

**Federal Court Report**  
  
**Employee with a Disability Was Not Discriminated Against During RIF**

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AT&T did not discriminate against an employee with a disability by selecting her for a reduction in force (RIF) on two separate occasions. The reductions in force were adverse employment actions, according to the 3rd U.S. Circuit Court of Appeals, but the appeals court did not find sufficient evidence that the first selection was made as a pretext to discriminate against the employee or that there was evidence that the worker was qualified for the position she held at the time of the second reduction.

The plaintiff was a 30-year veteran employee of AT&T who had epilepsy and breast cancer. In January 2016, as a part of a large corporate restructuring, AT&T made selections for an RIF based on scored performance evaluations. In the plaintiff's unit, one-third of the staff, including her, were placed on "surplus" and offered immediate termination with severance or a 60-day window to apply for other positions within the company.

The district court found that the plaintiff's election to stay and seek an alternate position, which she ultimately was hired for, was not an adverse employment action and therefore could not support a discrimination claim under the Americans with Disabilities Act (ADA) or Age Discrimination in Employment Act (ADEA).

The appeals court agreed that the plaintiff did not have sufficient evidence to support discrimination claims under the ADA or ADEA. Nonetheless, the court made a broad statement that a "notice of termination, like the selection for surplus status here, is an adverse employment action even if an employee is given a window of time—small or large—before her actual discharge. Such a notice is adverse without regard to whether the employee is permitted to apply for other positions within the company, or even if she ultimately succeeds in finding another position."

After the plaintiff was able to prove she suffered an adverse employment action by being designated surplus, the burden was then shifted back to AT&T. The appeals court found extensive evidence that the plaintiff's selection was based on neutral criteria and was not a pretext to discriminate against her based on her disability. The plaintiff was unable to offer any evidence in rebuttal, and the court upheld the dismissal of her discrimination claims arising from the first RIF.

After being hired in a new position, the plaintiff almost immediately acknowledged that she was not qualified. When AT&T selected employees for surplus again in October 2016, the plaintiff was chosen and then terminated.

The district and appeals courts agreed that in order for the plaintiff to prove discrimination under the ADA or ADEA, she needed to first prove that she was qualified for her position. As she was unable to do so, her claims of discrimination and failure to accommodate related to the second RIF were dismissed.

The appeals court sympathized with the plaintiff but noted that discrimination laws "do not prohibit employers from terminating employees in protected classes when the termination is a part of a neutral reduction in force."

*Fowler v. AT&T Inc*., 3rd Cir., No. 20-2247 (Nov. 26, 2021).

**Professional Pointer:** RIFs can be considered an adverse employment action under the ADA or the ADEA, so it is important to consider neutral criteria when selecting which employees may be affected.

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