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Employee performance reviews and pretext: A hard lesson from the Tenth Circuit

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By Paul Ross

As veterans of employment litigation can tell you, employment discrimination claims are rarely supported by direct evidence of discriminatory decision making. In the overwhelming majority of cases, employees support their entire case with circumstantial evidence. In short, they attempt to cast as much doubt as possible on the reasons offered by the employer for its employment decision, leaving the jury to conclude that there must be some other, more sinister reason for the decision — illegal discrimination. In essence, they ask the jury to conclude that the employer's stated reason for its decision wasn't the "real" reason but, instead, was pretext to hide illegal discrimination.

Of course, this approach is maddening to employers because it's a judicial process that essentially calls the employer a liar: "Sure, sure, we know what you say under oath, but we'll allow the jury to conclude that you're committing perjury — a federal crime — to cover up discrimination through the employee's use of indirect evidence; evidence that is subject to interpretation and always less than clear." Welcome to federal court employment litigation.

A recent decision by the Tenth U.S. Circuit Court of Appeals (which covers Oklahoma) provides some important guidance to employers about one of the most common forms — indeed, the original form — of pretext evidence: the annual employee performance review.

The performance appraisal problem

In 2005, Boeing sold its local facility to Spirit Aerosystems. Spirit intended to continue operations at the plant and asked Boeing to recommend which of its former employees should be retained. The employee at the center of this case filed suit against Boeing and Spirit after his former manager recommended that Spirit not hire him.

In defense of his recommendation, the manager testified that the employee, when compared to his coworkers, had "limited skills," performed with "low quality" and "low productivity," and had "marginal teaming abilities" — all legitimate nondiscriminatory reasons that would support the decision not to retain him.

Lacking any direct evidence of discriminatory intent, the employee contended that his former manager's explanation wasn't the "true" reason for the decision, but a pretext for age discrimination. To support his claim, he offered his most recent performance appraisal.

His review reflected that he "met all expectations" in every category, including technical skills, knowledge, productivity, quality, and "people working together." The comments section included a statement that he "performed well" and instructed him to "keep up the good work." The employee argued that the evaluation expressly contradicted the reasons offered by his former manager and that a jury should be free to conclude that his age was the true reason for the decision.

The Tenth Circuit agreed and ordered a jury trial on the issue. The court held that the disparity between the employee's written evaluation and the justifications later given by Boeing was sufficient, on its own, to require a jury determination on pretext. Thus, even without any affirmative evidence of age discrimination, a jury will be allowed, should it so choose, to conclude that Boeing discriminated against the employee because of his age. *Woods v. The Boeing Company*, 2009 WL 4609678 (10th Cir., 2009).

Takeaway

Although this case breaks no new legal ground, it's a reminder of employee documentation as critical circumstantial evidence. In that regard, it highlights two important lessons for employers. First, annual employee evaluations are of no assistance unless they are authored with complete honesty. In fact, as this case shows, they can be of significant detriment. Managers must be trained to carefully and thoughtfully review their employees and offer complete and honest feedback regarding performance. They must avoid the convenience of blanket "meets expectations" reviews and the temptation to avoid confrontation with underperforming employees. Otherwise, it's better not to do evaluations at all.

Second, HR professionals and managers alike must consider performance appraisals when contemplating disciplinary measures or other significant employment decisions. Before taking action, evaluate key documents (e.g., performance reviews) to ensure they don't contradict the action or support a "pretext" argument by the employee. If an evaluation reveals an issue, consider alternatives that will aid in building an appropriate record of the performance problems at issue.

Employer decision making will continue to face exhausting scrutiny under the microscope of "pretext" analysis. However, this case is a shining example of preventable pretext problems and should serve as a strong reminder to employers to properly manage your annual evaluation programs.

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Insights › Mike Loftin

Can a Performance Evaluation Constitute Retaliation?

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An adverse employment action, as a prerequisite for a viable retaliation claim, does not have to be an ultimate employment decision—such as termination or demotion. The alleged retaliatory conduct need only have been such that it may have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S.53, 68 (2006). If this standard is met, then the conduct by the employer is "materially adverse" and will support a retaliation claim.

The factors a court can consider in determining whether the employer's actions were materially adverse are:

- the effect the act had on the employee's prestige;
- the effect the act had on the employee's opportunity for advancement;
- the effect the act had on the employee's pay;
- the effect on the employee's core job duties;
- the effect on the employee's ability to obtain outside employment.

The court, in *Metropolitan Transit Authority of Harris County v. Douglas*, 2018 WL 1057629 (Tex. App.—Houston 2018), considered whether an employee's performance evaluation could constitute "materially adverse" conduct to support a retaliation claim. Because whether or not conduct by the employer is "materially adverse" is a fact specific inquiry, the court looked at the factual circumstances surround the poor performance evaluation. The court took the facts alleged by the employee as true because the employer was asking that the employee's retaliation claim be dismissed by reason of failing to state a prima facie case.

Taking the facts alleged by the employee as true, the court noted that the employee's performance evaluation was lowered at the request of her supervisor shortly after she filed her discrimination complaint. Her performance evaluation was lowered from "distinguished" to the lower than any of her six peers. Her lowered performance evaluation was inconsistent with her performance evaluations for the three previous years. Not only did having the lowest performance evaluation among her peers lower her prestige, but it reduced her opportunities for advancement because performance evaluations are an important factor in determining which employees are given opportunities for advancement.

Based on these factors, the court concluded that the lowered performance evaluation "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Accordingly, the employer's motion to dismiss was denied.

This case serves as a reminder to employers that a performance evaluation has the potential to give rise to a retaliation claim. In the aftermath of an employee making or supporting a claim of discrimination, performance evaluations for the employee should be scrupulously objective. If the employee, who was previously consistently given good performance evaluations, is given a poor evaluation, the employer should have a persuasive explanation with objective evidence to support the explanation.

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Employee Performance Evaluations: Keep These Legal Issues in Mind

Employee performance reviews are one of the most effective ways of improving and augmenting your employees' workplace performance. In addition to providing a structured forum for feedback, it also allows for a measurable process of employee engagement. Each company has their own approach to performance evaluations. These reviews can range from being highly formalized and data-based, to more narrative-driven and informal. Your ideal approach will depend on your company culture as well as the type of work your employees do.

Regardless of the format and scope of your employee performance reviews, however, it is important to remember that performance evaluations can create legal risk. An example of such risks materialising is the recent lawsuit filed against Yahoo in which it is alleged that their employee performance review system perpetuated gender discrimination.

What Are the Legal Risks Associated With Employee Performance Evaluations?

Employee performance evaluations do not only provide records of a particular employee's performance over time. In addition to this, it creates an evidentiary record of the employer's engagement with, expectations of, and promises toward an employee. As such, it can leave an employer vulnerable to discrimination and wrongful termination lawsuits.

Discrimination Lawsuits

If your employee performance review records show that you don't treat all employees similarly, you might be facing possible discrimination charges. Such employer discrimination can be intentional or unintentional. Whether or not you are liable for discrimination will depend on whether your varying conduct towards different employees was based upon a protected ground (for example: race, gender, sexual orientation), and whether your conduct caused prejudice.

It is best to completely avoid a situation where you need to prove that your conduct did not amount to discrimination: ensure, across the board, uniform treatment of all employees.

Wrongful Termination Lawsuits

By their nature, employee performance evaluations will require you to express an opinion about a particular employee's performance. This is a good thing. However, it also means that your later conduct toward that employee must be in accordance with the impressions you create in review sessions.

If you act in a way that creates an employee's reasonable reliance on a statement that you are happy with their performance, or that you do not intend to terminate them, you can be liable for wrongful termination if you do so.

This can play out in two ways: firstly, if your employee is not employed at-will, you can only terminate employment with just cause. Your actions and feedback during employee performance reviews can serve as proof of that just cause, or it can undermine your reliance upon just cause. In the latter case, you might not be able to fire the employee if he/she can prove that your employee performance review feedback proves their satisfactory performance.

Secondly, if an employee is employed at-will, you might be undermining your ability to legally terminate employment at any time if you make promises about continued employment during performance reviews.

How to Manage the Legal Risks?

There are a few easy steps that can limit the legal issues surrounding your performance reviews. Standardize your employee performance evaluations to ensure that it is substantively similar for all employees. Reduce the results and conclusions of each review to writing and have employees sign them. Be careful about making any promises about job security that you can't honor. And, perhaps most importantly: consult an employment law attorney.

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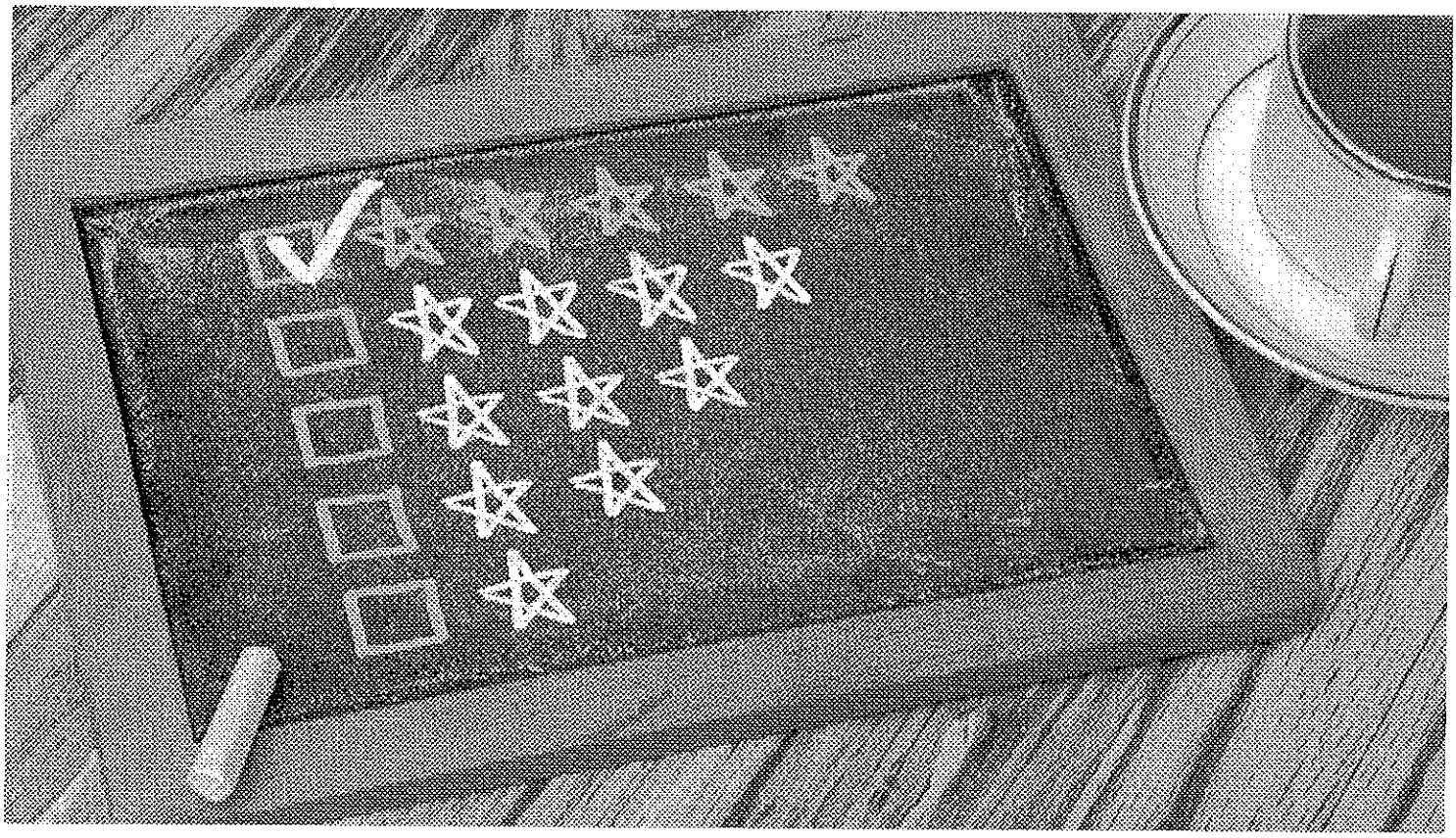
Legal Guidelines for Conducting Employee Evaluations



December 21, 2015
By: Maurice Baskin

When done well, performance evaluations can promote professional growth and offer motivation for employees, while at the same time providing liability protection for the association.

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Association executives must at times consider reducing staff size in order to maintain the fiscal health of their organizations. While sometimes these staff reductions are true "reductions in force"—not based on the performance of the affected individuals, but rather based on a decision to eliminate or outsource certain departments—often association executives will look to cut staff whose performance levels are below expectations.

Of course, a decision to terminate an employee for cause must be made only after great care is taken to ensure that the association is not exposing itself to significant legal risks. In these situations, an employee's past performance evaluations, documented in writing, can serve as the association's best ally or its worst enemy, depending on how effective and accurate those evaluations are.

Conducting proper employee evaluations is not only important for associations that want to minimize their risks when defending employment decisions that are attacked in wrongful-discharge cases, equal employment opportunity ("EEO") charges, and arbitrations. When properly planned and conducted, employee performance evaluations or appraisals also can be an important tool for increasing employee morale, motivation, and productivity. On the other hand, improper employee evaluations can be used against an employer and can subject the employer to an increased likelihood of litigation. In addition, the employee evaluation process may be subject to the Federal Uniform Employee Selection Guidelines (29 CFR Part 1607; see specifically Sections 2(B)-(C) and Sections 4(C), (D), and (E).)

The following are some practical guidelines for associations in developing and implementing an employee performance evaluation or appraisal system that will meet these practical and legal criteria.

Develop the Right Appraisal Form

The most important step in the development of a good performance appraisal form is the development of an accurate and detailed job analysis or, at least, a good job description. The performance appraisal should be directly related to the employee's job description or detailed job analysis, which should be incorporated by reference. In the best situation, the performance appraisal should include specific references to each aspect of the employee's job analysis or job description and rate the employee in his or her performance of each aspect separately.

The evaluation should also distinguish between major and minor components of the job. For example, if your job evaluation form results in a "point" rating, the employee should be able to earn more points for good performance in the major aspects of the job, and fewer points should be allocated for minor aspects. For example, if "written communications" are only a minor aspect of the employee's job, fewer points should be allocated to this aspect of the employee's appraisal than to an aspect of the job which requires a major part of his or her efforts, such as "dexterity in handling tools."

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Train the Evaluators

An employer may have a top-notch appraisal form, but that form is not worth much if the individuals using it are not properly trained. The evaluators should be given written instructions on the purpose and mechanics of the performance appraisal system, emphasizing the importance of accuracy and including information on the potential EEO problems and directions on how to relate the performance appraisal to the job analysis or job description.

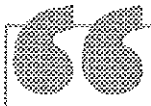
Associations should update these instructions and require evaluators to review them before each series of evaluations. It is important to document that this has been done by, for example, requiring a signed statement from the evaluator that he or she has reviewed the instructions.

Written instructions should be supplemented by group training for evaluators to teach them how to rate employees. This exercise should be helpful in addressing common questions or concerns of evaluators. Also, group training helps the employer lessen the disparity among evaluators.

In addition to written and in-person training regarding the evaluation process, associations should be certain that each evaluator is familiar with both the employees' job duties and how the employees perform these duties.

Develop a Rating Scale

The employee should be appraised in terms of how well he or she behaves in performing each job duty and how well that performance reflects a particular job-related trait. Typically, the evaluator will be allowed to rate the employee's behavior as falling in one of three to five levels, with the lowest level translating to "unacceptable" and the highest level translating to "exceptional." It is preferable, however, to develop ratings that are more descriptive and better tailored to the job and to provide space in which the well-trained evaluator can describe more specifically, if appropriate, how he or she arrived at the rating.



The performance appraisal should be directly related to the employee's job description or detailed job analysis.

Thus, with regard to a general trait such as resourcefulness, the choices available to the rater might range from a lowest rating of "unable to solve problems unless given specific guidance" to a highest rating of "frequently develops creative and original solutions to unexpected and unusual problems," with two or three other degrees in between. This type of specific rating system ensures greater accuracy (particularly with regard to ratings of general traits) than a system that simply rates the employee from unacceptable to exceptional with no explanation of what is meant by "exceptional" resourcefulness and no explanation of how "resourcefulness" might be manifested in the employee's job.

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Also, the appraisal should be based on observed evidence. There should be a blank for "not observed" or "inapplicable" for the evaluator's use where appropriate.

Safeguard Against Inaccuracy

By far the most typical problems that affect the accuracy and reliability of evaluations include a tendency on the part of evaluators to be too easy on employees, to give everybody a middle-of-the-road ranking, or to form a general impression of the employee and give that rating to all aspects of the employee's performance, without distinguishing the employee's strong points from weak points. The evaluator should be cautioned about these potential errors and trained on how to avoid them.

Another safeguard against inaccuracy can be a requirement that the evaluator provide relative rankings, where employees are ranked against each other by ranking all employees from best to worst in terms of job performance or by placing roughly the same number of employees into each of several performance distributions such as upper, middle, and last third. This may be particularly useful where appraisal scores are used to establish merit wage increases. However, such relative rankings are based on the assumption that employee performance will conform to a normal distribution curve. This assumption will not always be true, since detailed training and the degree to which poor performers have already been weeded out by discipline may tend to level out the normal curve.

In the other major type of ranking system, the employee's performance is simply explained in the evaluator's own words or in scores that compare the person's performance to what is expected—without any effort to compare his or her performance with that of other employees. Obviously, unless highly developed, this system is more subject to the rater's tendency to go easy on employees or to score them all at the same level. Accuracy can be improved if this type of appraisal is tied to specific job-related criteria or lists of job duties and job-related traits. A mixture of the best of these systems can be achieved if deviations from what is expected are demonstrated in graphs from which comparisons of employees are drawn.

Ensure Against Evaluator Bias

Associations should emphasize the EEO aspects of employee evaluations in training evaluators, and should caution them against stereotyping employees based on race, sex, age, or other characteristics. Actual observed performance should be the characteristic evaluated. In order to guard against trouble in this area, employers should monitor the evaluations performed by each evaluator and determine whether they consistently rate women or minorities lower than other employees or use language that reflects bias or stereotyping.

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Provide for Cross-Checks on the Evaluators

Generally, the reliability of the appraisal system is enhanced if two or more individuals separately review each employee, or if the first reviewer's evaluation is reviewed by another evaluator who also signs off on the review form. The second evaluator should also have personal knowledge of the job duties and performance of the employee being rated.

Provide for Employee Agreement

Providing a way for the employee to agree that the job duties on which he or she has been rated constitute and accurate and complete list of his or her major job duties can prevent later debates about whether an employee was expected to perform a particular aspect of the job being evaluated. If the employee disagrees with the evaluator's statement of the duties, the employee should be required to explain the disagreement.

Require Employees to Sign Their Evaluations

The employee should be given an opportunity to comment on whether he or she agrees with the evaluator's performance assessment and, if not, to explain the disagreement. The employee should be required to sign the evaluation, even if he or she disagrees, and care should be taken to ensure that the employee's signature is dated. This will help to establish the beginning of a statute of limitations for filing complaints relating to the evaluation and will also undermine the employee's attempt to attack an evaluation with which he or she previously agreed.

Provide for Appeals

Giving the employee a right to appeal a performance appraisal to a higher level of supervision enhances the employee's perception of the job evaluation process as fair and promotes good employee relations, so long as the higher-level review is not a "pro forma" review. Failure to exercise this right of appeal may be damaging to the case of any employee who later attacks the evaluation in an EEO or wrongful-discharge claim.

Also, a right of appeal provides another means by which the employer can assess whether or not supervisors are doing a good job of performing the evaluation.

Establish an Evaluation Schedule

The timing of the evaluation should depend on factors such as the purposes for which it is used and administrative convenience. There should be strict adherence to the evaluation schedule established. It is often advisable to provide for more frequent evaluations of new employees or employees who, for some other reason, are on probation.

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If the evaluator moves to another job or leaves the association, he or she should be required before leaving to complete an evaluation of all his or her employees since their last evaluation. Further, if an employee changes jobs and moves to another supervisor, his former supervisor should complete an evaluation of the employee as of the date of the transfer. This will prevent gaps in the evaluation process and consequent employee complaints that they have not received timely or complete evaluations.

Remember that inconsistency in the timing of evaluations can, like any other inconsistency in employment actions, become the basis for an EEO charge or undermine the employer's reliance on evaluations in its defense of EEO or wrongful-discharge cases or arbitrations.

Review Performance Evaluations for Adverse Impact

If performance appraisals are used as the basis for personnel selection decisions—such as promotions, transfers, or decisions to lay off or discharge employees rather than retain them—the evaluations are subject to the federal Uniform Employee Selection Guidelines. In other words, if the selection process has an adverse impact on protected groups, each component of the process, including the performance appraisal, must be independently evaluated for adverse impact. If it is determined that the performance appraisal is causing an adverse impact, the employer must be able to demonstrate its job-relatedness. If the appraisal cannot be validated through a showing of job-relatedness, the adverse impact must be eliminated through changes in the evaluation or the procedures by which it is implemented.

Follow Procedure Carefully

Follow established procedure to the letter, and carefully refrain from any actions or statements in performance evaluations that connote a guarantee of continued employment. Courts are increasingly finding ways in which employers can be held to have made binding, contractual commitments to their employees. Evaluators should be careful to avoid making such commitments, while at the same time being sure to follow all established procedures.

Tags:

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LIABILITY

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A performance appraisal itself may become the target of a lawsuit. Indeed, no evaluation system is completely immune to the risk of litigation. Even a well-designed system can subject an employer to various liabilities if it is poorly implemented or applied in an inconsistent manner. If they are well written and consistent, appraisals can support disciplinary or termination decisions. However, if poorly implemented they can support the plaintiff's position.

As courts continue to carve exceptions out of the once solid 'at-will' doctrine, employers are facing escalating requirements for proof of legitimate business reasons for many personnel actions.

The employee performance evaluation has become the cornerstone of the employer's defense against discrimination and wrongful termination charges and, as a result, has become one of the manager's most important responsibilities.

Appraisals are Your Greatest Vulnerability When:

1) They are Discriminatory and Inconsistent

An employer may be liable for adverse employment decisions made against employees based on one of many protected characteristics. Today the legal system affords protection to attributes such as age, race, sex, national origin, religion and disability. This cause of action is termed disparate treatment.

Some states also protect sexual orientation and HIV, marital, pregnancy and military status. Performance evaluations become a liability even if they cause an *unintentional* impact on a protected class. Such action is termed disparate impact.

CASE STUDY

Vaughn v. Edel (1990): A discharged black female employee, Emma Vaughn, brought a Title VII action against Texaco, Inc. The evidence showed that, to avoid a discrimination suit, Vaughn's supervisors were told not to confront her about her work. In neither criticizing Vaughn when her work was unsatisfactory nor counseling her how to improve, Texaco treated Vaughn differently than other employees because of her race. While the company's decisions not to criticize Vaughn may have initially appeared beneficial, with objective feedback she might have sufficiently improved her performance so as to avoid termination. The court upheld the jury's $465,000 punitive award.

2) They Become the Basis of a Lawsuit

If an employee is terminated and opts to sue an organization, the first documents the state Labor Commission or the plaintiff's attorneys will ask to see are the performance appraisal reports. Unfortunately, many problems often come to light when these reports are closely studied.

The manager's written comments in performance documentation may be too general, resulting in a review that takes individual strengths or weaknesses out of context or overemphasizes them. Similarly, comments may be ambiguously worded, leading to inaccurate or incomplete discussions of the extent of

performance problems.

CASE STUDY

Chipollini v. Spencer Gifts (1987):
Spencer Gifts claimed that employee Chipollini was terminated because he was uncooperative and could not adapt to changes in the company. Unfortunately, the company could not produce any specific examples of plaintiff's lack of cooperation. The court held that this failure on the employer's part was sufficient evidence of pretext to allow the case to go to trial.

1. They are Too Charitable

Charitable evaluations amount to documentation against the employer! Sooner or later, every manager will probably regret the decision to tolerate charitable performance appraisal. You are effectively maintaining an impression of harmonious employee relations while raising the chances of future legal action against Affinity Group.

By not documenting both good and bad performance accurately, you actually do a disservice to your employees. First, it is clearly not fair to others to fail to distinguish between good and inadequate performance. Second, if an employee is fired or disciplined for incompetence and the case has to be defended in court, an accurate record will be essential.

CASE STUDY

Brito v. Zia Company (1973): The court found that Zia had no controlled appraisal scoring system. Two of three evaluators had no firsthand contact with the employee's work resulting in many evaluations being over-charitable and not at all reflective of the individuals actual job performance.

4) They Are Conducted Negligently

Organizations also face liability from the negligent completion of a performance evaluation. While such cases have resulted in a good deal of academic debate, they have achieved slightly less recognition in the courts.

Incidents that form the bases of evaluations should be thoroughly investigated before making conclusions regarding employee performance, and employees should be thoroughly notified when they receive negative evaluations.

CASE STUDIES

Chamberlain v. Bissell (1982): In this action, a company manager relied on a

performance evaluation to discharge an employee. However, the employee in question was never informed that he would be discharged if his performance did not improve. The court held that the manager breached his duty to use ordinary care in conducting performance evaluations. Because the manager was in a position to give the employee an opportunity to improve, the court held that the manager was negligent in conducting the performance evaluation.

Schipani v. Ford Motor Company (1981): The court held that plaintiff could state a cause of action against his employer for negligence in carrying out performance evaluations. A quote: "...the law imposes an obligation upon everyone who attempts to do anything for another, even gratuitously, to exercise some degree of care and skill in the performance of what he had undertaken, for nonperformance of which duty an action lies."

Appraisals are Your Greatest Defense When:

1) They Offer Clear Documentation of Performance

A manager faces complicated legal issues with almost every employment decision. When accomplished properly, documentation provides written proof of logic, business necessity and equity behind personnel decisions and substantiates management action. Documented proof is helpful and necessary to defend all types of employment-related lawsuits. A jury is often sympathetic to an employee claiming wrongful termination or discrimination by a former employer – and will award their penalty according to this feeling. When faced with an employee performance problem, a manager should document the facts as they occur, always realizing that every memo or evaluation could someday become part of a legal action against the organization or individual manager.

CASE STUDY

Hoffman v. MCA, Inc. (1998): A 54-year old vice-president who was fired for "disruptive behavior" and replaced by a 37-year failed to show that he was discriminated against because of his age. This was despite Hoffman's recollection of comments from other members of MCA, that the company needed "fresh legs" and that Hoffman was "getting old". The company presented significant and well-documented performance records to show that

the firing was because of a accumulation of ongoing behavioral problems.

2) They are Consistent

Consistency is one of the key elements to defending performance evaluation systems against potential discrimination charges. In addition, a consistent evaluation system enables management to discipline or discharge poor performers who happen to be the member of a protected class without constant fear of a lawsuit. It is particularly important to remember that both mitigating or enhancing criteria should be applied uniformly.

CASE STUDY

Beaird v. Seagate Technology (1998): This case is currently pending in the Court of Appeals. Seagate faces claims of age and race discrimination from eight employees who lost their jobs during a large scale workforce reduction. The company used stated criteria for termination in a selective manner and retained employees outside protected categories. Even worse, the organization also allegedly falsified performance evaluation forms of those it chose to terminate and hired new employees for jobs the company claimed were being eliminated.

3. They are Candid and Truthful

Performance appraisals that do not adequately identify an employee's shortcomings can undermine subsequent discipline of a poor performer. In a legal action against an organization, a history of undeserved charitable evaluations makes it difficult to explain to a jury why an apparent 'good' performer was discharged.

The case below demonstrates that a realistic appraisal – no matter how distressing reality might be for your employee – is always the best defense.

CASE STUDY

Jensen v. Hewlett-Packard (1993):
In a victory for employers, the California Court of Appeals held that a performance appraisal cannot be used against an employer because the plaintiff disagreed with its contents. Jensen worked for Hewlett-Packard and received good evaluations for the first two years of employment. Then one of his co-workers was promoted to be his boss. In his first appraisal from his new superior, Jensen received lower evaluations in almost every category. Jensen disagreed with the appraisal and wrote a

12-page rebuttal, but Hewlett-Packard refused to alter the original appraisal document. He sued for libel and breach of good faith and fair dealing. The court noted that it is very common for employees to disagree with the employer's criticisms. But it is illegal only if the employer cannot justify the evaluation and is only giving a good appraisal to avoid potential legal liability. In other words, even if the manager was too critical or if he or she made a mistake, the organization could not be sued.

Appraise Without Fear as a Manager

Managing performance without fear of EEO complaints *is* possible. The guidelines that follow are repeated throughout this program. However, managers who abide by them will face less risk of being accused of illegal practices.

To protect against legal actions, employers should:

- Use the test of 'business necessity' – i.e. only evaluate those areas that are necessary for effective job performance.
- Maintain accurate, up-to-date job descriptions.
- Communicate clear job standards so employees understand what they need to do to get top ratings in their appraisals.
- Don't allow performance problems to continue unchecked; document problems when they occur so you can reference these records in your appraisal preparations.
- Be aware that outside forces (family or health problems) may be contributing to employees' poor performance. However, while you can be aware of such issues, you cannot allow it to justify poor performance.
- Make performance evaluation an ongoing process and have appraisals filed correctly for employee reference.
- Work to establish an office culture in which top managers support their peers' efforts to discipline poor performers.
- Be open to the possibility that employees may not be in the position that best suits their abilities; be aware of the need to rotate employees into different jobs.

A legally sound performance appraisal is:

- An OBJECTIVE job analysis
- Substantive in their coverage of all performance issues
- Consistent – everyone within a job group is treated equally
- Valid in terms of useful information and business necessity
- Evidence-based

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