

After-Acquired Evidence of Prior Conviction Disqualified Applicant from Position, California Court Finds

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Evidence of a prior narcotics conviction could be used to show that the employee was not qualified for a union organizer position, even though the employer did not learn of the conviction until after it made the decision not to hire the plaintiff, the California Court of Appeal has ruled. *Horne v. Int'l Union of Painters and Allied Trades, Dist. Council 16*, No. A135470 (Cal. Ct. App. Dec. 3, 2013). Although the after-acquired evidence doctrine would bar the use of the conviction to prove the employer's motive for refusing to hire the employee, the Court stated the conviction could be used to show the employee failed to satisfy a *prima facie* racial discrimination case under the California Fair Employment and Housing Act. Accordingly, the Court affirmed summary judgment in favor of the employer.

Background

Raymond E. Horne, an African-American male, was a glazier and a member of District Council 16 International Union of Painters and Allied Trades. In 2009 and 2010, Horne applied for an organizer position with the Union. The Union did not hire him, selecting a white male to fill the position on both occasions. Horne sued the Union for race discrimination.

During pre-trial discovery, Horne admitted he had been convicted of possession of narcotics for sale in April 1997, had served a prison term for that conviction, and was paroled after that term of imprisonment on May 30, 2003. The Union did not know this when it decided to hire someone else for the organizer positions. After learning of the conviction, the Union moved for summary judgment in the race discrimination case, arguing that Horne failed to establish a *prima facie* case because he was not qualified for the position. Federal law barred Horne from employment as an organizer due to the narcotics conviction. Horne opposed the motion, arguing the Union could not rely on after-acquired evidence to justify its failure to hire him. The trial court agreed with the Union and granted the motion. It found Horne could not establish a *prima facie* race discrimination case because he was not qualified for the position.

Applicable Law

California has adopted the three-stage burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for establishing a discrimination claim. First, the employee must prove a *prima facie* case of discrimination by a preponderance of the evidence. In a failure-to-hire case, the employee must show he was qualified for the position. If he does so, then the burden shifts to the employer to offer any legitimate, non-discriminatory reasons for failing to hire him. Then, the employee must prove the employer's stated reasons are pretextual.

The after-acquired evidence doctrine precludes consideration of evidence bearing on the employer's motive that was unknown to the employer before the decision not to hire the plaintiff was made. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). The reason for the rule is simple: an employer could not have been motivated not to hire a job applicant based on information it did not have at the time the decision was made.

After-Acquired Evidence

Horne argued the after-acquired evidence doctrine precluded consideration of his conviction because it was unknown at the time the hiring decision was made. The appellate court disagreed. It noted the doctrine would preclude consideration of the conviction insofar as it related to the Union's motive in failing to hire him. However, the issue was not the employer's motive, but Horne's qualification for the position. "Evidence that the applicant was disqualified as a matter of law at the time of the employment decision is relevant, *whenever* the employer acquired that information," the Court stated. It found the Union was entitled to present evidence rebutting Horne's claim that he was qualified for the position, even if that evidence would not have been admissible for the employer's burden of showing a legitimate non-discriminatory reason for failing to hire him. Accordingly, the Court concluded Horne had failed to establish a *prima facie* case of race discrimination and affirmed summary judgment in favor of the Union.

Horne is a positive development for employers and refines the scope of the after-acquired evidence doctrine. If you have any questions about this case or other workplace developments, please contact Mark S. Askanas, AskanasM@jacksonlewis.com, Mitchell Boomer, BoomerM@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

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