

American Bar Association
Section of Labor and Employment Law
Fifth Annual Conference
Seattle, Washington
November 4, 2011

PROVING DISPARATE TREATMENT IN A REDUCTION IN FORCE: Ideas to Help Plaintiff's Counsel Demonstrate Pretext

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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. 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 order 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.¹ In the context of a

¹ In cases brought under the Age Discrimination in Employment Act (ADEA), plaintiffs must now satisfy the elevated standard of *Gross v. FBL Financial Services*, __U.S.__, 129 S. Ct. 2343, 2350 (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.

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.

The myriad cases in which summary judgment has been granted for employers after a RIF² 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.

I. Demonstrating Pretext by Attacking the RIF Itself.

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

Plaintiff 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.³

Evidence of an employer's strong financial condition may be used to show that its explanation that plaintiff was replaced as part of a RIF was pretextual. *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

² 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).

³ 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).

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. 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.

Possible areas of inquiry in discovery 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?

B. The RIF was Used As An Opportunity to Change the Workforce.

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.⁴

Plaintiffs' counsel should be vigilant for 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. For example, the EEOC recently obtained a \$3 million settlement in an age discrimination case against 3M.⁵ (Two private lawsuits on related claims were settled for \$12 million in April, 2011.) The EEOC found that 3M's CEO had expressed a vision that "we should be developing 30 year olds with General Manager potential" and that leadership training opportunities were directed to younger workers.

⁴ 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).

⁵ <http://www.usatoday.com/money/workplace/story/2011/08/3M-settles-age-discrimination-suit-for-3M/50089710/1>

Remarks by high-ranking officials such as those attributed to the CEO of 3M 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 “may 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 don’t take advantage of all the opportunities that are offered to them.” *Mangold*, 67 F.3d 1470, 1476-77 (9th Cir. 1995).
- 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

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).

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.

C. 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.*, __F. Supp. __, 2011 WL 3901867 (D. Minn. Sept. 6, 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* * * 6 -7.

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. Thus, 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. *Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 762 (8th Cir. 1995); *Nesbit v. Pepsico*, 994 F.2d 703, 705 (9th Cir. 1993).

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. *Tarshis v. Riese Organization*, 211 F.3d 30, 37 (2^d Cir. 2000), *disapproved on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

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.
- 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?
- Analyze whether a transfer to a related job position should have been made available for your client.
- 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.

II. Showing 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 is 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 does “provide[] 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. Hewlett-Packard Co.*, 305 F.3d 1210,1218 (10th Cir. 2002) 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).

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 new technology may be legitimate, but may also be a proxy for age. Experience or salary level⁷ may be legitimate criteria in a RIF, but they 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

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).

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 increasing 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?
- 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).

III. 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).

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 3883851 (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 be 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 "rified," a jury might conclude that the objective criteria were not fairly applied. *Corbisiero v. Leica Microsystems, Inc.*, 2011 WL 3883851 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.

IV. 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. 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 with

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.

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 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.

Possible areas of inquiry on discovery 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. Exploration of sources of evidence should begin immediately with an analytical view of the employer's purported justifications for the RIF and the methodology of the decision-making process.

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