

## A Lesson in Avoiding Liability

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The Sixth Circuit Court of Appeals holds that a plaintiff-employee's claim of sex discrimination (failure to promote) should not have been dismissed, but rather may proceed to trial based on an accumulation of circumstantial evidence, much of which had little or nothing to do with the decision-maker's decision not to promote the female employee.

On September 23, 2009, in the case of *Risch v. Royal Oak Police Department*, 581 F.3d 383 (6th Cir. 2009), the United States Court of Appeals for the Sixth Circuit – which governs Kentucky, Michigan, Ohio, and Tennessee – reversed a federal district court's decision granting summary judgment in favor of the defendant-employer. The case ultimately demonstrates a court's ability to intercede in the decision-making process all employers go through when hiring, promoting, demoting, disciplining, and terminating employees. Furthermore, the case reinforces that employers need to: (1) police potentially inappropriate conduct of all of their employees (not just supervisors); (2) maintain and communicate to all employees appropriate policies forbidding harassment and discrimination; and (3) enforce those policies when violated by any employee, whether or not that employee has supervisory or managerial authority.

By way of background, a court's analysis in a discrimination lawsuit generally tracks the following pattern:

1. An employee must first show that he/she can establish a *prima facie* case of discrimination. A *prima facie* case requires a showing of the following elements: (a) the employee is a member of a protected class (e.g., age, race, sex, national origin, disability, etc.); (b) the employee was qualified for a particular position; (c) the employee suffered an adverse employment action (e.g., terminated, disciplined, demoted, denied a promotion, etc.); and (d) the employee was either replaced by someone outside the protected class, passed over for a promotion in favor of an employee outside the protected class, or treated differently than a similarly-situated employee outside the protected class.
2. If the employee proves a *prima facie* case, the employer may then rebut the employee's *prima facie* case by offering evidence that the employer took its adverse action for legitimate, non-discriminatory reasons.
3. Finally, if the employer rebuts the *prima facie* case by offering a legitimate, non-discriminatory reason for the adverse employment action, the employee must identify evidence from which a reasonable jury could conclude that the proffered non-discriminatory reason is itself pretext for unlawful discrimination. In other words, the employee must demonstrate that the employer's non-discriminatory justification for the adverse employment action is a ruse put on to avoid liability. An employee generally demonstrates pretext by showing that the employer's proffered reason (a) has no basis in fact, (b) was not the actual reason for the adverse action, or (c) is insufficient to explain the employer's actions.

On motions for summary judgment, an employer's ability to prevail frequently depends on avoiding a showing of pretext. In *Risch*, the Royal Oak Police Department convinced the District Court that the employee had not shown pretext. On appeal, however, the Sixth Circuit held otherwise.

At the time of the lawsuit, Plaintiff Karyn Risch was a 17-year veteran of the Royal Oak Police Department (the "Department") in Michigan. She alleged that on several occasions, between 2001 and 2005, she applied for promotions within the Department, but was denied those promotions by Police Chief Theodore Quisenberry. She specifically alleged that Quisenberry discriminatorily chose to promote male candidates with lower scores on a civil service promotion scoring system.

The civil service promotion scoring system was based on a written examination, performance evaluations, and seniority. Candidates for promotion were first required to score 70% or higher on a written examination. If they did so, the candidates were provided an overall numerical score based on the following: (1) 70% for the written examination; (2) 20% for performance reviews conducted by the Department; and (3) 10% for seniority. Once all candidates were identified, the Department generated a list ranking those candidates. While Quisenberry, the Police Chief since 2001, was vested with discretion as to whom he would promote, the city's civil service ordinance provided that where there was one vacancy, he must fill that vacancy by choosing one of the top three on the promotion ranking list. Where there were two vacancies, he could select from the top four candidates on the ranking list. And, where there were three vacancies, he could select from the top five candidates.

In 2002, Risch ranked second on the promotion list. Quisenberry, however, chose a male candidate ranked third on the list to be promoted. In 2003, Risch ranked second on the promotion list, and there were three vacancies. Accordingly, Quisenberry was charged with filling the vacancies from the top five candidates on the promotion list. Risch was again denied promotion and three male candidates were promoted. In 2004, Quisenberry again promoted two males over Risch, despite her being ranked ahead of them on the list. Between March 2004 and September 2005, Risch was ranked third on the candidate list. Three positions opened during this timeframe, but Quisenberry promoted three males, two of whom were ranked beneath Risch.

Quisenberry justified his decisions as follows: "Risch was not selected for promotion because the other officers in the eligibility list had better test scores, better performance evaluations and demonstrated more initiative and leadership qualities." Indeed, the reason the other candidates fell behind Risch on the overall list was simply that they had less seniority than she. They actually scored higher than Risch, except they had less seniority.

To buttress her position, Risch testified that she had heard other officers, not Quisenberry, state that "the chief [will] never have a female in the command staff," and "[n]one of you [female officers] will ever go anywhere." (Notably, though, a female officer was promoted to the command staff by Quisenberry in 2002.) Risch further testified that "a 'majority' of male officers" made comments that women do not belong in the police force. None of these officers, however, were involved in making the challenged promotion decisions. Risch also stated that two officers discriminated generally against women. One "called it 'bitching' when Risch raised a concern about 'neatness and how things were filed' and suggested a possible improvement." Another officer allegedly "gave all the plum assignments to the males," and offered "males the opportunity to decide what kind of work they wanted to do that day," while denying the same opportunity to women. Furthermore, during a meeting to consider certain promotions, a sergeant allegedly "made 'a general statement . . . something to do with the women in the Department' that 'was clearly negative.'" There were, however, no particulars about this "negative" comment.

Despite these allegations, it was undisputed that only Quisenberry had authority to make promotion decisions. Risch could not point to any statements or discriminatory behavior by Quisenberry, other than his discretionary decisions to deny her promotions in favor of males.

In court, the Department conceded that Risch could show a *prima facie* case of discrimination. However, it

stood firm on its argument that Risch could not prove pretext. Its position boiled down to the fact that Quisenberry was vested with discretion to make the decisions he made, that all of his decisions were made in accordance with that discretion, and, as he explained, "Risch was not selected for promotion because the other officers in the eligibility list had better test scores, better performance evaluations and demonstrated more initiative and leadership qualities." The trial court agreed with the Department that Risch had not shown pretext.

The Court of Appeals, however, disagreed. The Sixth Circuit specifically noted that Quisenberry personally discounted seniority as a reason for promotion, despite the fact that it was considered in the overall scoring process for ranking promotion candidates. The Appellate Court further relied on the evidence that certain male officers allegedly made comments and demonstrated a bias towards women, despite the fact that none of them were decision-makers and none of the discriminatory evidence could be directly attributed or imputed to Quisenberry. Most significantly, the Court of Appeals held that "evidence of a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment." According to the Court, "[t]he statements in this case evidence a discriminatory atmosphere in the Department in which male officers frequently made derogatory or discriminatory remarks about female officers. Two of the comments were made by sergeants who were members of the sixteen-person command staff." Even though none of these comments were made by Quisenberry, the Court held that Risch successfully raised an issue of pretext and that the case should be sent to a jury trial.

The key points to take away from this case, as noted above, are as follows:

1. Employers must police potentially inappropriate conduct of all employees (not just supervisors and managers) at all stages of employment. If an employer becomes aware, through any means, of inappropriate conduct by any employee, the employer should immediately investigate the situation and take appropriate action. This sets a tone for the workplace and, more importantly, can preclude a court from even having the opportunity to find that an "overall discriminatory atmosphere" exists that could then taint a non-discriminating decision-maker's decision.
2. Employers must maintain and disseminate to employees appropriate policies forbidding harassment and discrimination. This goes hand-in-hand with policing potentially inappropriate conduct. All employees should be made aware, in writing, that inappropriate conduct, whether discriminatory or harassing, can and will be punished. In an alleged harassment situation, such policies can even provide the employer with an affirmative defense if a complaining employee unreasonably failed to follow reporting procedures.
3. Employers must enforce the employment policies when violated by any employee, whether or not that employee has supervisory or managerial authority.

Had the Royal Oak Police Department policed and punished the behavior of the employees who allegedly made discriminatory comments about women, it likely could have avoided the Appellate Court's decision and the potential for being held liable at a future trial in the case. Good employment policies and enforcement of those policies can go a long way to avoiding liability and saving an employer the cost of litigating cases through trial.