

# Davis Brown Employment and Labor Law Blog

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## What You Don't Know Can Hurt You – Issues with Subjective Performance Standards – June 23, 2020

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Any time someone walks in for a job interview both sides have expectations of how that interview will go - from skillset to personality fit, every HR manager is looking for the perfect solution to their hiring needs.

However, when we can't clearly and consistently articulate what success looks like, problems occur. One clear issue is subjective interviewing standards. These undisclosed standards can create liability for employers.

### Recent Iowa Example – *Watkins v. City of Des Moines*

Recent Iowa case law demonstrates the need to use objective measures to support HR decisions whenever possible. This is especially true when decision makers in charge of hiring or promoting employees have made prior discriminatory comments, which is what happened in a recent Iowa case.

In *Watkins v. City of Des Moines*, the Iowa Court of Appeals addressed a scenario where the City of Des Moines decided not to promote an employee based on subjective scoring measures made by an interviewing panel.

After over 20 years of service to the city, the plaintiff, Clifford Watkins III, sought a promotion. The promotion process included objective measures to evaluate candidates including a written test and evaluation of the candidate's education and experience.

Along with the objective measures, a three-member panel also interviewed applicants and scored applicants' responses with a score of zero to five for each question. The subjective portion of the employer's promotion criteria was called into question by Mr. Watkins, a Black employee, when racially offensive comments made by multiple panelists surfaced.

While Mr. Watkins scored more points for his education and experience than some other candidates, others scored higher on the written test—making the panel interview an important determining factor for who would receive the promotion.



The interviewers admitted that the interviewing portion ultimately determined who would receive the promotion. One interviewer stated interview scores were the “sole basis” for the panel’s recommendation.

Two of the interviewers on the three-member panel had made, or would eventually make, arguably derogatory comments about Black employees. In a conversation with Mr. Watkins, Interviewer #1 made a comment using the term “monkey,” either criticizing a proposal Watkins made or directly criticizing him. While the interviewer contested Mr. Watkins’ perception and the context of the comment, Mr. Watkins also alleged that on that same day, another individual threw a banana near his desk when Interviewer #1 was present.

Three years after the promotion decision, Interviewer #2 was overheard using a racist term. Interviewer #2 received an oral reprimand for using the derogatory phrase after she was overheard making this comment by a different Black employee who was visibly upset after overhearing the comment. Interviewer #2 acknowledged her use of the discriminatory phrase but alleged that the employee she was referring to was white and that she did not know the racist history behind the phrase.

The Appeals Court determined that the trial court was wrong to grant the employer’s summary judgment on Mr. Watkins’ racial discrimination claim as he was able to demonstrate:

1. He belonged to a protected class
2. He was qualified for the position
3. The city rejected him for the position
4. The city promoted someone outside of that protected class

When asked to articulate a legitimate, nondiscriminatory reason for not promoting Mr. Watkins, the primary reasoning was subjective, not concrete. In evaluating this, the court determined that the comments of the two panelists were enough to create a triable issue of material fact whether the potential biases held by the panelists were a substantial factor in Mr. Watkins not receiving the promotion.

In the subjective interview scores, each interviewer, including the two panelists who made discriminatory comments, were allowed to score Mr. Watkins based on their subjective impression of his interview answers. This meant that the panelist who admittedly used the term “monkey” and the panelist who used a historically known discriminatory term were both allowed to subjectively score Mr. Watkins—a Black man.

Mr. Watkins argued that their subjective scores impacted the receipt of the promotion. In both scenarios, the interviewers argued context and intent, but as the Court noted, it is not for the courts to choose which version is believable. That is for a jury.

As a result, employers in similar circumstances are not likely to succeed on summary judgment in discrimination cases where subjective measures are a determining factor.

## The Big Picture

Employers can avoid these scenarios if they are clear about their expectations, both to candidates and the people making HR determinations. Employers need to seriously evaluate who determines promotions, as well as issues with their subjective assessments. Those overseeing and making hiring and promotion decisions should maintain the highest professional conduct and should be free of a history of comments that may indicate animus of any

kind. As the Court discussed, discriminatory comments made by the interviewers and decision makers were closely examined and ruled as factual issues for a jury. All hiring, firing, and promotion decisions have a subjective component. Employers can mitigate that liability with proper planning and a clear assessment.

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