

# Use objective criteria—and beware subjective judgment calls—when deciding promotions

Nothing speeds a disappointed job-seeker's trip to court like a selection process based on an employer's use of subjective criteria to make the hiring decision. That's especially true if the biggest deciding factor is subjective, while objective factors receive lesser weight.

Examples of objective factors: Test scores, physical assessments, skills measurements, training, education and experience.

Examples of subjective factors that lead to lawsuits: Soft skills like cooperation and being a team player.

Using subjective criteria to make promotion decisions can spur litigation, too.

**Recent case:** Tiffanye Wesley, a black woman, worked as a firefighter and earned good reviews. As soon as she became eligible for promotion to captain, she began applying whenever an opening occurred. Each time, the fire department passed her over in favor of white men.

She finally sued, alleging that her race or sex kept her from being promoted even though she was qualified.

She pointed out that two of the three steps in the promotion review process used entirely objective criteria. First, she had to pass a written test. Next, she had to pass a physical skills test. She did well at both of those stages, was deemed eligible for promotion and placed on the promotion list.

But she said the third step tripped her up each time. The fire department convened a roundtable of department officials to narrow the final promotion candidate list. During the roundtables, senior management discussed each of the eligible candidates. Subjective criteria such as interpersonal skills and communication ability were apparently highly prized at this stage. The fire chief then made the ultimate decision.

Wesley pointed out that during the entire time she sought promotion, the department never selected a woman. Only white men got the coveted promotions.

The fire department argued that it could legitimately use subjective factors in the selection process. It contended that just because candidates passed the first two tests did not mean that they were qualified. Instead, according to the chief, only those candidates who also met the final subjective criteria were qualified to become captains.

But the 4th Circuit Court of Appeals disagreed. The court said that, according to the chief's logic, there could only ever be one qualified candidate for any promotion—the one who actually got the job. That would mean no one could ever challenge any promotion. The court sent the case back to court for a jury trial. (*Wesley v. Arlington County*, No. 08-2063, 4th Cir., 2009)

## Document promotion discussions

Another problem with the fire department's defense: It kept no notes or other records from the roundtable meetings. The EEOC requires employers to keep such records for at least two years or as long as the case is pending.

If records go missing, courts will naturally wonder what might have been in those notes. Judges may not say so directly, but chances are they will believe that the employer is hiding something.

Remind everyone involved in the hiring or promotion process that they must keep relevant notes, score sheets, test results and other materials. Better yet, set up a process that collects and centralizes the information, preferably under HR's control.