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What's In Your RIF?

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Consistent with the age-old adage that there is no free ride, the Second Circuit Court of Appeals rejected an age discrimination claim of a former employee who based his case on comments allegedly made to another employee. The case involved a long-time employee of a large financial company who began work in 1988 and survived multiple mergers and restructurings. But, in 2010, his performance was rated in the bottom tier of employee rankings in the company. Coincidentally, his employee conducted a reduction in force (RIF) for low-performing employees, and the employee was selected because of his low ranking and a negative performance review—all of which was documented by the company. The employee was the oldest person caught in the RIF and soon thereafter, filed suit alleging that his termination actually was due to age discrimination. But, lacking any evidence of actual discrimination, the plaintiff pointed to the next oldest employee affected by the RIF. That second employee accused the company of age discrimination, based on age-related remarks made by employee happened to file a charge of discrimination attributing age-related remarks to the managers responsible for the RIF. The Second Circuit promptly rejected this as a concrete basis upon which to bring an age discrimination claim. First, the statements were hearsay, but aside from that – and perhaps more importantly for employers – "[c]omments about another employee's age, removed from any context suggesting that they influenced decisions regarding [plaintiff's] own employment, do not suffice to create a genuine issue of fact as to whether age was the but-for cause of [plaintiff's] termination." Stated differently, a plaintiff cannot base a discrimination claim on discriminatory statements made by managers concerning *another employee* when those statements have no connection to the decision to terminate *the plaintiff's* employment. The lesson? Well, for plaintiff's the answer is simple: have solid evidence of actual discrimination to yourself (*i.e.,* no copying someone else's homework) before you file a lawsuit. This is particularly critical for age discrimination claims, because the standard under the ADEA (unlike Title VII) requires a plaintiff to show "but-for" cause of discrimination. (This was highlighted in the Supreme Court's decision in *Gross v. FBL Financial Services, Inc*. (2008)). For employers, the lesson is familiar, but bears repeating. The employee won the case, in part, because of the hard work the company did preparing for the RIF in the first place: It successfully (a) it documented the reasons behind the RIF, and (b) documented the reasons for the plaintiff's selection for the RIF. Without these critical, non-discriminatory, pieces of evidence, the result easily could have been different. Employers contemplating RIFs should heed these simple, but critical takeaways: if you are planning a RIF, document why you are doing so, how you came up with the groups of employees affected by the RIF and the basis for those selected for the RIF. As in this case, a little preparation on the

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front end will help ward off a discrimination claim down the road.