

## A RIFing Yarn: How Being Able To Support A RIF Pays Off Down The Road

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If getting sued by a former employee is bad, it stands to reason that getting sued by a former human resource employee is worse. Aside from having to deal with the typical headaches associated with litigation, the employer also has to contend with someone who may know all of its dirty laundry. Mack Trucks / Volvo North America successfully faced down the appeal of such a suit just this last week in the federal Third Circuit. The case, *Andersen v. Mack Trucks, Inc.; Volvo North America* (Third Circuit Case No. 15-3063), involved a long-time (30+ year) employee of the company who worked out of their Allentown, Pennsylvania, facility as a human resource business partner. The facility was downsizing and in 2009, he was caught up in a reduction in force. After his termination, the employee sued claiming gender discrimination. After losing at the district court level, he took an appeal to the Third Circuit. The appellate court, however, agreed that he had no case and affirmed the underlying decision. Among other things, the Third Circuit held that the plaintiff could not demonstrate that the company's proffered reason for terminating him was a pretext for gender discrimination. The decision to axe the plaintiff's employment was made by a company VP who had three direct reports at the Allentown facility – the male plaintiff and two others, both of whom were female. The VP explained her decision to terminate the plaintiff over the others on several grounds. First, one of the human resource business partners who survived through the initial RIF was charged with assisting in the transition of employees from Allentown to another facility – and was herself terminated upon the completion of this task. Another employee specialized in labor relations and was needed because there were more bargaining unit employees than non-bargaining unit employees at the Allentown facility. As a result, the court did not believe there was any evidence of a discriminatory animus. The court also rejected the plaintiff's attempt to assert a mixed motive theory. A mixed motive theory would have enabled the plaintiff to proceed with his case if he could provide sufficient evidence for a reasonable jury to conclude that his gender was a motivating factor in the decision to terminate his employment. The record, however, lacked sufficient evidence that gender was a motivating factor. While the court noted that there was evidence the VP *liked* the other employees more than him, that alone was not enough to present a viable claim. The case provides another reminder for employers contemplating a RIF to thoroughly document the reasons for employment decisions made in conjunction with the RIF. Here, the company's ability to provide a cogent and non-discriminatory explanation for why the plaintiff was selected for the RIF over his peers played a critical role in the company winning the case. Employers would do well to remember to work with HR personnel and their counsel at every stage

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of a RIF to ensure that they take appropriate steps to build a record so that in the event of a dispute, the outcome can be as successful for them as it was in this matter.