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THIRD CIRCUIT HOLDS THAT A PLAINTIFF NEED NOT DISCREDIT EVERY REASON FOR TERMINATION TO SUSTAIN AN ADEA CLAIM

On April 19, 2006, the United States Court of Appeals for the Third Circuit held that when an employer proffers a “bagful” of legitimate reasons for terminating an employee, the employee need not necessarily offer evidence sufficient to discredit all of the rationales advanced by the employer in order to sustain a claim under the Age Discrimination in Employment Act (ADEA) (*Tomasso v. Boeing Co.*, 3d Cir., No. 04-4657, 4/19/06).

In *Tomasso*, Boeing terminated the plaintiff, a forty-year employee, as part of a reduction-in-force (RIF), which was initiated in 2001 to reduce operating costs and overhead by twenty percent at the site where the plaintiff worked. Shortly before the RIF, Boeing had discontinued a retention totem rating system it had previously used to identify which employees would be laid off in the event of a RIF. Under the discontinued system, which had been in place for ten years, employees who had worked at Boeing for thirty years were least likely to be let go. Boeing replaced the retention totem rating system with an evaluation process whereby Boeing decided which employees to discharge based upon managerial evaluations. The evaluation forms required managers to assign employees a score from one to five in the following nine categories: (1) organizational skills; (2) problem solving; (3) quality of work; (4) quantity of work; (5) technical competence; (6) leadership; (7) attitude; (8) communications; and (9) teamwork. The plaintiff received the lowest score of the 43 rated employees.

The plaintiff filed suit alleging that Boeing terminated his employment in violation of the ADEA, the Pennsylvania Human Relations Act (PHRA), and the Employee Retirement Income Security Act (ERISA). The lower court granted Boeing’s motion for summary judgment as to all counts, reasoning that the plaintiff had failed to demonstrate that Boeing’s proffered rationales for his layoff were pretextual.

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The Court of Appeals for the Third Circuit began its analysis by stating that the burden-shifting framework enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which states that once the plaintiff makes out a *prima facie* case of discrimination, the burden of production shifts to the defendant to articulate a legitimate nondiscriminatory rationale for the layoff, and then the plaintiff is required to respond by citing evidence that the rationale is pretextual, governed the plaintiff's ADEA claim. The court noted that Boeing conceded that the plaintiff had made out a *prima facie* case of age discrimination and that Boeing had articulated a nondiscriminatory reason for his discharge. Therefore, the court focused on the pretext phase. To create a material issue of fact as to whether the employers' proffered reasons are pretextual, the court stated that the plaintiff must "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." The court explained that while a decision to lay an employee off in a RIF differs from a decision to terminate an employee during ordinary circumstances, the *McDonnell Douglas* framework still applies.

The appellate court discussed each of Boeing's articulated age-neutral reasons for terminating the plaintiff, which included plaintiff's lack of interest in Process Validation Assessments (PVAs), a method of inspections used by Boeing to monitor its subcontractors; refusal to share technical knowledge; failure to maintain complete folders on his suppliers; and poor attendance at weekly meetings. The court reversed the summary judgment ruling because the plaintiff had cast sufficient doubt on two of Boeing's primary explanations for his discharge, those being his lack of interest in PVAs and his refusal to share technical knowledge. In so doing, the court held that "[i]f the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder." The court explained that the rejection of some of the employer's articulated explanations may so undermine the employer's credibility as to enable a factfinder to disbelieve the employer's remaining rationales, even if the employee fails to produce evidence particular to those rationales. The court determined, therefore, that Boeing's articulated reasons regarding the plaintiff's supplier folders and meeting attendance did not provide an adequate basis for summary judgment.

In sustaining the plaintiff's discrimination claims, the court was particularly concerned with the subjective nature of Boeing's evaluation system. The court stated that "low evaluation scores may be a pretext for discrimination, especially where, as here, an employer uses subjective criteria such as 'attitude' and 'teamwork' to rate its employees." While Boeing argued that the plaintiff was terminated, in part, because of his lack of interest in PVAs, the plaintiff proffered evidence that, during reviews conducted in August and December 2001, he was not informed of any deficiencies in his work relating to PVAs. The court further noted that the plaintiff's manager had previously conducted an evaluation of the plaintiff and concluded that he met expectations relating to PVAs. The court concluded, therefore, that Boeing's subjective determination of the plaintiff's lack of interest in PVAs was not supported by objective evidence.

Additionally, the court noted that although plaintiff had received a low score of two in the "quality of work," "quantity of work," leadership," and "attitude" categories of the evaluation, Boeing had not offered *any* evidence to explain these low scores. The court explained that if the plaintiff had received high scores in these categories, he would have been ranked high enough to avoid being laid off. The court was clearly critical of Boeing's lack of objective evidence to support the plaintiff's low evaluation scores.



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Although the appellate court did not use the aggregate results of the evaluation of all the employees in the plaintiff's department as a basis to overturn the summary judgment ruling, the court appeared troubled by the age of the employees selected for termination in comparison to the age of the retained employees. All seven employees in the plaintiff's department who were terminated were over the age of forty, while all employees under the age of forty were retained. Additionally, of the 43 employees evaluated, no employee under the age of forty was rated lower than fourteenth.

Circuit Judge Roth wrote a dissenting opinion as to the ADEA and PHRA claims, opining that discrimination cases filed subsequent to a RIF require a "different hermeneutic," or methodology, for evaluating an employer's conduct. Judge Roth reasoned that in a RIF, employers are required to terminate adequate or even high-performing employees who are under-performing relative to their peers. As a result, he posited that subjective criteria such as "attitude" and "teamwork" take on a greater significance and the employer's margin of appreciation to make a good faith mistake in evaluating talent must be respected. Judge Roth further reasoned that discriminating employers would not be able to hide their animus behind a RIF because courts can always question whether a true RIF occurred.

In the wake of the *Tomasso* decision, courts may be less likely to grant an employer summary judgment on discrimination claims if the employer posits a multitude of nondiscriminatory reasons for the employee's termination and the employee is able to offer evidence of pretext as to only some of the proffered reasons. This case highlights the importance of employers ensuring that, to the extent possible, performance appraisals be based upon objective criteria, backed up by specific example. Moreover, it demonstrates the dangers of ignoring or glossing over performance issues with standard "meets expectations" evaluations. Employers should be wary of terminating any employee based upon performance deficiencies that have not been previously addressed. This is particularly so where the employer is considering changing its evaluation criteria prior to a RIF or where the evaluations may disparately impact older employees.

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Please feel free to contact **Maxine Neuhauser** in the firm's **Newark** office at 973/639-8269 if you have any questions or comments. Ms. Neuhauser's e-mail address is mneuhauser@ebglaw.com. **Daniel R. Levy**, an associate in the Labor and Employment Department, assisted in the preparation of this Alert.

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