewise dismissed Conroy's claim of gender discrimination based on the readvertising of the INFRA program manager position after she had been identified as a qualified applicant. Conroy essentially argued that changing a job description to attract more candidates when perfectly qualified candidates have already applied for the position is illegal under Title VII. The court was unwilling to adopt that theory.

While the court stated that the door remains open for employees to show that an employer's reasons for relisting a position are pretextual, it found that Conroy didn't produce any evidence to support such a claim. Her only argument was that readvertising the position was contrary to USFS policy, but the uncontroverted testimony of USFS officials established that it was common practice for the agency to do just that.

'Not a pretty scene'

Next, the court addressed Conroy's claim that the USFS retaliated against her for filing a grievance when

it selected Hager and then, upon his departure, chose to advertise the position only in the professional series rather than in both the professional and administrative series, as it had done previously. To establish a minimally sufficient retaliation claim under Title VII, an employee must show the following:

- (1) She engaged in protected opposition to discrimination.
- (2) A reasonable employee would have found the challenged action significantly adverse.
- (3) A causal connection exists between the protected activity and the adverse employment action.

Focusing on the third prong of the test, the court agreed with the USFS that Conroy hadn't shown a causal connection between the grievance she filed in 2002 following the first job search and the announcement of the position in 2004. Because of the time between those two events, the court determined that she couldn't show a causal connection based on temporal proximity. Conroy argued that the court should consider the relevant period to be from the time the USFS learned of her desire to apply for the newly vacant position to the day it decided to classify the position in the professional series. In doing so, she asserted the USFS had no reason or opportunity to reclassify the position during those two years.

The court rejected that argument because the temporal period is measured from the time of the protected activity to the adverse action. The rationale is that negative emotions such as anger and resentment are strongest soon after the lodging of a complaint and tend to dissipate over time. The court noted that the USFS had multiple opportunities to retaliate against Conroy in a variety of ways (e.g., a demotion or transfer) in the two years following her complaint but didn't do so.

Conroy next tried to show a causal connection by pointing to admissions by USFS personnel that the INFRA program manager position didn't require a college degree. However, because professional series positions require *either* a college degree or an equivalent level of professional experience, the USFS had never maintained that a college degree was necessary.

Conroy was unqualified because she lacked both a degree and equivalent professional experience. The court also noted that a new USFS policy prevented the position from being posted as both a professional and an administrative series job and that the decision to advertise it in the professional series resulted from development

of the job into one that required more analysis and interpretation of data for management purposes.

Finally, Conroy attempted to show a causal connection by arguing that Donald Fullmer, the immediate supervisor for the INFRA program manager position, had adopted a negative view of her and accused her of refusing to work with Hager after Hager became program manager. A coworker testified that (1) Fullmer was aware that it wasn't a "pretty scene" when the newly installed Hager introduced himself to Conroy, (2) Conroy refused to work with Hager, and (3) Conroy was heard screaming over the telephone as she complained to a coworker about Hager's selection.

The court concluded that although the evidence might show that Fullmer had a negative view of Conroy, his view evidently was shaped by her alleged conduct following her nonselection, *not* her discrimination complaint. Thus, the court decided that Conroy hadn't shown a causal connection and wasn't entitled to a trial on her retaliation claim. *Conroy v. Vilsack*, 2013 WL 491546 (10th Cir., February 11, 2013).

Only you can prevent forest fires

What can employers do to prevent discrimination claims involving the hiring process from catching fire? First, before announcing new positions, carefully consider the skills and experience required to fill the position. Next, craft advertisements that represent the attributes sought in applicants. Although employers can change their mind and readvertise a position to try to increase the pool of applicants or better define what skills and experience an applicant should have, doing so can increase the risk of potential lawsuits from applicants who may feel misled by the process.

Second, employers can help insulate themselves from liability for discrimination claims based on how they set up the selection process. Courts like to see transparency in the selection process and at least some objective criteria on which applicants are judged. Also, having multiple steps in the process can increase the overall fairness. In this case, the advisory panel served that purpose.

Finally, employers should maintain hiring policies that are reasonable and don't get in the way of hiring the best person for the job. Retaining competent counsel to assist in reviewing or drafting hiring policies is recommended. Remember, it is easier to deal with potential issues regarding hiring procedures on the front end than fight a lawsuit sparked by poorly crafted policies that have caused a fire. ❖