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## EMPLOYMENT LAW

### Deference Given to Employer's Business Decisions in Bias Case

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*Special to the Legal*

There are few more settled tenets in employment discrimination law than that the court does not sit as a “super-personnel department that re-examines the employer’s business decisions.” In the recent case of *Andersen v. Mack Trucks*, No. 11-2239, 2015 U.S. Dist. Lexis 99388 (E.D. Pa. July 30, 2015) (Surrick, J.), the court repeatedly invoked this principle in granting summary judgment to the employer.

#### REDUCTION IN FORCE

Bruce Andersen was 62 years old, and had worked for Mack Trucks Inc. in Allentown for 38 years when his position as a human resources business partner (HRBP) was eliminated in 2009. At the time, Andersen was the second oldest HRBP in the company and was one of only two men in the human resources department, according to the opinion. The HRBPs reported to Lesley Billow, senior vice president of human resources.

In 2008, Mack announced that it would be closing its operations in Allentown. Most of the groups working with Andersen and a subordinate, Sherri Palopoli, remained



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in Allentown and their jobs continued. Palopoli was primarily responsible for implementing and interpreting the collective bargaining agreement—applicable to the union employees. Her experience in this area was admittedly superior to that of Andersen because, as Andersen observed, she did it “100 percent of the time,” the opinion said.

Bonnie Miller, a 65-year-old HRBP working in Allentown, was responsible for implementing the reduction-in-force but was offered the opportunity to continue her employment at Mack’s facility in Greensboro, North Carolina. When she declined to transfer, Miller was terminated in fall 2010, the opinion said.

#### LACK OF RELEVANT EXPERIENCE

In 2009, as the economic downturn continued, Billow sought to reduce

her staff further. She determined that Andersen’s position could be eliminated and that Palopoli could assume his “minor day-to-day human resources duties,” the opinion said. This was determined to be preferable than terminating Palopoli because Billow believed that Palopoli could continue to work with that half of the remaining Allentown workforce that was unionized without any additional training—while “it would have been a difficult task” for Andersen to get up to speed on the labor contracts at the facility. While Palopoli continued in her pre-RIF role for a short while, she was promoted twice in the next 10 months—ultimately becoming an HRBP (after which she was no longer responsible for the labor contracts).

Andersen’s position was eliminated in October 2009. He brought suit against Mack for age and gender discrimination, claiming that both Miller and Palopoli were treated better than he was. At the close of discovery, Mack moved for summary judgment.

#### CLOSE READING OF ‘SIMILARLY SITUATED’ REQUIREMENT

Initially, the court found that Andersen had failed to establish a

prima facie case of age discrimination under the *McDonnell Douglas* analysis, named for *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Specifically, where an employee is terminated in a RIF, it is his or her burden to show that “the employer retained a sufficiently younger similarly situated employee.” Because Miller was the only similarly situated HRBP in Allentown—and she was three years older than Andersen—his claim in that regard failed.

With respect to Palopoli, a key part of the “similarly situated” analysis focuses on whether the “retained employees had duties that were comparable to those of the [reduced-employee].” In this case, while Andersen claimed that Palopoli’s retention was discriminatory, the court found that “their job functions were different” because his job “was not focused on labor relations,” while Palopoli worked exclusively in that area. As such, Andersen’s age discrimination claim could not advance past the prima facie stage.

## **NO PRETEXT IN ‘BUSINESS DECISIONS’**

Nevertheless, the court advanced its analysis and found that nothing in Andersen’s evidence established that Billow’s decisions were pretextual. First, the court found that Mack’s failure to offer Andersen the Greensboro HRBP position that Miller declined (and that was subsequently offered to a younger female) was nothing more than a challenge to Mack’s business decision. Further, hiring and promotion decisions made after Andersen’s termination were “separate and apart” from the decision in question—without evidence

that age played a role. The court also found there to be no evidence that Mack had purposely staggered the termination dates to mask discrimination—or that its failure to provide the list of age demographics (as required by the Older Workers Benefit Protection Act) evidenced age animus. There was, in sum, “no showing that age discrimination was the cause of the adverse employment action by showing that no other believable reason for the action existed.”

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## **LOWER STANDARD IN REVERSE DISCRIMINATION CLAIM**

With respect to Andersen’s claim of reverse gender discrimination, the court observed that the U.S. Court of Appeals for the Third Circuit “has articulated a modified burden-shifting standard” that allows the plaintiff to establish a prima facie case by “presenting sufficient evidence ... that the defendant treated some people less favorably than others based on gender” (citing *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999)). Under this standard, Mack’s decision to retain Miller until 2010, while Andersen was terminated in 2009, established the prima facie case. This allowed

Andersen to advance all of his allegations of gender discrimination to the pretext stage.

Andersen argued that Palopoli’s retention and promotion, Miller’s retention (for a year) and Billow’s failure to “investigate into [his] skill sets prior to terminating him” (which would have revealed that he had far more HR experience to Palopoli) established viable gender discrimination claims. The court disagreed, finding that “these arguments attack defendants’—or more specifically, Billow’s business judgment. They do not link the decision to terminate [Andersen] to gender bias.” Summary judgment was, therefore, in order.

The case emphasizes the discretion afforded to employers in making employment decisions and the heavy burden on employees to link decisions to discriminatory animus. While the discussion of pretext in the age discrimination claim is dicta (as no prima facie case was established), it is notable that Andersen raised legitimate questions regarding both the substance of the decisions and the process of how the decisions were made, but could not link the decisions to either his age or his gender. Rather, as the court concluded, it does not sit “as a kind of super-personnel department that re-examines [a defendant’s] business decisions.” •