

The Work Week

Bassford Remele Employment Practice Group



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“You Might Have a Point There”: How Poor RIF Documentation Can Backfire in Litigation

[Andrew T. James](#)

Last month, the Minnesota Court of Appeals issued a significant opinion in *Engbretson*, imparting a sobering lesson on the high cost of unchecked managerial bias and poor documentation during a reduction in force (“RIF”). The Court of Appeals affirmed not just a jury award of \$375,000 for lost wages, but also an award of \$1.1 million in attorney fees and a civil penalty, illustrating the potentially severe consequences when a lack of documentation and stray comments allow an inference of discriminatory motivation.

Daniel Engbretson, who suffered from serious heart- and respiratory-related issues, sued his employer after his position (director of real estate) was eliminated in a RIF. At trial, the jury awarded Engbretson \$375,000 in lost wages. The larger cost, however, was in legal fees: The district court subsequently awarded over \$1.1 million in attorney fees and a civil penalty.

The evidence that supported the jury’s discrimination finding was largely circumstantial, including:

- **Stray Comments:** Engbretson’s supervisor discounted his sick leave, once telling Engbretson, “Either you’re healthy enough to be here or you’re not healthy enough to be here.” Critically, Engbretson also overheard his supervisor agree with another director’s assertion that he was “a more valuable employee” because he did not use the company’s healthcare plan, to which the supervisor replied that he “might have a point there.”

- **Differential Oversight:** After Engebretson returned from FMLA leave, his supervisor began to more stringently monitor his work and his absences. For example, the supervisor at least once input Engebretson's leave time without any request to do so.
- **Changes in RIF Selection Factors:** Upon learning of the RIF decision and reviewing the reasons the supervisor had cited for the employees who were included, the company's human resources department discussed with the supervisor that HR would like "additional supporting details" on certain of the selections in case there were "questions down the road." Only then did Engebretson's supervisor provide a set of "additional supporting details." For example, the supervisor claimed Engebretson was "not . . . as versatile," lacked the "skill set," and had "the least tenure"—reasons mirroring those that HR had previously suggested were typically considered in a RIF selection decision.
- **Lack of Documentation:** Crucially, the supervisor did not maintain any documentation supporting the specific factors that he considered in the RIF.

The Minnesota Court of Appeals affirmed the jury's finding that the employer discriminated against Engebretson based on his disability in violation of the Minnesota Human Rights Act ("MHRA"), concluding that the above evidence and testimony were sufficient competent evidence for a reasonable jury to conclude that disability was a "substantial causative factor" in the termination decision. The Court of Appeals also affirmed the district court's award of over \$1.1 million in attorneys' fees to Engebretson, noting that attorney-fee awards in MHRA cases often exceed the damages awarded due to the complexity and intensity of litigation.

Companies everywhere should consider some simple-but-important precautions in wake of the *Engebretson* decision:

1. **Implement Clear RIF Protocols:** In *Engebretson*, the company's failure to document objective RIF criteria, articulated before the RIF decision was finalized, enabled the jury to view the changed selection factors as pretext for unlawful discrimination. Companies that are considering a RIF should consult experienced employment counsel, and may want to consider creating a RIF protocol containing objective, quantifiable metrics for the selection process.
2. **Discipline and Training for "Stray" Managerial Comments:** A supervisor's casual workplace comments—even those not directly aimed at the plaintiff—can be used as "indirect evidence" of bias, becoming the "substantial causative factor" needed to prove discrimination. This risk is heightened when a company implements a RIF for reasons that are not strongly vetted and are not supported by sufficient documentation. To avoid this situation, employers need to effectively oversee supervisors and managers, impose discipline where appropriate, and consider when training may be necessary or advisable.

3. Carefully Consider Which Employees are Impacted by a RIF: Although employees with documented health issues, including those who have taken protected medical leave, *can* be included in a RIF, companies should proceed with caution when those employees are included. As part of the RIF process, HR or legal should review the personnel files for impacted employees. For example, in *Engebretson*, the supervisor documented in Engebretson’s performance review that, due to “health issues,” Engebretson “was unable to do his self-development.” This comment created a direct, written link between his disability and the company’s performance management. Speaking broadly, employers should scrutinize whether the employees who could be affected by a RIF might be members of a protected class or might have engaged in protected conduct, including considering the contents of their personnel records.

It is easy to look at the facts of *Engebretson* and criticize the employer, but the mistakes made here are frustratingly common—especially when an organization is under the extreme financial pressure of a RIF. These are not malicious errors; they are preventable process failures. A manager under stress, a lack of clear HR documentation, and an ill-advised, off-the-cuff affirmation like “you might have a point there” can instantly transform a necessary business decision into a legal nightmare. But with the right legal counsel and proactive planning, a compliance program can be built to eliminate these all-too-common blind spots. That commitment to process and precision is the essential shield that prevents a RIF from ballooning into a multi-million-dollar verdict.

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