

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic behind the company name. The name is written in a clean, sans-serif font, with 'astrachan' and 'thomas' in a darker blue and 'gunst' in a lighter blue.

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## **Lay Off the Desserts**

By: Julie R. Rubin

"I'll have the steamed brown rice with tofu and mixed vegetables. Oh, and no sauce, please." "No, no appetizer, thanks." This was no way to ring in the New Year, but after weeks of deep sea diving in the jumbo tin of caramel popcorn from my favorite court reporting company, sucking down ooey gooey Fairytale Brownies sent by my buddy Dean (Have you tried these things? I'm a wretched addict.), and convincing myself that those little berry tarts with pastry cream count as a serving of fruit, let's just say my 501s won't be seeing the light of day for a while. I had allowed the holiday season to have its way with me, but no more. So, there I sat – my husband slurping down his pork lo mein while I picked at what might as well have been a plate of twigs and bark. And then the phone rang. Thank God.

"Hello" I answered, weaving my way through the maze of tables to get to the revolving door. It was Ed, the human resources director of a new client of mine. "Julie, I'm sorry to bother you in the evening," he said. "I hope I haven't interrupted your dinner." "It's no bother, really," I assured him. As I stood on Pratt Street, I could see through the restaurant window that my departure from the table hadn't broken my husband's stride. Good man. Ed explained that, earlier that day, he'd received in the mail a former employee's formal charge of age discrimination filed with the local office of the Equal Employment Opportunity Commission. Ed couldn't wait until morning. He was just plain distraught that the company had been accused of discrimination on his watch. He needed to talk. "Ed," I began, "I can speak with you tonight – no problem – but I'm at a restaurant. Can I call you in about an hour?"

My client, a communications firm specializing in web design and development of suites of corporate branding materials, had managed to avoid a reduction in force for several months, but ultimately succumbed to the sickly economy. In an effort to keep its doors open, 8 employees were laid off in October. The unlucky targets were selected by management during a long afternoon meeting. The employees to be laid off were selected in part based on what departments could operate with fewer hands and in part in consideration of employee competence. They made their choices and did the deed. It was a dark time for the company. Despite management's assurances to

the contrary, the remaining employees were worried they would be next. Morale and trust among co-workers were at an all time low and the creeping flow of business wasn't helping.

The complaint asserted that employees 40 years of age and over had been disproportionately subject to the RIF or, alternatively, that the entire process was a pretext to get rid of older workers. The plain truth is that older workers can cost a lot more than their younger counterparts – higher health plan costs, salaries, more disability accommodations and long term medical leave. On its face, the complaint asserted a sound claim and put my client in a very poor light. Ironically, my client – who had cut staff to save cash – was now faced with substantial attorneys' fees to defend a discrimination charge.

"Ed, here's what I need. I need you to send me all the documentation about the RIF. The memos to file, any severance agreements, any meeting minutes at which the RIF was discussed, any memos assessing employee data like race and age and the like. Everything. I also want you to create a memo to me with a complete chronology and description of events, including identification of the decision makers, the layoff criteria – all that kind of stuff. And I want a list of any significant company expenses above and beyond standard overhead for the last year."

"Well," began Ed, "I can draft that memo for you tomorrow, but as for the other stuff, there really isn't anything. I mean, we talked about layoffs at a few meetings and then we did it. There weren't any formal documents created or anything like that. I might be able to dig up a few emails about it." And then there was a big sigh. And it was mine.

"Ed, do you mean to say that no documentation exists about the reasons for the layoffs?", I asked. "No, nothing really," he responded. What Ed was telling me was that there was no structure to the RIF. This was a problem and I told him so. I wished I could have given Ed the relief he was searching for, but I couldn't. Even if my client had not intended it, if the RIF adversely or disproportionately impacted employees age 40 and over, the company could face liability for "disparate impact" discrimination. Where an employment practice disproportionately adversely impacts a protected employee class (like 40 and over employees), liability for discrimination is a significant risk – intent doesn't factor into the equation. Likewise, if nothing existed to demonstrate that the laid off employees were selected, despite their age, as part of a legitimate, business-based rationale, my client faced possible liability for a discriminatory scheme to get rid of older workers in favor of a younger employee pool. Either way, liability damages could be steep and might include an award of attorneys' fees if the employee prevailed in court.

Reduction in force, downsizing, restructuring, layoffs. Whatever you call it, it's a damn awful thing to have to do. But don't make matters worse by risking liability for

discrimination. Minimize your risk by getting your lawyer involved early in the process. I know – this hardly seems the time to spend money on lawyer fees when no problem exists, but it's worth your while to spend a few bucks to get it right and avoid the hassle and risk of a lawsuit. Plus, discussions with counsel about the RIF process and analysis will be protected by the attorney-client privilege.

Next, establish selection criteria. Will employees be selected based on subjective or objective criterion? That is to say, will employees be laid off based on their comparative performance and competence or based, for example, on a decision to outsource a particular department function? Usually, employees are selected using a combination of subjective and objective criterion, but the risk of a charge of discrimination increases where a RIF is based largely on subjective issues that could be a function of one manager's like or dislike of an employee. Where feasible, base your decisions on objective, business-based factors and not employee versus employee comparative analysis.

Now it's time to put on your nerd hat for some statistical analysis. Collect data about your employees' races, ethnicities, genders, age and other legally protected classes. Consult these statistics to ensure the RIF does not disparately impact certain protected status employees.

Another key consideration is who the decision makers are. Be sure to involve more than one person in key and final decisions to avoid accusations that the subjective likes and dislikes of one decision maker led the way. Designate at least two decision makers to work cooperatively to assure that employees selected for layoff are the product of objective criteria analysis and nothing else.

Obvious though it may seem, it's crucial to document the reasons for the RIF. Whether in board meeting minutes or a memo to file, memorializing the reasons for laying off employees is critical in order to demonstrate that the RIF was not an outgrowth of discrimination, but rather economic necessity. Similarly – take care not to act inconsistently with the established reasons for the layoffs. Evidence of incurring material or unnecessary expenses – or a failure to cut unnecessary expenses – weighs in favor of a plaintiff claiming that her layoff was part of a ruse to conceal the company's discriminatory motives.

Taking deliberate steps to avoid disparate impact discrimination, as well as the appearance of or actual intentional discrimination, will minimize the risk of litigation and liability. And, if you do find yourself in my client's shoes, records demonstrating the steps taken and care given to the process will establish credibility with the EEOC and the court, which cannot be over-valued.

After interviewing the decision makers and other management involved in the process, I filed a written response to the charge of discrimination on behalf of my

client. I genuinely believe my client acted with a clean heart, but the EEOC doesn't care a wit what I think. So, here we are – white knuckled waiting to hear the results of the EEOC's investigation.

If your company is like me and ringing in the New Year on a diet of brown rice and tofu, do yourself a favor. Cut the fat the right way. Call your lawyer, make a plan, write it down and follow it.