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PROVING DISPARATE TREATMENT OR PRETEXT IN A RIF CASE[1]

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Your client has lost her job as part of a reduction in force ("RIF"), but she's convinced that the real motivation is something more personal – discrimination, retaliation, or reprisal for whistleblowing. Evaluating the new client's potential claims becomes a bit more complicated when the termination was part of a RIF. Because the new client has likely been offered a severance package, the plaintiff's lawyer's first and most urgent task will be to evaluate the strength of the claims and defenses in order to advise the employee about whether to sign a severance agreement.

I. Getting Started: Gathering Essential Information, *or*, "Do I have a case?"

Inevitably, one of the first questions the potential client will ask the Plaintiff's lawyer will be: "Do I have a case?" The answer is almost always, "It depends." Because an employer who has instituted a RIF has a ready answer for the "legitimate non-discriminatory reason" portion of its proofs, the plaintiff's counsel needs to take a bit more care in evaluating the case before jumping in. In addition to the obvious questions about protected class (age, gender, race, disability, use of FMLA leave, whistleblower status), there are some questions that should always be asked, especially to a potential client who has been "RIF-ed":

- *"Have you signed anything?"*

[1] Portions of this paper were previously published as "Proving Disparate Treatment in a Reduction in Force: Ideas to Help Plaintiff's Counsel Demonstrate Pretext," ABA, Section of Labor and Employment Law 5th Annual Conference, November 4, 2011 and "Evaluating and Litigating at RIF Case: A Step-by-Step Guide for the Plaintiff's Lawyer," ABA, Section of Labor and Employment Law, 6th Annual Conference, November 2, 2012.

Severance agreements are often offered to employees terminated in a RIF, so this needs to be one of the first questions. If your potential client has signed a severance agreement, the plaintiff's lawyer has an immediate uphill battle, and must weigh how difficult it will be to have the agreement set aside, along with considerations of the strength of the plaintiff's claim and the amount of consideration that the plaintiff is risking by foregoing the severance offered.

If you want to challenge a signed agreement or try to renegotiate it, your first line of attack for an employee who is over 40 is the Older Worker Benefit Protections Act ("OWBPA"). Under OWBPA, an employee who is over 40 years old, must be permitted a 21-day review period before signing, and is then permitted to revoke within seven days. In addition, under the ADEA if exit incentives are offered to a class of employees (as will often be the case if the employee's termination is part of a genuine RIF), the employee must be allowed 45 days to consider.

The plaintiff's attorney should also consider whether the signed agreement contains adequate consideration. A severance agreement that only provides for payment of accrued vacation time, or severance to which the employee would otherwise be entitled is insufficient. An agreement may also be attacked for failure to follow other technical requirements. An agreement under the OWBPA must contain information about the ages of comparable employees who were terminated and who were retained.

- *"Have you been offered a severance agreement?"*

The newly fired employee will often come to the lawyer's office with a proposed severance agreement in hand, and will be asking whether it should be signed. Along with assessing the strength of the potential client's cause of action, the attorney must be watching for and advising the client of the impact of other provisions in the severance agreement. Important topics to discuss with the client include:

    - Confidentiality provisions
    - Non-compete
    - Agreements to provide services or cooperate with the employer in the future, for example in pending litigation

- *"Did you get a list of other employees who were laid off and their ages?"*

Your client should have the data required by the OWPA. Go through the list with your client. Those included in the RIF and those not included should be identified by position and by age. Have your client try to identify who each person is. Talk through with the client why each person was likely to have been included or not included in the

RIF. See whether the job descriptions/titles for other employees on the list are accurate.

Watch out for older employees who are not on the RIF list, but who may soon be leaving for other reasons, such as the employee who has already announced that she will retire next summer. The employer may retain an employee in that circumstance to try to improve the statistics of the RIF. Similarly, watch for younger employees who are being let go for obvious reasons, such as the person who was just hired, who was a seasonal worker, or was performing poorly. You will want to be thinking about ways to show that the OWPA list is misleading, or is otherwise not complete or accurate.

- *"Show me every writing you received from your employer about the RIF."*

The plaintiff's lawyer will want to see whether required WARN notices were provided, and whether there is helpful information about comparators. In addition, it is common for employers to communicate with the workforce about a RIF through emails, memos, and other notifications, and to communicate with the public and investors through press releases. Because these company communications are written for a broad constituency (for example, investors, or employees whose positions will not be terminated), they may contain statements that seek to reassure employees and investors; these statements can be a fertile source of admissions or possible inconsistent statements about the scope and rationale of the RIF.

- *"Tell me about your job history."*

Don't rush through your client's story. Great things can be learned when you take the time to familiarize yourself with the details. How did she end up in this job? What were her job responsibilities? What were her relations with co-workers and supervisors? How were her performance evaluations? Have they changed? If there are negatives in the performance reviews are they based on somewhat objective criteria (*e.g.,* number of sales made last year), or are they based on more subjective criteria that may be more easily attacked?

- *"Tell me about the other people you worked with."*

You need to gather information about the comparators. Who else was let go in the RIF and who was not? Are they in the same protected class? How did their performance compare to your clients?

- *"Who do you believe made the decision that you would be included in the RIF?"*

Find out about the decision-maker's relationship to your client, that person's history in treating others of the protected class, and whether it is the same person who hired your client in the first place.

- *"Tell me what you know about the RIF. What were the reasons for it? How many people or positions were affected? Over what parts of the company were the reductions made?"*

These questions will help you begin the process of evaluating the scope of the reduction in force and whether you will be able to poke holes in the employer's justifications for the RIF.

- *"Who will take over your job functions?"*

Unless your client's spot on the assembly line has been taken by R2D2 or unless the employer has discontinued entire areas of operation, few jobs are truly eliminated. Usually, job functions are combined, outsourced, or divvied up. Sometimes a position that the employer claims to have "eliminated" has just been re-named. It is important to find this out.

- *"Tell me everything that was said at your exit interview. What was your employer's explanation for why you were chosen for the RIF?"*

Now is the time to begin to pin down the employer's story. If the explanation for the termination of your client changes later, those shifting explanations may be a sign of pretext.

Occasionally a client seeing the writing on the wall will consult with an attorney before he or she has actually been terminated. In that case, the employee should be advised to ask as many questions as possible about the rationale for the decision to eliminate his position. The information your client gathers during the exit interview may turn out to be helpful if the case is ultimately litigated.

II. <u>What to do next? Accept the severance, negotiate, or litigate?</u>

The plaintiff's lawyer owes his or her client a thorough and honest discussion of the risks and benefits of moving toward litigation, especially if a significant severance package is on the table. The factors that must be explored and discussed with the client include:

- Strength of the plaintiff's case. Now is the time to candidly discuss the weaknesses in the plaintiff's case. The employee who has just lost a job may be so upset that he or she has blind spots about the employer will say about the decision. It is the plaintiff's counsel's job to articulate the employer's likely arguments.

- Amount of severance that is offered. Few recently fired employees feel that the severance package is large enough, or sufficient to compensate for years of loyal service. The plaintiff's lawyer needs to give guidance to the client on amounts that are typically recovered in settlement, or after years of litigation.

- The economic costs of litigation: The client must understand fee arrangements and enter a decision to litigate with eyes wide open about costs.

- The delay of litigation: Litigation is slow. It is even slower when your client's claims have to go through a process of administrative exhaustion. Don't sugarcoat this with your client, or this time next year you may be dealing with a frustrated and angry client.
- The emotional costs of litigation: Litigation is often unpleasant. It is particularly unpleasant for the litigant in the employment context, because the employer's defense usually involves some variation of the themes, "She was never any good at what she did," "No one really liked her," or "Ladies and gentlemen of the jury, you would have wanted to fire her too."

- Your client's tolerance for risk: The plaintiff's lawyer should explore questions with the client about the client's willingness to "bet" the amount offered in severance on the hope of getting more through litigation. Ask your client if he or she would invest this amount of money in the stock market, or take it to Las Vegas.

- The employer's willingness to negotiate: Explore whether there is room for negotiation, particularly if there are provisions in the proposed severance agreement that are troubling, such as a covenant not to compete. Consider the employer's interests in providing a smooth transition, maintaining confidentiality, or securing your client's cooperation in ongoing litigation.

- The amount of severance offered to other employees: If the amount of severance offered to your client is less than that offered to other employees, explore whether the differential offer may itself form the basis of a claim[2] or whether it may signal the employer's willingness to pay more.

[2] In *Gerner v. County of Chesterfield,* 674 F3d 264 (4th Cir. 2012), the Fourth Circuit held that an employee whose employment was terminated when her position was eliminated stated a cause of action for gender discrimination because the three-month severance package she was offered was less than the six-month

III. Proving Disparate Treatment in a RIF

There's no doubt that an economically-required RIF is at times legitimate and even required for an employer's survival. At the same time, a RIF can sometimes provide an all too convenient cover, allowing an employer (or one particular supervisor) to disguise employment discrimination or other illegal motivation. It is not surprising that a manager's biases would surface when that manager is asked to rank employees for consideration in a planned reduction in force. It is plain that the mere fact of a RIF does not insulate an employer from liability when the employer discharges an employee in the RIF for improper purposes, but the circumstances of a RIF or reorganization can muddy the evidential waters, and make proof of wrongdoing more difficult for the plaintiff's counsel.

The existence of the RIF itself will generally satisfy the employer's burden to show a legitimate nondiscriminatory reason for the termination under the *McDonnell Douglas* test. This leaves the plaintiff's counsel to demonstrate that the termination was actually motivated by an invalid reason, and that the employer's explanation that the termination was due to a RIF is pretextual.

In the context of a RIF, pretext can generally be shown in three ways: First, the plaintiff may attack the underlying rationale for the RIF, and attempt to show that the RIF itself was pretextual. Second, the plaintiff may attack the RIF criteria, demonstrating that the criteria were deliberately chosen for the invalid reason of terminating employees in plaintiff's class or this specific plaintiff. Third, the plaintiff may demonstrate that the RIF criteria did not apply to the plaintiff, that the party who made the decision was improperly motivated, or that the criteria were not neutrally applied to similarly situated persons not in the protected class.

In cases brought under the Age Discrimination in Employment Act (ADEA), plaintiffs must now satisfy the elevated standard of *Gross v. FBL Financial Services*, 557U.S.176 (2009) and meet the burden of persuasion to show that age was the but-for cause of the termination. Meeting the *Gross* standard will be even more difficult in the context of a RIF. That may be done by showing that the plaintiff's age was the reason why his or her position was eliminated, or that the decision not to move the plaintiff to another position was motivated by his or her age.

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packages offered to some male employees. In so holding, the court held that Title VII protects employees from discrimination even after their employment is terminated.

A *prima facie* case of age discrimination would ordinarily require a showing that the plaintiff was replaced by a younger similarly situated employee. The Third Circuit has held that the fourth prong may be met when there is a reduction in force by showing that the employer retained a sufficiently younger similarly situated employee. *Monaco v. Am. Gen. Assur. Co*, 359 F.3d 296, 301 (3d Cir. 2004).

"Consequently, in a reduction-in-force case the fourth prong of the *prima facie* case for age discrimination [replacement by a younger employee] is supplanted by the requirement that the plaintiff proffer additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Walls v. Johnson*, 229 F. Supp. 3d 678, 687 (E.D. Tenn. 2017)(internal quotes and citations omitted). Alternatively,

The myriad cases in which summary judgment has been granted for employers after a RIF[3] demonstrate that the plaintiff's attorney must prepare well for litigation, marshaling facts that will demonstrate improper discriminatory intent. Evidence gathering should begin with the initial client interview and continue with vigorous discovery and case work-up. This paper will examine some of the ways to show pretext in a RIF, and will suggest areas of inquiry on discovery that may yield useful information.

A. Demonstrating Pretext by Attacking the RIF Itself.

1. Economic Necessity: The employer's economic situation was not so dire after all.

Plaintiff's counsel may question whether there was an economic necessity at all. Of course, an employer can terminate an at-will employee even if there is no economic necessity. But, if the employer has claimed that the reason for a particular termination or RIF was economic necessity, a showing that the professed financial problems did not really exist may be one step toward showing that the rationale for the claimed RIF was pretextual.[4]

Evidence of an employer's strong financial condition may be used to call into question the employer's explanation that plaintiff's employment was terminated as part

[3] Some recent examples of cases in which courts held that the plaintiff did not have sufficient evidence to overcome a motion for summary judgment when termination was part of a RIF include *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633 (8th Cir. June 16 2011); *Cherry v. CCA Properties of America*, 2011 WL 3667879 (5th Cir. August 22, 2011); *Baumeister v. AIG Global Inv. Corp.*, 420 Fed. Appx. 351 (5th Cir. March 28, 2011).

[4] To show pretext, a plaintiff may demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the proffered reasons for the employment action such that "a reasonable factfinder could find them unworthy of credence." *Cooper v. Southern Co*., 390 F.3d 695, 725 (11th Cir. 2004) (quotation marks omitted). However, the plaintiff cannot merely quarrel with the wisdom of the employer's reason, but "must meet that reason head on and rebut it." *Chapman v. A.I. Transport,* 229 F.3d 1012, 1030 (11th Cir. 2000).

of a RIF. *Gaworski v. ITT Commercial Finance Corp*., 17 F.3d 1104, 1109-10 (8th Cir. 1994). The most effective argument may be to frame this as an inquiry into the employer's credibility to support a showing of pretext. Plaintiffs will have a difficult time getting a court to inquire into whether the RIF itself was a sound or appropriate business decision. *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 638-39 and n. 3 (8th Cir. 2011); *Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 986 (10th Cir. 1996). But, if the employer's claim of economic necessity can be shown to be false, the fact that a false story was told may bolster an argument of pretext.

A supposed RIF that affects only a few employees may not be a RIF at all, but may simply be a matter of an employer deciding to terminate some of its employees. The employer who then claims that the dismissals were because of a RIF is setting itself up for an argument that its shifting explanations point to pretext. "A reduction in force that results in a single employee being terminated also suggests a lack of credibility regarding this explanation for the Plaintiff's termination." *Callan v City of Dover*,65 F.Supp. 3d 387, 395 (D. Del. 2014).

In *Powell v. Time Warner Cable, Inc.*, 2011 WL 2604802 (S.D. Ohio June 30, 2011), the employer claimed that the plaintiff's termination was because of a RIF. The court found that there was a genuine issue of fact of whether there had been a RIF at all. First, the court considered the evidence that the plaintiff's supervisor was not aware of the supposed restructuring of the department until a few days before plaintiff's dismissal, *id.* at *4. Plaintiff's counsel could argue that this lack of communication with the supervisor was more consistent with discriminatory intent than with a well-planned RIF, and that even if criteria were developed for the RIF, there was insufficient time to apply it. The court also considered evidence that only four employees were purportedly affected by the reorganization, and that there were other explanations for the termination of employment for the other three employees. *Id.* at *5. Thus, a jury could conclude that there was not a RIF, only an isolated termination.

<u>Possible areas of inquiry in discovery</u> on the issue of whether there was a *bona fide* RIF because of economic necessity include:

- Employer documents concerning sales, customer base, and the like.
- Employer financial and earnings reports.
- Reports concerning financial projections for the future.
- Meeting notes at which economic necessity and planned RIF were discussed. Obtain all emails and memos discussing economics and the proposed RIF.

- How many people were laid off in the alleged RIF? (A small number may demonstrate that the termination of employment was aimed at a particular person or persons, not as an overall reduction in expenses.)

- What alternatives to a RIF were explored? Did the employer seek to reduce or freeze wages across the board? Did the employer seek to reduce other sources of expense?

- If the employer claims a cut in funding, investigate whether the funding was actually cut, or whether it was obtained from another source. Investigate whether projects that allegedly lost funding were discontinued, or whether they are continuing in another form.

- Are there corporate excesses that can be explored to call into question the employer's crying poor? For example, if managers continued to use private corporate jets without limitation while cutting the jobs of low wage earners, the RIF begins to "smell bad."

- What advance planning was done for the restructuring or RIF?

- Was there actually a restructuring of positions? Were positions really eliminated?

- What criteria were applied to determine who should be terminated, and are the criteria logically related to the supposed economic justification for the RIF?

2. <u>The RIF was Used as An Opportunity to Change the Workforce.</u>

Disparate treatment claims may allege either isolated discrimination against an individual, or a "pattern or practice" of discrimination affecting an entire class of employees. If plaintiff puts forth evidence that the RIF was being used as a systemic tool to get rid of a particular class of employees, under the pattern and practice framework set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-62 (1977), the plaintiff is not required to bring evidence of specific discriminatory intent toward him or her.[5]

[5] For a discussion of the *Teamsters* "pattern and practice" framework as compared to the standards of proof under *McDonnell Douglas*, see *Aliotta v. Bair*, 614 F.3d 556, 562 – 64 (D.C. Cir. 2010).

Plaintiffs' counsel should actively seek evidence that the employer was using the proposed layoff as a convenient opportunity to "clean house," i.e., that the employer used the layoff to change the nature of the workforce, perhaps in ways that had a discriminatory intent or effect.

Remarks by high-ranking management such as a CEO have particular force because they set an agenda or a "tone" that is presumably followed by numerous lower level managers. For example, in *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87 (2d Cir. 2001), the new Chairman of the Board stated his belief in a "young dynamic staff" and that "a younger workforce will be more in tune with the knowledge worker spirit." *Id.* at 89. The court held that even though the Chairman was not involved in the personnel decisions at issue, and even though those who were involved in the termination decisions did not know of his statements, his statements were relevant; statements of a top executive affect corporate culture down through the ranks. *Id.* at 92 – 93. The court in *Slattery* relied on *Lockhart v. Westinghouse Credit Corp*, 879 F.2d 43, 54 (3d Cir. 1989), which states:

> When a major company executive speaks, "everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or watchman.

Id. at 54. *See also Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3d Cir. 1995)("We have held that a supervisor's statement about the employer's employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decision, and may be used to build a circumstantial case of discrimination."); *Mangold v. California Public Utilities Commission*, 67 F3d 1470, 1477 (9th Cir. 1995) (remarks by "senior decision-makers" admissible and relevant to support finding of discrimination; not in context of a RIF).

Comments that may demonstrate the real reason for the RIF or the corporate culture that influenced it are not limited to those made at the immediate time of the RIF. The decision in *Pulsipher v. Clark County*, 2010 WL 5437252 (D. Nev. Dec. 27, 2010), although not in the context of a RIF, has a useful analysis that will bolster a plaintiff's attempt to obtain discovery of comments showing bias even if the comments were made well before or after the challenged RIF. In *Pulsipher,* the court held that comments made outside the Title VII statute of limitations may be admissible to show defendants' improper motivation.

> Before-the-fact and after-the-fact comments will often be the "smoking gun" of discriminatory treatment. Such comments are relevant so long as they are probative of the actions complained of. It will be the impossibly rare situation where a defendant makes a discriminatory comment

> contemporaneously with the discriminatory act such that the entire evidence necessary to support a Title VII verdict is encapsulated in a single snapshot. No one says, "I'm recommending denying your request because you are black, and I'm going to harass you and encourage your coworkers to ignore you for the same reason." Even unapologetic racists are cleverer than that.

Id. at *7. The court held that remarks related to general employment practices or attitudes can be relevant to show discrimination in particular instances even if not directed specifically to those instances, as long as the comments are made by the decision maker. These remarks "must indicate that the supervisor is apt to treat members of the plaintiff's background unfairly in employment decisions, or that the supervisor has treated or intends to treat the plaintiff unfairly in a particular circumstance." *Id.* at *8. They are not, therefore, "stray remarks."[6]

An individual employee may establish a *prima facie* case by showing that employees who were not in the protected class were retained in the RIF. Evidence that younger workers were hired while older workers were discharged may be evidence that the RIF was a pretext for age discrimination. *Furr v. Seagate Technology*, 82 F.3d 980, 985 (10th Cir. 1996). For example, in *Showalter v. University of Pittsburgh Medical Center*, 190 F.3d 231, 236 (3d Cir. 1999), the plaintiff showed that he was eight years older than one retained worker and sixteen years older than another retained worker. A *prima facie* case was established under the ADEA, even though all three workers discussed were over forty years old.

Possible areas of inquiry in discovery may focus both on direct evidence of employer intent and circumstantial evidence based on the make-up of the group of employees whose employment was terminated.

- Look for all interviews or public statements by high-ranking company executives; they may be a publicly available source of evidence of a discriminatory corporate culture.

- Emails among managers may be a rich source of information about the employer's "vision" in conducting the layoff. Memoranda about or witnesses to meetings of managers may also be a source of useful evidence. Plaintiffs' lawyers will be especially happy to find phrases such as "fresh young blood," or "older employees, unfortunately, don't take advantage of all the opportunities that are offered to them." *Mangold*, 67 F.3d 1470, 1474-75 (9th Cir. 1995).

[6] For an excellent analysis of the "stray remarks" doctrine and discussion of the widely inconsistent results courts have reached when faced with so-called "stray remarks," see *Reid v. Google, Inc.*, 50 Cal.4th 512, 536 - 545, 235 P.3d 988 (Cal. 2010).

- All communications from anyone in management that may reflect on attitudes toward the protected class, whether or not the communications relate to the conduct of the RIF. Request that emails and text messages be searched for key words that might describe the protected class in order to obtain less guarded statements reflecting biased attitudes.

- Do not limit your search to the time period in which the RIF was being formulated. As discussed in *Pulsipher*, comments from time periods substantially earlier may be relevant in proving intent.

- Were employees with higher benefits or pension costs disproportionately affected? If so, this may indicate a violation of the Employee Retirement Income Security Act ("ERISA") § 510, which prohibits a termination "for the purpose of interfering with the attainment of any right to which such participant may become entitled," under an employee benefit plan.

3. Attacking the Supposed Elimination of Plaintiff's Position.

Even when an employee's position has been eliminated, the employee may be able to demonstrate evidence that would give rise to an inference of discrimination. Plaintiff's counsel will want to look for evidence that the so-called restructuring and elimination of a position is a ruse. For example, if the plaintiff's position was "eliminated," find out how those job functions were handled: if the job functions were placed into a different position, or spread among several positions, and if those positions were filled with persons not in the protected class, there may be an inference of discrimination.

An employer cannot avoid a discrimination claim by merely proclaiming that a position has been eliminated. In *Hillins v. Marketing Architects, Inc.*, 808 F. Supp. 2d 1145 (D. Minn. 2011), the court found that the plaintiff had put forth enough evidence to overcome a summary judgment motion on the question of whether the elimination of her position just after her return from maternity leave was part of a *bona fide* RIF. In *Hillins*, the court was swayed by the fact that 1) no objective evidence of a decline in business was presented to the court; 2) the employer failed to point to objective criteria by which it decided which jobs to eliminate; 3) there were numerous job openings and new hires by the employer during the relevant time period. *Id. at* 1152-53.

When the employer claims that the employee was selected for termination in a RIF solely because of elimination of that employee's position, an employee may show pretext by providing evidence that the position was not in fact eliminated. *Furr v.*

Seagate Tech., Inc., 82 F.3d 980, 988 (10th Cir. 1996); *see also Abuan v. Level 3 Communications, Inc..,* 353 F.3d 1158, 1169 (10th Cir. 2003)(Evidence supported jury verdict for the plaintiff because plaintiff was replaced by someone who lacked the technical expertise for the position.)

Similarly, if the position itself was eliminated, but the job duties were redistributed, the court may find that the position was eliminated with discriminatory intent. "If a plaintiff is in a unique position which is eliminated, however, he can establish the fourth element [pretext] by demonstrating that the remaining responsibilities of his position were transferred to persons outside the protected class." *Mahler v. Community College of Beaver County*, 43 F. Supp. 3d 495, 509 (W.D. Pa. 2014), *quoting Torre v. Casio, Inc.*, 42 F.3d 825, 830-31 (3d Cir. 1994).

Similarly, in *Coleman v. Quaker Oats*, 232 F.3d 1271, 1283 (9th Cir. 2000), the court found that the inference of discriminatory intent could be created by evidence that either (1) the employer had a continuing need for the employee's skills and services and that his duties were redistributed to others who were not in the protected class; or (2) similarly situated workers not in the protected class were retained. The fact that the older employer's duties were assumed by a younger person may not alone establish a *prima facie* case; additional evidence is needed as well. *Nesbit v. Pepsico*, 994 F.2d 703, 705 (9th Cir. 1993).

If you intend to attack the premise that your client's job was really eliminated, it may be helpful to obtain an expert with experience in HR to compare job descriptions and to testify about whether the position was eliminated or just re-named. *Mahler v. Community College of Beaver County*, 43 F. Supp. 3d 495, 510-11 (W.D. Pa. 2014).

The *Mahler* case also makes the point that the plaintiff may attack the Defendant's restructuring and renaming of positions by the Defendant's failure to follow its own policies about the creation of or elimination of positions. *Mahler v. Community College of Beaver County*, 43 F. Supp. 3d 495, 515-16 (W.D. Pa. 2014).

Possible areas of inquiry in discovery include:

- Seek organizational charts from both before and after the elimination of the position. Don't be satisfied with organizational charts immediately after the elimination of the position. See whether there were any subsequent changes in the following year or two that essentially re-established your client's position elsewhere in the company.

- Seek job descriptions of the eliminated position and of positions that may have taken over the job functions of the eliminated position. Do a careful comparison of the job descriptions to see where the duties have been moved.

- Ask every witness at deposition about the job functions of the jobs in question. Even if the job descriptions seem to indicate that a job was eliminated, those that do the jobs day-to-day may give you a different sense of what those jobs really constitute.

- Get resumes and demographic information for employees hired for or transferred into positions that are handling your client's former job responsibilities. What is the compensation for these positions?

- Obtain demographics of all new hires and transfers in your client's department or area of responsibility. Have any of these people taken over your client's job functions?

- Look for evidence that your client's job functions have been moved to an independent contractor. If so, inquire into whether the independent contractor is appropriately designated, or whether it should really be an employee. If so, look at motivation of this outsourcing.

4. Explore Whether the Plaintiff Should Have Been Offered a Different Job.

Even if the plaintiff's position was eliminated for unassailable reasons, plaintiff's counsel should inquire into whether the plaintiff was given the same opportunity to transfer or be considered for other job opportunities in the company as afforded to employees in the non-protected class. *Walls v. Johnson*, 229 F. Supp. 3d 678, 689 (E.D. Tenn. 2017); *Tarshis v. Riese Organization*, 211 F.3d 30, 37 (2d Cir. 2000), *disapproved on other grounds, Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

Possible areas of inquiry in discovery include:

- Were any similarly situated employees moved to other jobs?

- Was your client given the opportunity to apply for any other jobs?

- Analyze your client's qualifications for those other jobs.

B. Demonstrating Pretext by attacking the "Objective Criteria" on which the RIF Decisions were Supposedly Made.

Employers will frequently defend decisions made in a RIF by stating that decisions were made through employee rankings based on supposedly objective criteria. Rankings can be challenged by arguing that (1) they are really subjective in nature and reflect the biases of the persons doing the ranking; (2) the criteria used is invalid or is a proxy for a protected class; or (3) the criteria in not sufficiently related to the job.

Rankings that are subjective in nature do not give much protection to employers, especially if they can be attacked in conjunction with other evidence of discriminatory intent, such as ill-advised remarks by the persons doing the ranking or other supervisors. Although the use of subjective criteria is not wrongful *per se*, it "provides an opportunity for unlawful discrimination." *Bauer v. Bailer*, 647 F.2d 1037, 1046 (9th Cir. 1981). When the criteria are "wholly subjective, "the plaintiff will usually be able to overcome a summary judgment motion that relies on the ranking system. *Garrett v. Hewlitt-Packard Co.*, 305 F.3d 1210,1218 (10th Cir. 2002).

Subjective criteria used for the RIF are particularly suspect if they are not consistent with the employee's work history. When an employee was given a low score for "customer relations" that did not match years of high evaluations for that criteria, a jury could find that score was a pretext for age discrimination. *Kiesesetter v. Otis Elevator Co.*, 183 F. Supp. 3d 656, 661 (E.D. Pa. 2016)(Patricia Barasch, plaintiff's counsel); *see also Gerundo v. AT&T Inc.*, 2015 WL 9461335 (E.D. Pa. Dec. 22, 2015)(plaintiff's historical performance reviews matched those of higher ranked employee who was not included in RIF, and manager could point to no criteria that would explain why retained employee received a higher ranking).

However, evaluations that include some subjective considerations (such as team building and leadership) along with more objective criteria involving specific results may be viewed by the courts to be sufficiently objective to support an employer's motion for summary judgment. *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 639 (8th Cir. 2011); *Pippin v. Burlington Resources Oil and Gas Co.*, 440 F.3d 1186, 1195 (10th Cir. 2006).

Employers are also vulnerable if the criteria have not been well documented. In *Eno v. Lumbermen's Merchandising Corp.*, 2012 WL 1344394 (E.D. Pa. April 18, 2012), the court denied summary judgment for the employer, pointing out that the purported non-discriminatory reason for choosing the plaintiff for termination (a history of contentious interactions with others) was not documented in the plaintiff's performance reviews. which in fact contained positive statements about her demeanor.

The plaintiff's counsel should carefully examine the criteria that the employer claims it used to determine whether it may be a proxy for a protected class, and to evaluate whether the criteria are actually related to the job being done. Criteria

involving familiarity with new technology, level of experience, or salary level[7] may be legitimate criteria in a RIF, but criteria such as these may also be a proxy for age. *Slathar v. Sather Trucking Corp.* 78 F.3d 415, 418 (8th Cir. 1996). Criteria involving maintaining a particular appearance, be it "professional," "sexy," or "attractive" should be evaluated to determine whether it is really a proxy for age, gender, or race stereotypes and whether that appearance is validly connected to the job to be done.

Understanding the business is a key step in evaluating whether the criteria are slanted against a particular group. In a recent example from our practice, a sales employee was fired, with the employer saying that her "percent to plan" was lower than others. But on examination, because of her long tenure and good performance in the past, her sales goals (i.e., "plan") were set higher than other employees. By increasing her plan and consequently the denominator in the analysis, the employer gave the impression that her performance was not as good as others. As plaintiff's lawyers, we argue that the appropriate and objective measure was overall sales, rather than percent to plan. On this measure, our client was a top performer.

Possible areas of inquiry in discovery include:

- Obtain all documents concerning any ranking system that was used.
- Start with documents relating to the creation of the ranking system, and any discussion of what criteria should be included.
- Obtain all documents relating to the administration of the ranking system.
- What criteria were used? Why? What connection do the measured qualities have to the employee's job?
- Were the criteria measured over time (as in annual performance evaluations), or were they measured once for the RIF?
- Are the criteria objective and measurable, subjective, or mixed?
- What is the relationship between the criteria and the job?
- Can the "objective" criteria be attacked? For example, in the sales context, were some sales people not in the protected class given better or different opportunities?

[7] Firing an older employer to avoid paying pension benefits that were about to vest may violate ERISA, even if it does not violate the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993).

- Conduct a 30(b)(6) deposition on the above issues. Defendant's failure to provide an appropriate witness with knowledge can result in sanctions. *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275, 301-05 (3d Cir. 2000).

C. Showing Pretext by Demonstrating that the "Objective Criteria" Were Not Neutrally Applied.

An employer's failure to follow its own stated procedures concerning which employees will be selected for layoff may support an inference of pretext. *Rahlf v. Mo-Tech Corp., Inc.*, 642 F.3d 633, 639 (8th Cir. 2011); *Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1214 (9th Cir. 2008)(failure to follow criteria in company handbook undermines credibility of proferred explanation for layoffs).

In *Walker v Verizon Pennsylvania* LLC, 2017 WL 3675384 (E.D. Pa. August 25, 207), a jury returned a verdict for age discrimination after a reduction in force. Key evidence included testimony that the managers were instructed to rate each employee's skills on a variety of criteria. The person with the lowest rank was to be terminated. Instead, two managers talked to each other and decided which employee to select for termination, and then contrived a rating that justified the decision to fire her, ignoring the fact that a younger employee should have received a demerit for being on a performance improvement plan.

Inconsistencies in the employer's explanations of the objective criteria, like all shifting explanations, may be evidence of pretext. In *Corbisiero v. Leica Microsystems, Inc.*, 2011 WL 3882851 (D.N.J. Sept. 1, 2011), the court pointed to minor inconsistencies in the objective criteria, as described in an email written by a manager, that same manager's deposition testimony, and the defendants' motion papers. *Id.* at *4.

If it can shown that at least one person involved in the evaluation or selection process was biased against the plaintiff, the plaintiff may be able to break through the defense of supposedly objective criteria. Thus, in *Barresi v. Donahoe*, 2011 WL 3903107 (D. Ariz. Sept 6, 2011), the court found that there was evidence that one of the three people who were involved in the decision to deny the plaintiff's application for a transfer after a RIF was biased against plaintiff because of his prior EEO history, and summary judgment was denied.

If the "objective criteria" were not fairly applied to those who were not in the protected class, they may be pretextual. Thus, when the plaintiff was included for a RIF based on objective criteria involving performance, but an employee who had previously been placed on a Work Improvement Plan was not "riffed," a jury might conclude that

the objective criteria were not fairly applied. *Corbisiero v. Leica Microsystems, Inc.*, 2011 WL 3882851 at *4 (D.N.J. Sept. 1, 2011).

Possible areas of inquiry in discovery include:

- Obtain all documents that describe the "objective criteria" and review them carefully to seek out inconsistencies.

- Find every employee who may have had any involvement in the decision to include the plaintiff in the RIF. Recognize that there is usually more than one person involved in these decisions, and be ready to question the employer's "party line" that the decision was made solely by one person. Look for evidence of bias in the statements of any of these decision-makers.

- What documents or information were provided to the decisionmaker(s) who made the ultimate call of who would be laid off?

- Obtain documentation (such as performance reviews, sales figures, etc.) for all employees who may be comparators as to the objective criteria.

- Did the employer create a list of employees to be considered for the reduction in force? Who created the list? What was the criteria? Analyze patterns in which groups of employees were included or excluded from consideration.

D. A Word About Statistics.

The use of statistical analysis is a complicated subject, and a comprehensive discussion is beyond the scope of this paper. Although statistical analysis is classically used to show disparate impact, use of statistics can also play a significant role in demonstrating discriminatory intent in the context of a RIF.

The use of a statistical expert showing that employees in your client's protected class were overrepresented in the layoff at a statistically significant level may be the key in avoiding summary judgment. *See Walls v. Johnson*, 229 F. Supp. 3d 678, 687-88 (E.D. Tenn. 2017). It may be worth retaining an expert early in the litigation to help evaluate the strength of the case.

It may take some patience and number crunching to find the statistical analysis that supports a finding of discriminatory intent. In *Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1209 (9th Cir. 2008), the court found that the statistical evidence at first glance did not support a finding of age discrimination, because the average age of those laid off was not sufficiently older than those hired to support an inference of discrimination. However, when the numbers were viewed during the tenure of one particular supervisor, the difference became far more stark, and suggested a finding that the supervisor used his influence to replace older workers with younger ones.

Thus, in *Lewis v. ATT Technologies, Inc.*, 691 F. Supp. 915, 918-19 (D. Md. 1988), the court held that evidence that black engineers were laid off at a disproportionately high rate during a RIF could be considered evidence of disparate treatment of the two named plaintiffs, who had been among the employees laid off. The court rejected the defendant's argument that an intention to discriminate could not be inferred from statistical evidence. Statistics may also be used as part of the evidence of a pattern or practice of discrimination. *Id.* at 920.

Even when the statistical evidence is not strong enough to support a disparate impact claim, it may be used as persuasive evidence to support a disparate treatment claim. Thus, in *Clark v. Matthews International Corporation*, 628 F.3d 462, 467-68 (8th Cir. 2010), *rev'd in part on rehearing, Clark v. Matthews International Corp.*, 639 F.3d 391 (8th Cir. 2011), the court held that even though fourteen of fifteen terminated employees were over the age of forty, this did not constitute sufficient evidence to show disparate impact.[8] However, on rehearing, the panel found that the evidence was sufficient to get to the jury on the question of disparate treatment under the Minnesota Human Relations Act ("MHRA") (which requires only that age be a "contributing factor" for the termination, and does not impose the strict "but-for" standard of *Gross v. FBL Financial Services* which applies to claims under the ADEA). *Clark v. Matthews International Corp.*, 639 F.3d 391 (8th Cir. 2011). The court held that although the statistical evidence was not sufficient to show disparate impact it *was* relevant evidence that should be considered by the jury – along with other evidence of age discrimination – to buttress a claim of disparate treatment. *Id.* at 398-99. *See also, Diaz v. AT&T*, 752 F.2d 1356, 1363 (9th Cir. 1985) (statistical evidence may be used to establish a discriminatory pattern; statistical study may be evidence of pretext even if it does not prove plaintiff's case); *Damon v. Fleming Supermarkets of Florida*, 196 F.3d 1364, 1361 (11th Cir. 1999) (supervisor who terminated plaintiff also terminated or demoted four older, highly experienced store managers, out of a total of seven, and all were replaced

[8] The court's conclusion as to disparate impact is counterintuitive, given the disproportionate number of older workers who were laid off. The court's rationale was that the pool of persons to be considered for statistical purposes was not only those laid off but the entire pool of non-management employees. When this very large pool was considered, the RIF caused a 4 – 5% drop in the number of employees over forty, a percentage that the court found too small to create an inference of disparate impact. *Clark*, 628 F.3d at 467-68.

with employees under 40 years old; "[T]his pattern of firing and demoting so many older workers and replacing them with younger workers, *by the relevant decision-maker during the same time period*, constitutes probative circumstantial evidence of age discrimination.")

Both parties will need to analyze which group(s) of employees should be compared in compiling the statistics. The employee's counsel must critically analyze the assumptions contained in the employer's statistics. Discovery is likely to be necessary either to obtain the statistics from a broader group of employees, or to get the information needed to break a large group of employees down to a narrower, more representative sample. For example, in *Lewis v. ATT Technologies, Inc.*, 691 F. Supp. 915, 921 (D. Md. 1988), the plaintiffs' attorneys argued that the operative group should be all engineers. The proportion of African American engineers laid off was much greater than the proportion of African American engineers as a whole. The employer argued that the operative group was only those engineers who had been recently hired; because most of the African American engineers were in this recently-hired group, when the statistics were narrowed in this way, there did not appear to be a disproportionate number of African Americans laid off. The court denied summary judgment, finding that because layoffs were not limited to this recently-hired group, the court would not thus narrow the inquiry.

<u>Possible areas of inquiry on discovery</u> include:

- Evaluate the statistics on the RIF from every possible angle. What percentage of employees laid off are in the protected class? What percentage of employees in the protected class were laid off? How did the lay off affect the percentage of persons in the protected class remaining employed?

- Analyze statistics by job title, by department, by region, and by supervisor to look for patterns.

- Obtain demographic information for all new hires, before, during, and after the RIF. In what departments/positions were they hired? Do they remain employed?

- If layoffs were limited to a particular office or facility, analyze whether that office or facility had an older or different workforce than offices or facilities that were not impacted.

- Analyze how the employer's statistics have been molded. Was the group of employees compared for statistical purposes really representative? For example, if you allege that your client's supervisor used the layoff to terminate all of the older workers, has the employer disguised this by

combining statistics for several different departments or several different supervisors?

- Obtain discovery on all analysis of statistics conducted by the employer, before, during and after the RIF.

CONCLUSION

An employer or supervisor who is inclined to discriminate may find a tempting opportunity presented in a RIF. Proving discriminatory intent is difficult under the best of circumstances; untangling the evidence becomes more complicated for the plaintiff's lawyer when the discriminatory treatment of one employee is disguised within a larger reduction of force. These issues should be explored with the client at the first meeting. If the client decides to litigate, the plaintiff's attorney should move quickly to explore of sources of evidence, with an analytical view of the employer's purported justifications for the RIF and the methodology of the decision-making process.