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## LAY-OFFS CANNOT ALWAYS AVOID DISCRIMINATION OR RETALIATION TRIALS

In Equal Employment Opportunity Commission v. The Boeing Company (August 18, 2009), the Ninth Circuit reminded employers that reductions-in-force do not mean that the company may still not have to defend discrimination and retaliation claims. The Ninth Circuit held that the EEOC was entitled to a trial against Boeing because the EEOC had adequate evidence from which a reasonable jury could conclude that the reasons Boeing advanced to justify its employment actions were pretextual.

The EEOC was pursuing this action on behalf of charging parties Antonia Castron and Renee Wrede. With respect to Ms. Castron, the Court noted that after complaining of a hostile work environment, Castron was transferred to a new work group and was terminated in a RIF two months later. One co-worker indicated that Castron's supervisor frequently made demeaning and derogatory comments about women. The Ninth Circuit concluded that those comments, considered along with the supervisor's interactions with Castron over the course of her employment at Boeing, were sufficient to create an inference of discriminatory motive even though the comments were not directed specifically at Castron or made in regard to decisions about her employment.

The Court acknowledged that Boeing had articulated legitimate, non-discriminatory reasons for its decision to transfer and subsequently terminate Castron – specifically, her request for a transfer and her subsequent low RIF scores. Nevertheless, the Ninth Circuit ruled that a full trial was necessary. According to the Court, the discriminatory animus shown by Castron's supervisor constituted direct evidence of pretext, even though the comments did not refer specifically to Castron. Based on the supervisor's sexist comments, a jury might reasonably infer that the supervisor's decision to transfer Castron, rather than a male co-worker about whom she had complained, to a new position where her job was less secure, may have resulted from improper motivations, including discriminatory intent, retaliatory intent, or both.

The Ninth Circuit reasoned that a jury might credit Castron's allegations that her superior (1) initially refused to transfer Castron at all, (2) made promises to transfer her to the department she requested, (3) agreed to transfer her, but only to a different department to which no other engineers from her department had been transferred in recent years, and (4) assured Castron that she would be exempt from the RIF process during her training in order to induce Castron to accept the transfer despite her explicit concern that the transfer might significantly increase her risk of termination.

The Court also stated that there was sufficient evidence from which a jury could find that Castron's later poor RIF evaluation scores, which led to her termination, were pretextual. Castron's supervisor in her new department had previously referred to her as a "little girl" and made a "joking" inquiry as to whether she "broke a nail." Although those comments occurred two years before Castron's firing, the Court concluded that the comments constituted at least some evidence of discriminatory animus.

Moreover, the new supervisor evaluated Castron without asking Castron's trainer about her progress. Several employees testified that the new supervisor unfairly ignored Castron's past performance evaluations and instead only focused only on her two months as a trainee in her new department, that Castron's skills merited higher scores, and that the new supervisor gave Castron lower scores than those received by other male employees from Castron's previous department who allegedly possessed skills inferior to Castron's. The Ninth Circuit took the view that co-workers' assessments of a plaintiff's work should be considered because they can be "clearly probative of pretext."

With respect to Ms. Wrede, the Court pointed out that in October of 2002, one year after Boeing substantiated a sexual harassment claim Wrede had filed, she received lower RIF scores than most engineers in her skill code and was subsequently terminated. Those scores were lower than the scores she had received in two previous RIF evaluations in April and July of 2002. Wrede scored high enough on the earlier RIFs to avoid discharge, but her scores in the October RIF dropped substantially, placing her at risk. Although several male engineers were also initially selected for termination, none was ultimately terminated in any of the three RIFs because they either successfully contested their scores or found other employment within Boeing, sometimes with the assistance of their supervisors.

In Wrede's case, the EEOC had to overcome an inference arising from the fact that the same actors who made the adverse employment decision against Wrede in the October RIF had twice given her scores that were high enough to avoid vulnerability to discharge. Nevertheless, the Court found that the EEOC had produced evidence from which a jury could conclude that Wrede's RIF assessment was pretextual.

First, Wrede's supervisor assigned her RIF scores in October indicating "no background or experience" in areas in which she had received higher scores in earlier RIFs, indicating at least some background or experience. Wrede also received significantly lower evaluations in several soft-skill categories, such as "communication/leadership" in the October RIF than in the July RIF, even though the supervisor was unable to offer a non-conclusory explanation of any of the significant changes or to point to any concrete conduct, specific complaints, or written records indicating a change. The supervisor also contended Wrede had trouble communicating with her "dotted-line manager," but was unable to recall who was Wrede's dotted-line manager.

The Court found that other specific and substantial circumstantial evidence also suggested that the supervisor lacked legitimate justification for his scoring. For example, several of Wrede's co-workers and managers offered detailed testimony regarding why the RIF assessments of Wrede's skills were not credible. Finally, Wrede, the only woman in her skill code, was laid off while

every male employee identified for termination in all three RIFs ultimately remained at Boeing, sometimes due to the assistance of supervisors, assistance that was not made similarly available to Wrede.

This case is yet another reminder to human resources professionals regarding the amount of scrutiny that any layoff decision will receive when challenged as discriminatory or retaliatory. Seemingly objective or neutral test results or layoff rankings will be scrutinized. Any drop in performance evaluations will be examined, as well as the testimony of co-workers and as well as supervisors and managers. Even apparently minor jokes from years before can come into play. If those that are selected for a RIF have previously complained about discrimination or harassment, retaliation lawsuits will frequently follow. While it remains to be seen whether Boeing or the EEOC will ultimately prevail at trial, this lawsuit is a good case study of the level of detail that needs to be analyzed if the employer hopes to avoid a full trial through summary judgment.