

Layoffs Without Lawsuits

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Discrimination Basics

Layoffs, reductions-in-force, or downsizing, are the principal reasons for age discrimination cases. The employer says that Mr. X was let go due to a reduction in force. Mr. X says the real reason was his age. Notice that this is a disagreement over the employer's **motive**. If a court could hook an employer up to a lie detector, there would never be any need to try an age discrimination case. Because the perfect lie detector has not yet been invented, courts are stuck with using juries to figure out who is telling the truth.

The search for employer motive causes many employers to become angry. They say, "I never discriminated in my life. I want to fight this case to the end." When I hear this, I try to explain the discrimination secret. The big secret lawyers and judges know is that the employers motive **doesn't matter**. No one can really find out what was in the employer's heart. To decide a discrimination case, judges, lawyers, and ultimately the jury look for other things instead. They look for "equal treatment", or "pretext", or sometimes an unguarded statement such as "Smith is a young tiger." If they find one or more of these things, they **assume** a bad motive. Why do innocent employers settle? Usually because of an innocent mistake.

Before a jury goes out to deliberate, the judge instructs the jury on the law. Imagine an impressive black robed person on the bench looking down at you. The following is part of the standard instruction:

Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000), the Supreme Court held that an employee could prove a case of discrimination by showing that the employer's stated reasons for his termination were not the real reasons. This sort of case is called "pretext". It is the most common way to prove discrimination in a reduction in force.

With that background let’s take a look at an actual case. In *Janiuk v. TCG/Trump Co.*, 157 F.3d 504 (7th Cir. 1998), Mr. Janiuk was employed as a sales manager for the Independent Outlet Division. He supervised sales representatives assigned to the Independent Outlet Division, as well as the Division’s three area managers. In January 1995, Trump lost one of its largest accounts. As a result they decided to eliminate the jobs of five employees including Janiuk.

Janiuk sued alleging that his position was not eliminated. Instead he was replaced by Steve Kalk, one of the three area managers he had supervised. He produced an organization chart showing Kalk in overall charge of the Independent Outlet Division. Trump argued on summary judgment (a motion to throw the case out) that the organization chart was simply incorrect and that Kalk in fact was never promoted. The lower court granted summary judgment, dismissing Janiuk’s case, but the appeals court reversed and sent the case back for trial. It said:

When the discrimination is alleged to have occurred in the context of a reduction-in-force, the plaintiff’s initial burden is to show that (1) he was in the protected age group; (2) he was performing to the employer’s legitimate expectation; (3) despite his performance he was discharged; and (4) substantially younger employees who were similarly situated were treated more favorably. . . . Once plaintiff satisfies the original burden, the employer must come forward with a legitimate, nondiscriminatory reason for the adverse employment action, and if it does, the plaintiff bears the ultimate burden of showing that the proffered reason is a pretext for age discrimination.

The court found there was evidence from which a jury could conclude the uses made of the chart were inconsistent with Trump’s assertion that the chart was incorrect. It sent the case to the jury.

In simplest terms, when the employer lists “reduction-in-force” as the reason for termination, an employee has two ways to win. The employee can prove there was no “reduction-in-force”. The employee can prove that younger employees (or non-minority employees, or employees of a different sex) were treated better.

Call a Discharge a Discharge

Some time ago, I lost track of the number of calls asking whether an employee can disguise a discharge as a layoff. “Tom,” the caller will say, “We are having to cut back on a few jobs and the office administrator is just not as effective as she used to be. We are bringing in a new secretary for the general manager. I am thinking of laying off the office administrator. The general manager’s secretary can take over the hiring of clerical staff and ordering office supplies.” Whenever I hear this, I know I am going to have to hand out some bad news.

The manager who called me was unhappy with the performance of the office administrator. There may be sound reasons for his unhappiness. Perhaps the office administrator has taken up gambling and the petty cash has begun to come up short. This situation calls for discharge. It calls for termination. It calls for firing. It does **not** call for layoff.

The problem is that the employee is not being terminated for lack of work. If properly analyzed, there is plenty of work for the employee to do. The employer simply does not want to face up to discharging an employee, especially a long service one. To avoid facing this unpleasant task, the employer is prepared to make up a false reason. That is exactly the “pretext” an employee needs to prove discrimination.

In *Montana v. First Federal Saving and Loan Association of Rochester*, 869 F.2d 100 (2d Cir. 1989), the Second Circuit decided the classic “false layoff” case. Here are the facts:

Because of mergers, the number of employees in the metro region, where Montana was employed, was reduced from approximately 600 in September 1982 to approximately 480 in November 1983. Included in the reduction-in-force was the elimination of 45 managerial positions. . . . Montana, who had been vice president of personnel at Knickerbocker, became the personnel administrator for First Federal’s metro region. . . .

In early November 1983 Sue Chapin, corporate personnel manager, and Dean Schultz, acting senior vice president of administration and General Counsel, restructured First Federal’s personnel reporting system so that the metro and central region would no longer be accountable for their own personnel functions, but would instead report directly to, and be administered through, the Rochester corporate headquarters. Following that decision Montana was discharged on November 10, 1983.

Until the time of her discharge, Montana had consistently received satisfactory to excellent performance ratings. . . . At 56 years of age and with 32 years of experience behind her at First Federal and Knickerbocker, including 19 years in the personnel department, Montana was at her termination the oldest, highest paid, and most senior non-clerical employee in First Federal’s personnel department.

After her discharge, First Federal assigned the bulk of Montana’s responsibilities to Mary Sue Rossi, a 26-year old woman who had been hired by First Federal on December 6, 1982. Rossi held the

rank only of personnel administrator, she was paid less than Montana, and she was less experienced in the field. . . . Some of Montana's duties were also assigned to Patricia Chugg, the corporate employee relations/benefit manager.

The Second Circuit reviewed these facts and decided there was enough evidence to permit *Montana* to go to trial.

In *Montana*, the court said that plaintiff could make out her case if she proved (1) she was in the protected age group; (2) she was qualified for the job; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination. She need not prove that she was actually replaced by a younger worker. The court analyzed the facts as follows:

When viewed in the light most favorable to her, Montana's evidence was sufficient to defeat summary judgment. First, at the time of her discharge, Montana was the oldest and highest paid non-clerical employee in First Federal's personnel department. Second, she was the only department head whose position was consolidated into the corporate headquarters at Rochester and whose staff continued without her. Third, she was not offered the opportunity to transfer to Rochester. Fourth, after her termination, her duties were not eliminated; instead, the bulk of her duties were assigned to a co-worker, Rossi, who was 30 years younger. Even before assuming those additional responsibilities, Rossi had worked overtime on a regular basis. By taking Montana's responsibilities, Ms. Rossi's workload increased by 15 to 20%. Moreover because these additional duties overburdened Rossi, many of her duties were subsequently distributed to another younger, newly hired personnel employee. Fifth, when First Federal took over the personnel functions of its wholly owned subsidiary, HWD, and created the position of compensation analyst, it failed to even consider Montana for that position although she was qualified for it. Finally, after Montana's discharge, purportedly as part of a reduction-in-force, First Federal increased the number of employees in its personnel department by three, adding the positions of compensation analyst, assistant compensation analyst, and pension administrator. Still, Montana was neither offered a position or even considered for those positions.

The court concluded a jury could find from these facts that Ms. Montana was terminated because of her age.

Montana's job was never eliminated. The court found there were three more employees in the personnel department after Montana was terminated than before. First Federal did not dispose of any of her duties, it simply redistributed them. First Federal may have had reason to fire Montana, but instead it said it laid her off. That simply wasn't true.

While we are still on the subject of employer pretext, please be careful what you write on unemployment information requests. Frequently employers terminate employees for incompetence but write "layoff" on the unemployment form. An employee who is terminated for incompetence will get unemployment. By writing "layoff" on the form, however, the employer has created evidence for an age discrimination case. The employee will sue saying, "My employer wrote 'layoff' on the unemployment form. In fact I know he hired someone to fill my job two days after he let me go." That sounds like a pretty good case, doesn't it?

Consider what a pure reduction-in-force would look like. Suppose a company owned a delivery truck which it used to deliver its products around the city. The company sells the truck and subcontracts deliveries to a delivery service. In that case, it has clearly eliminated the job of delivery truck driver. No one in the company is doing it.

Consider another example. A company has four customer service representatives who answer the telephone, track orders using a computer terminal, and handle customer complaints. Due to a reduction in sales volume, the company reduces the number of customer service representatives to three, and sells one of the terminals. This is another pure reduction-in-force. There are only three people doing what four people had previously been doing.

Here is the rule. If a worker is over 40 (or a minority group or other protected status member), she cannot be "laid off" unless her job is going to disappear. If the employee's job is still going to be around after she has left, she is being fired. It is sometimes hard to recognize this is going on when a manager who reports to you comes to suggest a reduction in force. Look for the reassignment of duties. Ask yourself, "Will anyone be doing the work Ms. X is doing now after she has left." If most of the work will still have to be done, then Ms. X is being fired.

Before we leave this subject, just a word about firing. Can you fire a 55 year old employee for poor performance? Absolutely. If he sues, will you have to prove that his performance was poor? Again, absolutely. In *Sanderson Plumbing*, Mr. Reeves (age 57) supervised the "hinge room." His responsibilities included recording attendance and hours worked by employees under his supervision. Although the monthly attendance report did not indicate a problem, Reeves' supervisor told the company director of manufacturing that productivity was down because employees were often absent, came in late, or left early. Reeves was fired for not keeping control of the attendance.

At trial, Reeves showed that he had accurately recorded attendance and hours of employees under his supervision. Many of the employees were shown on the record as having arrived at the plant at 7:00 am, so they could not be at their work stations at 7:00 am. Reeves proved that the

time clock was broken on many occasions, so he simply wrote the employees in at 7:00 am. Thus, the employees were in fact in the department and at work, although their time records showed that they punched in at 7:00 o'clock. Reeves also proved that he had no authority to discipline employees for absenteeism. The general manager, the same one who fired him, had absolute authority to determine who would, and who would not, be disciplined for absenteeism.

The moral of the termination story is clear. Company records must support the reason for termination. If management says that an employee is being terminated for absenteeism, company records must demonstrate that the employee was actually absent on the days charged. In addition, company records must show that no younger employees, or non-minority employees, with worse attendance records were retained. Companies can win discharge of cases, but only if they check the facts.

Rules for Reduction in Force

Lawsuits for reduction in force have been going on for so long that there is a universal set of rules for doing it right. Once management has set a force reduction goal (10 per cent of payroll or a similar kind of goal), the process begins. The following are the rules:

- 1. Identify jobs (or skill sets), **not employees**, to be eliminated.
- 2. Establish non-discriminatory criterion to select among two or more employees in the same job (such as performance or seniority).
- 3. Decide how, if at all, a terminated employee can apply for a vacant position in another job classification.

These abstract principles can be effectively applied to reduce the risk of a layoff to a minimum. Consider the following example. The boss has four classes of employees reporting to him, and there are four employees in each class. His marching orders are to reduce the work force by 25%, by eliminating an employee from each class. The following table shows some of the characteristics of the employees working for the boss.

| |
|-----------------|
| The Boss |
|-----------------|

| Length of Service | Customer Service | Assembler | Shipping and Receiving | Truck Driver |
|-------------------|------------------|--------------|------------------------|---------------|
| Over 10 years | A Age 56 *** | E Age 62 ** | I Age 38 *** | M Age 58 *** |
| 5 to 10 years | B Age 38 *** | F Age 48 *** | J Age 46 *** | N Age 42 **** |
| 3 to 5 years | C Age 38 *** | G Age 27 *** | K Age 28 **** | O Age 27 **** |
| Under 3 years | D Age 22 **** | H Age 22 *** | L Age 26 ** | P Age 23 **** |

Stars next to age are the last performance evaluation. Four stars are the highest.

The boss decides that he will eliminate the employee in each job class who received the lowest performance evaluation on the last performance review. If two employees got the same performance evaluation, the employee with the least service with the company will be terminated. The following table shows the result of applying these rules. The letter “T” in a box indicates that the employee was terminated.

| Length of Service | Customer Service | Assembler | Shipping and Receiving | Truck Driver |
|-------------------|-----------------------|----------------------|------------------------|-----------------------|
| Over 10 years | A Age 56 *** | T E Age 62 ** | I Age 38 *** | T M Age 58 *** |
| 5 to 10 years | B Age 38 *** | F Age 48 *** | J Age 46 *** | N Age 42 **** |
| 3 to 5 years | T C Age 38 *** | G Age 27 *** | K Age 28 **** | O Age 27 **** |
| Under 3 years | D Age 22 **** | H Age 22 *** | T L Age 26 ** | P Age 23 **** |

In this termination, the boss has terminated “E,” the oldest employee in the company and the oldest assembler, and “M”, the oldest truck driver. Either “E” or “M” may sue. To succeed, they will have to allege the performance evaluations were designed to get rid of them.

The basic rule for reductions in force is, “stick to your plan.” Inconsistency can give fuel to employees who are suing. Sticking to your plan does not mean ignoring the facts. Employee “E,” age 62 and with over ten years of service, is being terminated while The Boss is keeping employee “H,” age 22 and with under three years of service. This situation is a common one in lawsuits, so it is helpful to see how the courts decide it.

In *Viola v. Philips Medical Systems of North America*, 42 F.3d 712 (2d Cir. 1994), Mr. Viola worked for Philips, primarily as an expeditor in the Spare Parts Department, until he was discharged on January 1, 1991 at age 57, in a general reduction in force. The court found:

In November or December of 1990, the executive management of Philips undertook a reorganization plan calling for a general reduction in the work force. Termination of union employees was covered by the collective bargaining agreement. Termination of non-union employees was governed by guidelines devised for the reduction in force. In applying those guidelines, termination decisions would be made on the basis of function, performance, and seniority. First, each manager was to identify functional areas that could be consolidated or pruned. Employees in those areas were selected for termination based on their performance reviews, with employees “needing improvement” being the first to go. In the event of a tie, the more senior would be retained.

Until September 20, 1990, Viola had consistently been rated “fully effective.” In the September review, his supervisor rated him as “needs improvement”, but said that his performance was “improving.” Viola did not file a written comment in response to this evaluation, although he had filed such comments following past reviews.

The court upheld Viola’s termination. It said:

The circumstances of Viola’s termination are consistent with a broad-based program of downsizing, affected according to standards that are related to business needs and that do not discriminate against older employees. . . .

Viola argues that the September 1990 adverse performance review was an unjustified criticism made to justify his firing in an anticipated wave of dismissals. . . .

Viola alleges [the performance review] is suspect because it was the first adverse review he had received, it was given on the eve of the reduction in force, and it was unjustified on the merits. Dismissals are often preceded by adverse performance reviews. Were we to view this pattern as suspect, without more, many employees would be able to appeal their personnel evaluations to a jury. If any set of circumstances could justify such an inference, they are not presented here. . . .

Viola adduces many reasons why the evaluation was unjust, but he did not submit written objections to the performance evaluation, although he was privileged to do so, and had frequently done so in the past. Most important, O'Connell states that when he gave Viola the September 1990 evaluation, O'Connell was unaware that Philips was going to implement a force reduction. Courts are reluctant to attack performance evaluations unless there is some evidence of supervisory bias.

Do employees ever succeed in convincing a court that a performance evaluation is biased? Of course. If the employee produces evidence that the supervisor said, "You are too old to do this job anymore," this case will go to the jury. If the employee produces evidence that statements in the evaluation are false, the case **may** go to the jury. For example, suppose the supervisor writes, "Mr. E's productivity has fallen off." Mr. E's attorney would ask for weekly production figures going back about two years. If E's weekly production was fairly steady, or, even worse, going up, E could probably win his case. Suppose E's productivity was going down? E's attorney would then ask for production figures of the other employees in the department. If all of them were going down, and if E's production was as good or better than others in the department, then E might also win. In the case of the 62 year old assembler, it would be good to check the last performance review and verify that the underlying facts support the supervisor's conclusion, before laying E off.

One defense which works well in a reduction in force is the "average age test." Under the test, the employer compares the average age of the workforce before and after the reduction in force. If the average age stays the same or goes up, the employer usually wins. In *Stone v Autoliv ASP, Inc.*, 210 F.3d 1132, 1139 (10th Cir. 2000), the court phrased the rule as follows:

[A]ccording to Autoliv... the undisputed fact [is] that the net effect to the RIF was to actually increase, albeit slightly, the percentage of workers at Autoliv who were age forty or over.... While a "balanced workforce" cannot immunize an employer from liability for specific acts of discrimination, ... statistics concerning employees terminated in a RIF are probative to the extent they

suggest that older employees were not treated less favorably than younger employees...

This calculation says “The Boss” is in some trouble. The average age of his workforce went down from 37.5 to 34.8. Do you think age was a factor when he evaluated Assembler I and Truck Driver M?

Before we leave this subject, consider *Berger v. New York Institute of Technology*, 94 F.3d 830 (2d Cir. 1996). Ms. Berger was employed for about 11 years in the Accounting Department of New York Institute of Technology when she was terminated in a reduction in force. Berger, at one time or another, had performed all of the tasks in the Accounting Department, except for grants which was a specialized area. She occasionally filled a supervisory role when the supervisor was off sick. She was age 57 at the time of termination.

Two employees, age 24, were performing functions that Berger had performed in the past at the time of her termination. Managers testified that Berger was selected for termination because her functions were the most expendable in the Accounting Department. Ms. Berger handled the conference center work, and after the layoff, the Accounting Department no longer handled that work.

In this case, the court struggled with whether Ms. Berger’s job functions were similar to the ones of the employees who were retained. It stated:

In cases involving a reduction in force, the inquiry is highly fact specific. We illustrate by analyzing two polar hypotheticals. In the first, an older maintenance employee is laid off when a company shuts down a plant. The older employee could not prevail on an ADEA claim simply because a younger maintenance employee continued to be employed by the company in a similar plant, no matter how identical their responsibilities. The rationale for granting judgment against the older worker would be that no reasonable trier of fact could find that the shutting down of a plant was motivated by the age of the older maintenance person. In the second hypothetical, a company with a phone bank lays off the oldest operator. The company could not prevail on a motion for judgment as a matter of law in such a case on the theory that a desire to eliminate the particular phone used by that operator was the sole motive for layoff.

The court noted that job functions of employees being compared for ADEA purposes must be “similar,” although not necessarily identical. It said, “We emphasize, however, that similarity of jobs is a factor to be considered, but not a complete surrogate for the question of whether the plaintiff’s main case supports a reasonable inference of a discriminatory motive.”

The *Berger* court found that similarly situated, but younger, employees were retained when Berger was laid off. It particularly noted that a 24 year old was transferred into accounting just before Berger was laid off. The court sent the case back for trial.

Employees terminated during a reduction in force regularly point to jobs they had previously held which were filled in the succeeding few months by new employees. Companies are frequently successful in defeating this argument by pointing out that the terminated employee failed to reapply.

As you can see, reduction in force analysis is not a simple matter. Whenever an older (or minority, woman or handicapped) employee is being terminated in reduction in force, that termination should be carefully examined. Is the performance review which triggered the termination supported by facts? Are employees in similar jobs treated similarly. If appropriate, was the employee being terminated given the opportunity to fill other open positions?

Reductions in force may be necessary in order to save the business. If they trigger lawsuits, the cost of those suits can substantially reduce the effectiveness of the reduction in force.