

## THE “OLD MAN” CAN’T MAKE IT UP THE STAIRS, BUT MAKES IT INTO COURT

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Finding that a supervisor’s comments about an employee’s age were admissible circumstantial evidence, and that his employer’s reduction in force plan was not a “plan” at all, an appeals court has reinstated the claim of a 57 year old employee, who had been let go in a RIF that affected over 90 employees. *Blair v. Henry Filters, Inc.*

Richard Blair had worked as a sales engineer for Henry Filters, a manufacturer of industrial filtration systems, since 1986. In 2001 the new owner of Henry Filters, Durr Ecoclean, decided for business reasons to consolidate the sales force of Henry Filters with two other companies it owned, resulting in a cut back among the sales staff. Blair was one of the employees let go, and believed it was because of his age.

To establish a claim under the Age Discrimination in Employment Act, an employee must show that he is in the protected age group (40 or older), qualified for the job, suffered an adverse employment action such as termination, and was singled out for the action “because of age.” If the employer can articulate a legitimate business justification, the employee must show that the reason given is a pretext. Under typical circumstances employees terminated because of a reduction in force face a fairly heavy burden in establishing that their selection was based on age, since the terminations will have involved other employees as well, and are almost always a legitimate business justification.

In this situation Blair offered as proof of age discrimination the actions and statements of his direct supervisor. John Tsolis, a VP of Sales, took Blair off a profitable account with

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Ford Motor Co., and assigned him to a far less productive account with General Motors. The reason? According to the lawsuit: Blair was too old. Ford buyers were younger and interested in activities like mountain biking – coincidentally, so was Blair's 33-year old mountain biker replacement. Tsolis also threatened to fire Blair if he told anyone about the real reason for the reassignment, according to Blair's allegations.

Finally, Tsolis also supposedly made derogatory remarks about Blair's age, including calling him "the old man" at sales meetings, and asking others at a meeting with GM's purchasing department whether "the old guy" could make it up the stairs. Maybe not, but he made it to the court house in pretty good shape, filing suit in federal district court in Michigan claiming both age discrimination and a hostile work environment.

In its defense Henry Filters argued that Blair was one of scores of employees let go. In fact, the employee workforce shrank from 143 to 52 during the period 2001 to 2003. Based on that, and on the company's argument that Tsolis did not in fact have the authority to terminate Blair, the district court dismissed Blair's claim of age discrimination, and also found no evidence that Tsolis's age-related comments created a hostile environment, even if they were made.

RIFs are a part of economic life. In some industries they come even more frequently than in others because of the cyclical nature of the product or service being offered. They need to be handled carefully and thoughtfully. Of course, terminating employees strictly by length of service is one way to handle these situations, and a safe way at that. But the law doesn't require it (although union collective bargaining agreements may) and often a company would be faced with keeping less productive employees at the expense of harder working ones by following such a plan.

If your company is faced with a cut back give careful thought to a number of factors, including what you are going to call it. For example, not all cutbacks are layoffs. A "layoff" is a term that implies a continuing relationship with the company, and a likelihood that the employee will be called back when work picks up. If that's not what you intend, better to term the action a "termination for lack of work." That truthfully signals to the employee the employment

relationship is over, and any future employment will be based on a new application as a new hire.

Similarly, the criteria you end up using should be rational, business-based, and – if you're in doubt about it – reviewed by counsel.

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