

## **PAST PERFORMANCE NEED NOT BE CONSIDERED DURING RIF**

By: Gregory P. Kult\*

January 05, 2004

In *Cerutti v. BASF Corporation*, 349 F.3d 1055 (7th Cir. 2003), the U.S. Court of Appeals for the Seventh Circuit (Indiana, Illinois, Wisconsin) confirms that employers are not required to rely on past performance evaluations when determining who to terminate in a reduction in force, particularly when the employer is attempting to select employees most likely to satisfy newly devised, increased workplace expectations.

According to the *Cerutti* case, in February 2000, BASF Corporation ("BASF") decided to restructure one of its operating units. This resulted in the termination of 23 employees at a manufacturing plant in Joliet, Illinois. Several of those employees filed suit against BASF, alleging that the company unlawfully fired and declined to rehire them on the basis of, among other prohibited factors, their age.

In defending this action, BASF explained that it had developed a new business plan that included the reorganization of virtually the entire unit in question in an effort to "reduce the number of personnel and repopulate the organization with individuals who demonstrated specific behavioral skills and attributes that BASF believed were necessary to [the unit's] future success, and who, going forward, 'could do more with less' in order to achieve the necessary [return on assets]."

Following its offer of a voluntary retirement program to certain eligible employees, BASF assessed all employees (both young and old) who desired to continue their employment with the unit to determine whether they possessed the competencies BASF believed necessary to effectively restructure the unit in question. The plan was to terminate employees who lacked these competencies. BASF retained the services of an experienced outside consultant to assist in the assessment process, however, ultimate decisions were made by selection panels consisting of individuals expected to hold leadership roles in the restructured unit.

In this case, each of the plaintiffs acknowledged that they did not meet the competency standards established by BASF. Nevertheless, the plaintiffs maintained that they were qualified to be retained by BASF because: (1) BASF used a flawed methodology to measure the competency of its employees; (2) their prior performance reviews were positive; (3) many of them were determined competent by the outside consultant but had their scores lowered by the selection panels; and (4) the job duties of employees in the restructured organization and those previously performed by employees were similar.

One of the ways that an employee can prove a case of age discrimination in a reduction in force situation is to show: (1) he is a member of a protected class (at least 40 years old); (2) he was qualified to be retained or rehired; (3) he was discharged/not rehired as a result of the workplace restructuring or reorganization; and (4) similarly situated employees outside of his protected class (or substantially younger) were treated more favorably by the employer. If the employee establishes these elements, the employer must offer a legitimate, nondiscriminatory reason for the adverse employment decision. If the employer does so, the employee must present evidence sufficient to demonstrate that the employer's explanation is a lie.

In *Cerutti*, the court noted that one of the primary purposes of BASF's restructuring process was to "determine whether its current employees possessed the skills necessary to

perform prospectively in a manner consistent with the company's newly devised, increased workplace expectations.” The court determined that BASF was under no obligation to consider the employees' prior written performance evaluations in making this decision. Prediction of future performance was more important than consideration of past conduct.

The court confirmed that employers, not employees or courts, may determine qualifications for a position (as long as the criteria utilized are not unlawfully discriminatory). The court found nothing inherently discriminatory about an employer's decision to use criteria other than past performance evaluations to determine whether its employees can meet the increased workplace expectations that often coincide with a corporate reorganization. Nor was it discriminatory for BASF to allow selection panels (rather than the consultant) to make the final decision as to whether its employees were competent in a given category. In sum, the employees' claims failed because they were not able to demonstrate that they were qualified to be retained.

*Cerutti* provides a good illustration of how employers have a great deal of flexibility in establishing and changing employment standards--and in selecting criteria for employee retention or dismissal--as part of a reorganization. However, all such decisions must be made and carried out in a non-discriminatory manner.

\*Current contact information:

Wooden & McLaughlin, LLP  
One Indiana Square, Suite 1800  
Indianapolis, IN 46204  
(317) 639-6151 ext. 341  
gkult@woodmclaw.com

This article does not constitute legal advice, nor is it a substitute for familiarity with the most current statutes, regulations, ordinances and case law on this topic. Slight differences in factual context can result in significant differences in legal obligations. Consider seeking legal advice with respect to any particular situation.