

## Subjective Criteria for Hiring Decisions or RIFs May Be Problematic



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*Mergers and acquisitions bring lots of financial opportunity, but they can sometimes result in upheaval in the workforce as the new entity determines whether it will operate business differently from its predecessor. If the new business decides to change the workforce, how should it make those decisions? A recent appeals court opinion sheds some light on that question.*

Merit Energy Company, LLC, acquired part of an ongoing oil and gas company from XTO Energy the Ozark, Arkansas area. Merit determined that it did not need all of the former XTO lease operators. Seventeen-year XTO employee Kimberly Connors was not included in the 20 lease operators chosen to be re-hired. Ms. Connors had operated one of the longest routes and had more experience than several of the other operators chosen. She sued Merit, claiming age discrimination and gender discrimination.

The Eighth Circuit Court of Appeals (the court of appeals for federal trial courts in Arkansas, Missouri, Iowa, Nebraska, North Dakota, South Dakota, and Minnesota) reviewed the hiring decisions and found that Ms. Connors could not continue with her age discrimination claim. The court found Ms. Connors was qualified to be hired for the position, but there was no age discrimination because Merit also re-hired several other operators who were older than 40, and several who were the same as age she was or older (55).

The court ruled differently on Ms. Connors' gender discrimination claims. All of the re-hired lease operators were men, so Ms. Connors was able to satisfy the initial proof to show the possibility of discrimination. To keep the case from continuing, Merit had to produce proof that it made its hiring decisions based on legitimate, non-discriminatory reasons. Merit stated that Ms. Connors was not hired because of lack of enthusiasm, clashes with her former supervisor, failure to wear proper protective clothing, failure to follow certain directions impacting well production, and because XTO supervisors were more complimentary of other lease operators.

The court determined that there was sufficient evidence to rebut Merit's reasons. Ms. Connors was able to produce evidence that problems with her supervisors were unearthed after the hiring decisions were made, so they could not have been reasons factored into to the decision not to hire her. And Ms. Connors was able to produce sufficient evidence to rebut allegations of safety and production concerns. The court also noted that Ms. Connors had years of experience and operated one of the longest routes while at XTO, whereas several of the male operators did not have that level of experience. Of particular note and warning to companies hiring or firing decisions for groups of employees, the court said that, while subjective criteria (such as enthusiasm for the job) are not of themselves unlawful, a "reasonable jury may doubt the sincerity of this rationale." Because there were fact issues on whether Merit's decisions were based upon discriminatory reasons, the case will be decided by a jury.

### Key Takeaways

The lesson for employers from this decision is that it is always helpful to have objective criteria for deciding which employees to re-hire after an acquisition, or to terminate during a reduction in force (RIF). While subjective criteria can be valid considerations, if one prospective employee has more experience or other objective qualifications than others but is not hired because of subjective reasons (for example, supervisors did not “like” him; or she was not as “pleasant” or “enthusiastic”), it is more difficult to prove that the subjective reason wasn’t actually grounded in discrimination. The result for the employer is that a case will more likely go all the way to trial, rather than being resolved much earlier by the court.

A better process would be to use objective criteria—tenure, experience, past performance review scores, number of disciplinary actions, or some combination of these types of considerations. This process provides a clearer rationale and guide for the decisions and acts as a check against favoritism or bias of any kind by supervisors. Subjective factors such as attitude or enthusiasm hopefully will already be factored in to the determinations from prior write-ups or performance reviews. And if not, then it is a great example to demonstrate why those factors should be included in discussions or counseling with employees before re-hiring decisions or RIFs happen.

It is also helpful to review who has been chosen and who hasn’t, to see if there are any patterns emerging (such as in this case, when no women were among those re-hired). If there is a pattern, then it is worth re-checking the data to make sure there is not a neutral criteria that is improperly screening out a protected class of employees. It may be that there are valid reasons, such as if there is only one woman, and she had more write-ups than the other employees. But if the criteria used is not necessary (a strength requirement for a desk job, for example), then further analysis and review may be necessary before making the decisions.

*Connors v. Merit Energy Company, LLC*, Case No. 22-2080 (8th Cir. 2023)