

Blog Post

A Shield or a Sword? The Role of Performance Evaluations in Employment Litigation

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Performance reviews are intended to provide feedback and identify opportunities for growth. They can also help an employee understand how well the employee is meeting the employer's expectations. But make no mistake – the significance of performance reviews does not always cease at the time of termination. If the employment relationship goes south, performance reviews can develop a second life in subsequent litigation.

After an employee is terminated, it is not uncommon for an employee to claim that the employer's proffered reason for termination was *pretext*, and the real reason for the termination was unlawful discrimination or retaliation. This argument—that the employer's stated reason for termination is a cover up for an unlawful motive—carries significantly less weight when the employer can point to the employee's negative performance evaluations in support of the termination. Performance evaluations are particularly effective in legitimatizing the employer's stated reason for termination if the evaluations showed a decline in performance over time and culminated in termination.

Employees, too, can use performance evaluations to bolster their claims. Expect the plaintiff to scour the personnel file for evidence of pretext. Evidence of

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pretext can include negative treatment that occurred after the employee engaged in activity protected under the law, such as union-organizing, participating in an investigation, or filing a charge. Pretext may also be found where there is heavy reliance on subjective criteria in performance evaluations, where employers have taken different disciplinary measures against different employees who engaged in the same conduct, and where an employer terminates an employee following glowing performance evaluations.

To ensure your performance evaluations not only guide employees, but when necessary, serve as a shield, and not a sword, keep the following in mind:

1. **Be consistent and consider silent implications.** A discrimination claim may arise if employees in a protected class have consistently received negative evaluations whereas their peers with similar performance have not.
2. **Use detailed, objective criteria to measure performance.** Subjective or ambiguous criticism can be seen as pretext for discrimination. Use examples and objective criteria where possible. Focus on behavior, not attitude. In a case out of California, *Xin Lui v. Amway Corp.*, a federal appellate court found suspect that the plaintiff's lowest scores in her performance evaluation (which "served as the central, if not sole, factor in her termination") were in "soft skills" that "cannot be taught" such as "being upbeat." The court stated: "Where termination decisions rely on subjective evaluations, careful analysis of possible impermissible motivations is warranted because such evaluations are particularly 'susceptible of abuse and more likely to mask pretext.'"
3. **Provide the employee an opportunity to comment.** Allowing the employee to respond during the evaluation process can reduce miscommunication and frustration.
4. **Provide achievable goals.** Impossible goals set up the employee for failure and create distrust.

5. **Consider timing.** Conduct performance reviews on a specific schedule and in a consistent manner. Do not suddenly conduct a performance review after an employee has made or filed a complaint, as that can lead to a claim of retaliation. Additionally, beware of suddenly placing an employee under a microscope. As a federal appellate court noted, *Burton v. Freescale Semiconductor, Inc.*, “[e]vidence of a sudden and unprecedented campaign to document [an employee’s] deficiencies and thus justify a decision that had already been made...could raise an inference of pretext.”

Akerman attorneys are available to guide employers dealing with employees who have performance issues.

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