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## EMPLOYMENT LAW

### District Court Refuses to Disrupt Employer's Hiring Decision

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**D**iscrimination claims based upon an employer's failure to promote or hire remain among the more difficult claims for employees. As discussed in the recent case of *Nunn v. NHS Human Services*, No. 13-cv-3140, 2015 U.S. Dist. LEXIS 74176 (E.D. Pa. June 9, 2015), in the U.S. District Court for the Eastern District of Pennsylvania, employees seeking to demonstrate discriminatory animus must demonstrate both comparable qualifications to the selected candidate and pretext in the decision-making process.

#### Restructured HR Department

Sabrina Nunn, an African-American female, had worked for NHS Human Services Inc. for about 18 months when, in mid-2010, the company announced that it would be restructuring its human resources department, according to the opinion. At the time, Nunn was working for NHS as its corporate senior director for HR information systems/HR projects. In that



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role she primarily managed NHS's HRIS system (Kronos). She supervised two employees. Before joining NHS, Nunn had worked for 14 years for various companies—primarily managing HRIS systems. Nunn's final pre-reorganization evaluation was overall "superior"—with the caveat that she had "issues with teambuilding" and in her "interpersonal skills," the opinion said.

As part of the reorganization, Nunn applied for the position of director of human resources services in early 2011. Although

Nunn, a high-school graduate, was facially underqualified for the position, which listed a "master's or advanced-level degree" as a qualification, she advanced to be among the final three candidates from an original pool of eight to 10.

#### White male selected for job

Ultimately, however, she was not selected for the position. The successful candidate, Michael Oglensky, a white male, had not initially even applied for the position, but was identified by the company after he had interviewed for another HR position as an external candidate. He did, however, have a Bachelor of Arts in industrial relations, an MBA and had 18 years of HR experience, including a number of years as a high-level HR manager.

When Nunn learned that she had not been selected for the HR director position, she applied for the position of director of human resources information systems, a lower-level position that would have required that she take a pay cut from her then-present position.

## Second candidacy fails

Oglensky was the decision maker for this position, and he selected a white male, Randy Gilbert. Oglensky based his decision largely on Nunn's interview, in which she stated that she did not believe in "best practices" and did not offer any suggestions to improve the company's Kronos system, the opinion said.

Because she was not selected for either position, Nunn was terminated—after which she brought suit claiming that she had been discriminatorily denied the positions sought and had then been discriminatorily terminated. NHS moved for summary judgment at the close of discovery.

## Interview confirms qualification

The court addressed the two hiring decisions separately, beginning with the denial of the director position. Initially, NHS argued that Nunn had failed to establish a prima facie case because her education did not meet the qualification criteria established by the company. This argument was rejected because she was both interviewed for the position and subsequently selected as a finalist, citing *Hugh v. Butler County Family YMCA*, 418 F.3d 265 (3d Cir. 2005) (the plaintiff's promotion was "an acknowledgement that she was qualified at the time").

## Qualifications superior

However, the court found no genuine issue of fact as to the fourth

element of the prima facie case—that the circumstances of the decision could give rise to an inference of discrimination. Specifically, the court found that based upon Oglensky's "superior educational qualifications, his broad HR management experience and his stronger management experience," it could not find that Nunn was "at least as qualified" for the director position.

As for the HRIS position, however, there was little disparity between Gilbert's qualifications and those of Nunn. As such, the court advanced to a consideration of whether Nunn had established that the decision was pretextual.

## Arguing resume disparity not enough

The court began by noting that in the hiring/promotion context, "more than a ... dispute over qualifications must be shown to prove pretext." Rather, a successful plaintiff "must show that the differences in qualifications ... are so disparate that a reasonable fact-finder could rationally conclude that [the] plaintiff was clearly a better candidate for the job." This test harkens back to the language commonly used by courts before the U.S. Supreme Court's decision in *Ash v. Tyson Foods*, 546 U.S. 454, 456-57, 126 S. Ct. 1195, 163 [\*928] L. Ed. 2d 1053 (2006), that "pretext can be established through comparing qualifications only when the disparity in qualifications is so apparent as virtually to jump off

the page and slap you in the face." Although the *Ash* court rejected the use of the colorful phrase "slap you in the face," it retained the requirement that a mere similarity in qualifications will be insufficient to establish pretext.

While Nunn's qualifications were comparable to those of the successful candidate, NHS demonstrated that he "possessed experience that was particularly valued by defendant as it undertook to centralize its HR functions." The court recognized that "an employer is permitted to decide which job criteria are important and to determine what skill set is most appropriate for a given position." In this light, coupled with the fact that Nunn could not show that her qualifications were clearly superior to those of the selected candidate, her claim of discrimination failed.

The fact that employers are free to evaluate a candidate's qualifications in light of the particular job does not give carte blanche for irrational decisions. The criteria upon which emphasis is placed must, of course, be rationally related to the job and the criteria must be consistently applied. That having been said, this case is one in a long line in which a court has refused to sit as a "super-personnel" board and has, therefore, refused to second-guess an employment decision. •