This Should Go Without Saying: Replacing An Older Worker With Two Younger Workers Is Not Consistent With A Reduction In Force Defense

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A recent case from a Chicago federal court is a good reminder that just because you *can* make a particular argument in defense of a lawsuit doesn't mean that you should. In *Summers v. Electro-Motive Diesel, Inc.*, Case No 13C1312 (N.D. Ill. May 19, 2015), an employee who had worked for her employer for 40 years was fired, along with a number of other employees. The employee sued for age discrimination. As a reminder, employees must meet the high standard that "but for" their age, they would not have been fired. In its motion for summary judgment, the company insisted the employee had been dismissed as part of a reduction in force (RIF). The only problem was that the company had hired a younger employee (who was not RIF'd) into the same job just three months *before* the supposed reduction, and the employer also hired another younger employee into the same job just six months *after* the supposed reduction. Faced with those undisputed material facts, the court still might have ruled for the company if only the company had told the employee that she was being released as part of the RIF. Instead, the employee's supervisor told her that her "skill set" was not one the company wanted to keep. Therefore, the court rejected the company's summary judgment motion, giving the green light to the employee to take her case to trial. In the end, it is possible that the company will convince a jury that the employee's separation had nothing to do with age. And, in the end, sometimes a "kitchen sink" approach is the right way to defend a lawsuit. Sometimes it is not. *Summers* makes clear in any event that employers must have all of their ducks lined up in a row when it comes to RIFs and terminations, and that consulting with legal counsel throughout the process is advisable.

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