

Performance Evaluations -- A Good Defense to Employment Claims

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Perhaps it's that time of year again in your office- the time when everyone seems to revert to the grammar school gymnasium for report card day. Annual performance reviews seem to generate immediate feelings of uncertainty, anxiety, and defensiveness. Most employees view the performance appraisal process with general distaste.

Employers are equally concerned about how to adequately evaluate their employees. What do I need to convey to my employee? What is the best way to express constructive criticism? How specific do I need to be if there is a performance problem? Can't I just avoid the whole process by simply underlining the appropriate words, "does/does not meet expectations"?

When Swiss Reinsurance America Corp. ("Swiss Re") was faced with similar questions about their employee, Eugene Slattery, their answers ultimately saved them from liability.

In 1993, Swiss Re hired Mr. Slattery as an Account Executive/Assistant Vice President in their New York office. Seven years later, his termination resulted in a lawsuit filed under the Age Discrimination in Employment Act and under the New York State Human Rights Law. Mr. Slattery claimed that he was illegally terminated because of his age and that the company retaliated against him by taking an adverse employment action after he filed discrimination charges. His employer was then faced with the task of rebutting these allegations. Ultimately, the best weapon proved to be the well-documented history of the employer's dissatisfaction with Mr. Slattery's job performance.

The Second Circuit determined on May 3, 2001, in Slattery v. Swiss Reinsurance America Corp., that the employer easily met its burden of demonstrating a legitimate, nondiscriminatory reason for terminating Mr. Slattery by well-documented performance evaluations.

While there is a developing trend among workplace consultants toward abolishing performance appraisals in favor of a different approach and format, if done properly, performance evaluations are still valuable tools in defending against discrimination cases. They also remain an important source of reliable information to help employers determine and support their personnel decisions.

Evaluation Guidelines

New York law does not require that employers evaluate its employees in any formal or informal manner. Nor does New York law require any specific form that must be used if an employer decides to evaluate performance. However, there are some guidelines that an employer should follow to avoid having their performance evaluation process challenged.

--Establish specific performance criteria for the job and then assess the employee's performance based on objective criteria. Use job descriptions if available. Avoid evaluating personality traits (she's aggressive) and focus on specific job behavior (she consistently exceeds her sales quota).

--Train your supervisors and human resource personnel in the art of performance reviews. This will help establish fairness and consistency in the process. Of course it goes without saying that your managers and supervisors should be trained to avoid bias and discriminatory acts.

--Evaluate candidly. Identify deficiencies, weaknesses and areas to improve as well as the employee's strengths. It is a rare employee who performs all aspects of his or her job perfectly, so expect to include some constructive criticism.

--Communicate effectively. Make your meanings clear to avoid any misunderstanding of your expectations.

--Approach the appraisal process seriously and devote sufficient time to do a thorough review; if not, a poorly executed performance review could be more damaging than none at all.

Address Problems

As an employer, your defense to a charge of discrimination will be seriously undercut if you terminate for a specific reason or an ongoing problem, but do not identify or address those same issues in the performance appraisal.

Let's look at Mr. Slattery. He had performed well for the first four years of his employment and received a significant promotion. The company reorganized. His performance then deteriorated. If Swiss Re continued to evaluate him favorably because his supervisor wanted to avoid confrontation, the company would not have been in as good a position to justify its termination. Instead, Swiss Re responded appropriately to the change in performance by identifying the ongoing problems it had with Slattery in its performance appraisals, and it set reasonable goals and timetables for improvement. Mr. Slattery filed a charge of discrimination but the employer's dissatisfaction with his performance had been already documented. When he did not improve, Swiss Re placed him on probation, again documenting his deficiencies. The employer twice extended his probationary period before terminating him. At each interval, the company documented his poor performance and failure to meet company objectives. While employers need not adopt a progressive discipline program, as did Swiss Re, the important lesson is that they documented Mr. Slattery's poor performance and advised him of the deficiencies. The court found that the company had not retaliated against him by firing him.

Employer Protections

Can an employee sue the employer for a negative evaluation? What if the negative evaluation caused an employee to suffer emotionally? New York courts have held that a negative performance evaluation cannot support an employee's claim for damages based on intentional infliction of emotional harm. Also, a negative evaluation is generally insufficient under New York law to allow an employee to resign and seek unemployment insurance benefits under a constructive discharge theory.

Must an employer provide the employee with access to the actual evaluation or can it simply provide a summary? New York law does not require that employees have access to their performance evaluations. The evaluation can be summarized. Where an individual works under the supervision of more than one person, the employer may combine and summarize the results of the reviews, without showing the employee the individual supervisors' underlying evaluations. This provides not only flexibility in the process, but a fairness in the review process as it better provides for a more balanced evaluation.

Must an employee sign the evaluation or acknowledge that he or she received the evaluation? Must an employee be given the right to comment, disagree, or rebut the evaluation? While many employers provide this opportunity to sign and make comments, they are not required to do so under New York law. The advantage to signing the evaluation, however, is that whether or not the employee agrees with it, the employer can prove that the employee has notice of management's view of their performance and the areas needing improvement. When faced with an employee, who disagrees with a review, the employer should control the process, acknowledging the employee's disagreement without re-evaluating or changing the written evaluation.

Documenting performance and counseling sessions are critical steps for employers to effectively defend against charges of discrimination and other post-termination litigation. This helps establish that the legitimate, business reason for terminating the employee was real, and not a pretext. When combined with a corporate culture that supports equal opportunity and a bias-free workplace, employers can readily defend their employment decisions.