

LABOR & EMPLOYMENT

MICHIGAN COURT OF APPEALS OFFERS GUIDANCE TO EMPLOYERS IN DOCUMENTING REASONS FOR HIRING, PROMOTIONS

by Aaron V. Burrell

On February 1, 2018, the Michigan Court of Appeals issued an opinion which offers employers guidance regarding ways to document the reasoning behind hiring, promotion, and termination decisions to overcome allegations of discriminatory intent. In *O'Dell v. State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 1, 2018 (Docket No. 334146), the plaintiff was a female trooper employed with the state police department. She alleged that the department discriminated against her when it chose male officers over for her certain vacant sergeant positions. Specifically, she alleged that the "selection process for sergeants is inherently subjective," and that the interview process "lends itself to manipulation and, in this case, unlawful discrimination." *Id.* at 4. The trial court, notwithstanding, granted a motion for summary disposition dismissing the female trooper's case.

The Court of Appeals, in a split decision, affirmed. In affirming summary disposition for the department, the court reiterated the burden of proof stated in *McDonnell Douglas Corp v Green*, 411 US 792 (1973) and noted that the plaintiff was required to prove, among other things, that the "job was given to another person under circumstances giving rise to an inference of unlawful discrimination." If the plaintiff is able to make such a showing, the employer then has an "opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). A plaintiff may demonstrate that the employer's stated reason is pretext by "(1) showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Id.* at 4. (citing *Feick v Co of Monroe*, 229 Mich App 335, 343; 582 NW2d 207 (1998)). Importantly, the court reiterated that the key question is whether "consideration of a protected characteristic was a motivating factor, namely whether it made a difference in the contested employment decision." *Id.* at 5 (citing *Hazle*, 464 Mich at 466).

Applying these principles to this case, the court paid particular attention to certain comprehensive memorandums the department prepared during the hiring process that described the reasons for the ultimate hiring decision:

For each sergeant vacancy at issue, defendants produced a selection memorandum o[f] other non-discriminatory reasons stating specifically why the successful candidate was selected over plaintiff. We carefully reviewed each in turn. **Each selection memorandum, as the trial court recognized, sets forth in detail why the successful candidate was selected. As a general matter, the selection memoranda detail the successful candidates' educational credentials, work experience, seniority, training,**

and performance during their interviews, as well as other non-discriminatory factors that led to their selection as the successful candidate. [emphasis added].

Considering these memorandums, the court found that although the plaintiff may have had "marginally more seniority than some other successful candidates" and attained a higher level of education and experience, there was "no support" for the conclusion that "Plaintiff's qualifications for each of the disputed positions were so 'significantly' better than the qualifications of the selected candidates that no reasonable employer would have selected the successful candidates over plaintiff." *Id.* at 7. In emphasizing the significance of the department's memorandums and distinguishing this case from others, the court noted that the department "tendered a selection memorandum for each position that plaintiff was unsuccessful in obtaining to support their reasons for not promoting her." *Id.* at 8. Considering this information, the court held that the record did not reflect a "pattern of promoting men who were less qualified than plaintiff." *Id.*

Thus, employers should make it a practice to prepare brief memorandums describing precisely what non-discriminatory factors led to their hiring decision. As discussed in *O'Dell*, such memorandums should briefly describe, among other things, the candidates':

1. Educational credentials
2. Work experience
3. Seniority
4. Training
5. Performance during the interview.

The interviewer should prepare the memorandum contemporaneously with the interview and ensure that it is dated. Employers who prepare such memorandums will undoubtedly be better positioned in the event a candidate denied for a position feels they were the victim of discrimination. Please contact us if you require additional information.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of labor and employment law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in here.

FOR MORE INFORMATION CONTACT:



Aaron V. Burrell is a Member in Dickinson Wright's Detroit office. He can be reached at 313.223.3118 or aburrell@dickinsonwright.com