

# Beware justifying hiring or promotion with criteria that don't appear in job description

Here's a reminder to pass on to everyone involved in the hiring or promotion process: You're running a huge risk if you deviate from the job announcement's minimum and preferred qualifications.

That's especially true if it looks like someone changed the hiring criteria to favor one candidate over another or to make sure a certain applicant doesn't get the job. If the job description needs updating, do so before posting the job and starting to accept applications.

**Advice:** Regularly and routinely update job descriptions instead of doing it on the fly. Document a business reason for any new requirements.

**Recent case:** Martha Ellerbrook sued the city of Lubbock after she was rejected for an open position. She alleged that she wasn't selected because at the time she was helping her husband sue the city; she claimed she was a victim of retaliation.

The city said it simply chose a better-qualified candidate. But it turned out the hiring manager changed the preferred qualifications after narrowing the field to three candidates, including Ellerbrook.

The hiring manager, who knew about Ellerbrook's participation in her husband's lawsuit, created a matrix to use in the selection process. The matrix gave extra weight to possessing a master's degree in business, a qualification that wasn't in the job announcement.

It also ignored some of the previously listed qualifications. Ellerbrook was the only one of the three finalists without a master's degree. But she did possess qualifications that received little or no weight in the matrix—qualifications the other candidates did not have.

Because the degree was heavily weighted and the qualifications she had weren't counted, she could not earn enough points to get the job.

A jury concluded that the hiring manager retaliated against Ellerbrook when he created the matrix that excluded Ellerbrook from being hired. The 5th Circuit Court of Appeals refused to overturn the verdict of the original jury, which had awarded Ellerbrook \$243,000 in damages. (*Ellerbrook v. City of Lubbock*, No. 11-10058, 5th Cir., 2012)

**Final note:** What if you find a candidate who has additional qualities beyond those listed in the job announcement or description? You can certainly pick her based on the extra value she brings to the position. You can't, however, change the minimum requirements later to favor one candidate over another.

## Hiring practices that spell potential trouble

Avoid these hiring practices, which are likely to result in a lawsuit:

- **After hiring, justifying your decision** based on previously unmentioned job requirements, instead of selecting a candidate who met all criteria but stood out because of additional qualifications.
- **Violating existing hiring processes** or ignoring them altogether. You're courting a discrimination lawsuit.
- **Using the "old boy" network** to recommend hires or promotions and not posting opportunities. In fact, courts allow employees to file failure-to-promote lawsuits even if they technically never applied. Open systems that inform candidates of all opportunities will withstand legal scrutiny. That's legal protection. If you post a job opening, only employees who actually applied can sue.
- **Emphasizing qualities not pertinent** to the position to justify hiring one candidate over another.