

*Robinson et al. v. Polaroid Corp.*, 567 F. Supp. 192 (D.Ma.1983) (Skinner, J), *aff'd* 732 F.2d 1010, (First Cir., 1984)

In the late 1970s, the Polaroid Corporation was forced to reduce its labor force (RIF). The way they did that was by eliminating jobs. Each department was told the number of jobs it would lose. The department head could determine which jobs would be eliminated, but was instructed to be sure that there was no use of the race of the person in that job to make that determination. Nonetheless, the firm became “whiter” after the RIF, as Rich Goldstein, plaintiffs’ “expert,” showed. Polaroid could not explain how this happened. They called upon LRA to do so.

Everyone was confused about the difference between the job and the employee. Letters had been sent to employees announcing the termination of their jobs. Management considered this effectively firing the incumbents, as they told their attorneys, who related it that way to LRA. We knew who left the company, and requested a list of those to whom termination letters had been sent. Polaroid said they could not provide that list (or copies of the letters themselves). We are not sure why—possibly because the decisions had been decentralized. So we asked for computerized personnel records.

In those records we found a particular date on which many people left the company. On that same date, however, many more people transferred to a different job. This generated a second peak in persons leaving the company, and also a second (smaller) peak in persons changing their jobs. Then there was a third peak in persons leaving the company. What was going on?

Here is where it is important to understand the institutional framework within which events are happening. Polaroid had two categories of worker, hourly and salaried. Hourly workers were unionized. An hourly worker did not lose seniority he had acquired at one job if he moved to another. That held true even if the new job was salaried. A worker retained “bumping rights,” the right to take back a job if the incumbent has less seniority than he does, as long as he, the bumper, was still a Polaroid employee.

From the people who either left the company or transferred on that first date, we identified those that got letters of termination. Remember, it was the *job* that was terminated, not the person. Those with bumping rights exercised them. Some of those bumped had their own bumping rights, creating the next set of exits and transfers. And then there was one more round until all those who had to leave, because of the RIF, did leave. Goldstein had analyzed the wrong employees. The correct analysis of Polaroid’s decisions, the one LRA did, was based on employees who received notice of job termination.

Employees who received letters were different from those who terminated in three respects. First, the people who survived the RIF by exercising bumping rights were older than those who did not. Had Goldstein looked, he would have seen this outcome in age or “seniority.” Second, those who left the company were not representative of the company’s labor structure. Although letters were distributed proportionally between salaried and hourly workers, those who left the company came overwhelmingly from

hourly jobs. Third, more blacks ultimately left the company than received termination letters.

How did this happen, and isn't this what "disparate impact" is all about? It happened because some years earlier, in expansion, Polaroid had adopted an "affirmative action" attitude in recruiting new employees. It tried to have a balanced work force, in terms of "race," and it succeeded. The result was that black employees had low seniority when, a few years later, the RIF occurred. The applicable law—it is important for an expert in litigation to understand relevant law—specifically exempts actions taken pursuant to a "bona fide" seniority system. They are not discrimination.

Once again, the other side's "expert" took the outcome—the diminished representation of blacks in Polaroid's workforce—as an indication of discriminatory actions by Polaroid management. The company was too well known in the Cambridge, Massachusetts area, in which Goldstein lived, as a progressive, "equal opportunity" employer, to base his analysis on the outcome. There had to be a race-neutral explanation. Not even Polaroid management knew what that was, but LRA found it, and the court understood it.