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Darryl J. Lee, Editor — Kirton McConkie

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TERMINATION

'Grandma's Feather Bed': Court puts feather tester's claims to sleep

by Lance Rich

It was nine feet high and six feet wide, soft as a downy chick.

It was made from the feathers of forty 'leven geese

Took a whole bolt of cloth for the tick.

So goes the popular song written and performed by the late John Denver. While Grandma may not have had her feathers from the "forty 'leven geese" tested, apparently there is a need for that in the textile industry. The following case involves the claims of a Hispanic female feather tester who alleged her employer violated Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) when, among other things, it reduced her hours and eventually terminated her employment as part of a reduction in force (RIF). Go ahead, make yourself comfortable (even if you don't climb in bed with the "eight kids 'n' four hound dogs and a piggy we stole from the shed"), and read on to find out how the federal district court ruled after all the feathers had settled.

Slim pluckings

International Down & Feather Testing Laboratory (IDFL), a company with testing facilities in Utah, Switzerland, and China, conducts quality assurance evaluations for filled textile products. Ruth Cruces, a Hispanic woman in her 40s, worked for IDFL as a feather tester, separating feathers and down in samples and determining the composition and species of the material. While she worked for IDFL, the number of samples the company received for testing declined significantly. Consequently, it cut the number of workers in its content and species department by more than half in just two years.

In February 2009, IDFL's CEO, Wilford Lieber, reduced the hours of 22 workers, including Cruces. To decide which employees' hours to reduce, Lieber and other members of management reviewed data from a computerized reporting system. Employees checked out samples on the system to begin work and checked them in again when they were done. The system ranked the employees' efficiency by the average time it took them to complete an analysis of a sample. IDFL decided to reduce the number of hours worked by the less efficient employees.

After having her hours reduced, Cruces complained to Lieber that Asian workers were receiving preferential treatment and were given more hours than other employees. He responded that the hours were assigned based on efficiency and she could receive more hours if she improved her speed. Cruces alleged that around this time, she overheard one of the content and species managers state that IDFL needed younger and faster workers. She also complained that some people weren't being required to speak English at work.

In August 2009, Cruces filed a claim with the Utah Antidiscrimination and Labor Division (UALD) alleging that IDFL was hiring younger employees and showing preference toward Asian workers by giving them full-time hours. Upon receiving Cruces' discrimination charge from the UALD in September 2009, Lieber met with her in an attempt to mediate the charge. She refused to mediate because she felt she had already attempted to address her concerns with management and had been ignored.

A few days later, IDFL informed Cruces that it would further reduce her hours and the hours of some of her coworkers and she would only have intermittent work. IDFL had reviewed the computer data on employee speed to determine which employees were less efficient and would have their hours further reduced. The next day, Cruces filed an amended discrimination charge with the UALD to add a charge of retaliation.

In October 2009, IDFL fired Cruces along with 10 other employees as part of a RIF. Once again, the company based its decision about which employees to terminate on the efficiency ratings. Cruces was ranked 20 out of 25 employees. The downsized employees ranged in age from 22 to 74 and included five Caucasians, two Africans, three Hispanics, and one Asian. Cruces didn't amend her discrimination charge to allege that she had been fired for discriminatory or retaliatory reasons.

The UALD eventually issued a determination and order that considered the reduction in Cruces' hours in February and September 2009 but didn't examine her termination or her claim that she was forced to speak English while other employees were allowed to speak in their native tongues. After the Equal Employment Opportunity Commission (EEOC) issued a right-to-sue letter, Cruces filed suit in federal district court in Utah, raising discrimination and retaliation claims under Title VII and the ADEA.

Court puts unexhausted claims to bed early

Employees are required to exhaust administrative remedies for each alleged discriminatory or retaliatory act before they can take the claim to court. IDFL argued that Cruces hadn't exhausted her termination-based claims because she never amended her charge with the UALD to include her termination. Cruces argued that she wasn't required to amend her charge to include information about her termination because the UALD was aware of her discharge and it was within the scope of agency's investigation.

Although it acknowledged that the UALD asked Cruces to provide documents relating to the reason she was no longer employed, the court concluded it was unclear that the agency had performed any investigation into whether her termination was discriminatory or retaliatory. In agreeing with IDFL's position on this issue, the court noted there was no reference to Cruces' termination in the UALD's determination and order.

The court likewise concluded that Cruces hadn't exhausted her claim that IDFL discriminated against her by requiring her to speak English while not requiring Asian employees to do the same. In making its conclusion, the court rejected her argument that the UALD must have investigated the claim because it was a natural extension of her claim that Asian employees were receiving preferential treatment by not having their hours reduced. While the court stated it would consider her argument in the context of her reduction-in-hours claims, it refused to analyze a separate claim for the alleged preferential language rules. Having decided that Cruces couldn't raise the "unexhausted" claims, the court then turned its attention to the claims that were included in her charges with the UALD.

Exhausted claims also put to rest

The court examined Cruces' claims that IDFL had (1) violated Title VII by reducing her hours but not reducing the hours of Asian employees, (2) violated the ADEA by reducing her hours but not reducing the hours of younger employees, and (3) violated Title VII by retaliating against her and reducing her hours after she lodged a discrimination complaint.

To make a basic case of discrimination under Title VII, an employee must show (1) membership in a protected class, (2) an adverse employment action, and (3) disparate treatment among similarly situated employees. The court found that Cruces satisfied this initial test because she is Hispanic, the reduction in her hours constituted an adverse employment action, and she had provided testimony that Asian coworkers' hours weren't reduced when her hours were cut. IDFL was then required to provide a nondiscriminatory explanation for reducing Cruces' hours. It did so by explaining that because of a decrease in available samples, it chose to reduce the hours of employees with the slowest average processing times.

To reach trial on her claim, Cruces was then required to show that her employer's explanation was simply a pretext for unlawful discrimination, meaning it was a cover-up or a fake reason. In the context of a RIF, she could do that by showing (1) the adverse action taken against her didn't accord with the RIF criteria, (2) IDFL's criteria were deliberately falsified or manipulated to adversely affect her, or (3) the RIF was generally pretextual. Cruces argued that IDFL's explanation was pretextual because (1) the hours of other employees weren't actually reduced, (2) she was more accurate than other employees and worked at an above-average speed, (3) the computer efficiency ranking lacked evidentiary support, and (4) IDFL didn't address her complaints that Asian employees were receiving language preferences.

The court rejected each of those arguments. First, it found that contrary to Cruces' claim, IDFL had supplied the UALD with a list of 22 employees from nine different countries whose hours had been reduced. The court stated that the company was under no obligation to inform Cruces of other employees' work schedules in the letter reducing her hours. Second, IDFL had shown that she ranked 20th out of 25 employees in her average speed for completing a sample.

Third, although Cruces criticized IDFL's use of the efficiency rankings by arguing that they didn't measure the accuracy of an employee's work, the court noted that employers may choose their own criteria for a RIF. Thus, even if Cruces' work was more accurate than that of her coworkers, the court couldn't substitute its judgment about the criteria IDFL should have relied on in making its RIF decisions. Finally, even if Cruces could show that IDFL allowed Asian employees to speak their native language while she was required to speak English, that

alone wouldn't call into doubt the reality of the economic difficulties the company was facing or the validity or accuracy of the criteria it used to make RIF decisions.

The court also dismissed Cruces' ADEA claim, rejecting her argument that the manager's statement that IDFL needed younger and quicker employees was direct evidence of age discrimination. Although the manager who allegedly made the comment did have some input into the decision about which employees' hours should be cut, there was no evidence that he had expressed such sentiments to Lieber, who ultimately made the decisions, or that the CEO made his decisions based on such input. Rather, the manager's statement was circumstantial evidence of discrimination.

The court concluded that Cruces hadn't set forth a basic ADEA claim because she hadn't identified any younger employers who were treated differently than older employees when IDFL decided to reduce the hours of some of its workers. Also, even if she had made a basic ADEA claim, she hadn't shown that IDFL's reason for reducing her hours was a pretext for discrimination. The court rejected pretext for this claim for the same reasons it denied pretext for the Title VII discrimination claim.

Finally, the court determined that Cruces had established a basic retaliation claim under Title VII but hadn't shown that IDFL's explanation for reducing her hours was a pretext for retaliation. To establish a basic retaliation claim, an employee must show (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there is a causal connection between the protected activity and the adverse action. Cruces engaged in protected activity by filing charges with the UALD, the reduction in hours constituted an adverse action, and she had shown a causal connection between the two events through their temporal proximity. Nevertheless, the court found that she hadn't provided enough evidence to cast doubt on IDFL's explanation for the reduction in her hours.

The court noted that if Lieber had singled out Cruces for a reduction in hours, the decrease in her hours so soon after she filed an administrative charge might have been sufficient to get the matter to trial. However, because other employees were also affected by the RIF and because Cruces hadn't shown that IDFL's actions weren't in line with its RIF criteria, that the RIF data were manipulated or falsified, or that the RIF was generally pretextual, the court concluded she wasn't entitled to a trial on her retaliation claim. Therefore, the trial court dismissed all of her claims without a trial. *Cruces v. International Down & Feather Testing Laboratory,* 2013 WL 3423259 (D. Utah, July 8, 2013).

Sweet dreams

There are several lessons hidden beneath the covers of this case that may help employers sleep better at night when they're undergoing a RIF. First, if an employer isn't going to uniformly reduce the hours of all employees, it's best to base a RIF on carefully considered criteria that can be measured objectively. Second, once the criteria have been established, decisions about who will be affected by the RIF should follow the criteria set. If Cruces had been one of the quicker employees and her hours were still reduced while the hours of less efficient employees of a different race went unchanged, she would have had a much stronger case that might have warranted a trial. Third, an employer should exercise caution when terminating an employee who has recently lodged a discrimination complaint, but a termination is supportable if it's done as part of a RIF as long as the workforce reduction resulted from verifiable business concerns.

Finally, whenever an employer faces a lawsuit, it's prudent to engage competent counsel to review whether the employee alleged the same discrete unlawful acts in her charges with the UALD that she alleged in her complaint filed with the court. If not, the employer can request that the court put the unexhausted claims to bed without even considering their merits.

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