EEO MANAGEMENT SOLUTIONS

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Keep it Legal!

By Diane S. Gold, JD

In a legal battle, even emerging as the winner may feel like a half-hearted victory. So much time, money, and emotion may be invested that just concluding the case can feel like a win. Prepare performance appraisals carefully and you'll sharply reduce the risks.

Performance appraisals can be challenged on their own, or used as evidence in legal battles tied to other types of employment decisions. The appraisal itself might be challenged if an employee believes it contains language detrimental to his or her career, reputation, job security, or salary increases. It can be challenged if discriminatory language seems to indicate unfair bias. If an employee is part of a "protected" class, being age 40 or older for example, and an appraisal reads, "Carl needs to show more energy," that remark might be construed as an age-related criticism.

When another employment decision is the issue, such as an employee's alleged failure to be promoted, the employee might point to outstanding ratings to show that he or she should have been promoted. If alleging a discriminatory termination, an employee may likewise point to positive appraisals to show value to an employer. Alternatively, an employer can use appraisals to defend a negative employment decision, such as a termination, demotion, disciplinary action, or undesired transfer.

Stay Away From Challenges

To protect against lawsuits, ratings must be fair, consistent, and based on objective criteria. If lawsuits alleging discriminatory appraisals are to be avoided, consistency between performance

objectives and the rating itself are vital. If, for example, the appraisal doesn't match job objectives, and the employees is rated on elements that were not clearly articulated, the possibility increases that an employee will yell foul play and allege that the rating is unfair. The employee may question why the rating is "unfair" and, if there is no clear basis for it, the employee may assume the rating is lower and/or negative due to race, religion, sex, national origin, etc.

As long as rating elements are objective and not subjective, a manager will have and easier time defending a rating that has been challenged. If an employee is rated on "friendliness," what does that really mean? What is friendly to one person might be excessive to another. Rating anyone on that criterion is inherently subjective and difficult to measure. Examples of more objective evaluations include measuring how many closings a salesperson has made, how often a copywriter has met editorial deadlines, or whether a vice president has brought projects in on budget 90 percent of the time. While it's not always possible to quantify rating elements in numbers, aiming for objectivity makes it easier for managers to prepare rating easier for employees to understand them. It may also keep you out of court.

Without measurable criteria, defending a rating can get tricky. Subjective criteria, such as attitude, personality, demeanor, and enthusiasm, can lead to discrimination suits because employees might have a harder time understanding what the supervisor wanted. Additionally, the employee will be more likely to believe he or she is being rated unfairly, misjudged, or discriminated against. While it's not always easy to be 100 percent objective in measuring every employee, seeking objectivity as a clear standard will limit the possibility of legal trouble.

It's also vital that supervisors keep a running file of notes on their employees' performance. This ensures a contemporaneous performance record with specific examples to cite. With careful records in hand, supervisors won't have to dig into their memories. It's also more likely that they will produce an appraisal that fairly reflects the whole appraisal period, not just the recent events. Having this documentation becomes critical if the rating is ever challenged.

EEO Compliance

Staying out of legal trouble means rating employees equitably, based on their skills and abilities. With performance

ratings, as well as all other employment decisions, it is against federal law to consider an employee's race, color, age, sex, religion, national origin, pregnancy, or disability what evaluating performance. These are federally protected groups. There are often state, county and/or city laws, local rules and ordinances that must be followed. There is no substitute for effective training about the law. When it comes to the law, there is no such thing as second best! In developing appraisals, it's critical to consider only the appropriate factors, such as skills and specific examples of performance. The most legally damaging comments in an appraisal blatantly indicate that the rater has considered an employee's race, sex, religion, etc. *The focus must be on the performance only.*

Likewise, no factor should be construed as favoritism. Favoritism occurs when employees are rated more positively simply because a supervisor likes them, shares a personal friendship with them, or is attracted to them. Legal troubles can similarly be triggered by ratings that factor in personality conflicts with employees being evaluated. How much an employee is liked or disliked does not belong in the appraisal process. Factoring such feelings into the process is a legal slippery slope. Supervisors may like employees who are similar to themselves. They may feel more comfortable around them and are better able to relate to them. But these feelings must be kept in check to prevent claims of bias down the road.

The High Cost of Inflation

Sometimes discrimination suits are brought specifically as a result of a challenged rating. At other times, different employment issues are the crux of the matter and performance ratings are used as evidence of the unfair treatment or lack of rater credibility.

When termination is the primary issue, courts may rely on the lack of a negative written performance rating or other written documentation to cast doubt on an employer's defense to the challenged termination. In the case of a plaintiff arguing under the Age Discrimination in Employment Act, the 1967 Federal law prohibiting age-based job discrimination for those 40 and over, the court reasoned that the employer's defense that the plaintiff was a poor performer was not substantiated by written ratings. The court ultimately concluded that using poor job performance, as a reason for his RIF, was "an afterthought."

Positive performance appraisals are often used by plaintiffs in employment cases to show that they are worthy employees who do not deserve undesirable treatment. An employee questioning a demotion or low monetary award will undoubtedly use positive performance ratings to prove that negative action is unfair and unwarranted. Here, again, the bottom line is to focus solely on performance. Documentation of specific examples of performance is essential to support solid ratings. Managers can get into trouble if they inflate ratings, then find that their hands are tied when it's time to let someone go. In a case of discriminatory termination, employees challenging the termination who have a history of positive ratings can be expected to use these ratings as evidence that they are now being treated unfairly.

What the Courts Say

In analyzing discrimination cases, including cases involving performance appraisals, courts follow legal analyses and case law that has been developed pursuant to Title VII of the Civil Right Act of 1964. Three basic steps are required to prove a case of discrimination. First, the employee is required to prove a *prima facie* case that is considered to raise an inference of discrimination. Second, the employer must come forward with a reason for taking the action in question. Third, in order to prevail on his or her claim, the employee must establish that the employer's reason is not valid, or is merely a pretext for a discriminatory motive. Following is a closer look at these steps, especially with respect to a case alleging a discriminatory performance rating:

Establishing a *prima facie* case of prohibited discrimination means the employees must prove three factors:

1. They are part of a protected class.
2. They have suffered an adverse employment action.
3. They have been treated less favorably than someone who is similarly situated who does not belong to their protected class.

Initially, employees are members of a protected class when they are protected by specific federal, state and/or local laws. Although state and local laws vary, federal law protects individuals from discrimination on the basis of race, color, sex (including pregnancy), religion, national origin, age, and disability.

When Is a Bad Appraisal an "Adverse Action?"

As the second factor of a *prima facie* case, employees must prove that their rating constitutes an "adverse action." Poor performance appraisals, along with other business decisions that might make an employee unhappy, aren't necessarily considered adverse actions. Courts generally look at whether the action at issue is a "tangible employment action" that amounts to "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." While a lower than expected rating itself may not rise to this level, the negative monetary effect of such a rating, such as a lower bonus, cash award and/or salary, can often be considered an adverse action for the purpose of establishing a *prima facie* case.

For instance, in a Washington, D.C. case in which the plaintiff received a bonus of $807 based on a rating of "excellent," instead of the $1,355 bonus that her co-worker received with a rating of "outstanding," the court determined that this difference constituted an adverse action for the purposes of presenting a prima facie case of discrimination under the Title VII.

To complete their *prima facie* case, employees must show that they were treated less favorably than someone in a similar position who is not of their same protected group. If employees can prove all of the elements of the *prima facie* case, the burden then shifts to employers to defend their decision.

Employers should keep in mind, and employees should be aware, that when articulating a legitimate nondiscriminatory reason, credibility will be given to a performance record that is contemporaneous with actual performance. Likewise, it is important to note that courts will frown upon documentation of poor performance made after the fact. Created after an appraisal, such documentation might actually be viewed as trying to cover up a rating that was not based on appropriate or lawful criteria.

When Is an Inconsistent Rating Discriminatory "Pretext?"

After a *prima facie* case is established, a presumption is raised that the motivation behind the employment action was "prohibited discrimination." (*McDonnell Douglas Corporation v.*

Green, 411 U.S. 792 (1973)). At this point the employer has the opportunity to overcome the presumption by articulating a valid reason for taking the action (*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). If the employer gives such a reason, the employee can introduce evidence tending to prove that the employer's reason is not valid and is really pretext, and that the real motivation was the prohibited discrimination as alleged. "Pretext" when discussed in the context of ratings means that the employer is not being truthful and that the actual reason for the negative employment action is either discriminatory or otherwise unlawful or inappropriate.

One way an employee can show pretext is to provide evidence that a rating is inconsistent. Ratings can be inconsistent in two ways. First, a rating can be inconsistent with respect to an individual's performance. Either the rating is better than the performance warranted, and that person might be favored, or the rating is worse than is merited by the performance and that person is disfavored. Second, a ratings process can be inconsistent when only some employees receive ratings, when employees with similar jobs are being rated on different criteria, and when some employees receive extensive explanatory verbiage on their ratings while others have minimal comments or feedback.

When ratings are inconsistent, there is inequity-and perhaps grounds for legal problems. If a lawsuit is pursued a court may find that "[d]eviation from established policy or practice may be evidence of pretext." Once a court finds that the employer's defense is pretextual, it can infer that the employer is trying to cover up a discriminatory motive. In discrimination cases, courts have ruled that if an employee who suddenly gets a bad rating has a new supervisor, pretext won't be proven by the sole fact that the new supervisor's expectations differ from those of previous supervisors. Courts will also look at substantial changes in an employee's work responsibilities as an explanation for a deviation from a pattern of appraisal that has generally been positive.

For an employee to prevail, he or she has the burden of proving the truth by a "preponderance of the evidence" in the record. A "preponderance of the evidence" is "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." *U.S. Postal Service Boar of Governors v. Aikens*, 460 U.S. 711 (1983); *Furnco Construction Company v. Waters*, 438 U.S. 567

(1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)).

Special Considerations

Disability

Sometimes an employer gets into legal trouble as a result of talking with an employee about a bad rating. When employers surmise that a bad rating might be the result of a mental or physical problem, they need to guard against asking questions that could reveal a disability. Any questions relating to employee health can be interpreted as disability discrimination in a courtroom. However, if the employee reveals and/or explains that he or she has a medical issue that requires attention, the supervisor should handle the matter with sensitivity and refer the employee to personnel who are trained to handle these types of issues (that is, counselors, nurses, Human Resources, etc.). The focus for the supervisor should be on the performance deficiency itself, and not on the speculation about why.

Retaliation

Retaliation claims arise when employees allege they received a lower appraisal than they would have otherwise received because they filed an EEO complaint or engaged in other activity that is considered to be "protected." Employers need to be particularly careful in fairly rating an employee who has engaged in such activity and should keep in mind that it is generally easier to pursue a successful retaliation claim than to prove the initial claim of discrimination itself.

In order to prove a retaliation claim, employees must prove:

1. They engaged in a protected activity.
2. Their employer was aware of the protected activity.
3. The employer took adverse action against them.
4. There was a casual connection between the protected activity and the adverse action. (*McKenna v. Weingberger*, 729 F.2d 783, 790 (D.C. cir. 1984). Demonstrating that the adverse action followed the protected activity within a short period of time is one method of making this casual connection.

Plaintiffs' attorneys who are claiming unlawful retaliation will scrutinize a rating that is received subsequent to the filing of an EEO complaint. If the rating is lower than in prior years, or the language reflects hostility or a previously absent critical tone, there is often

fertile ground for a now EEO complaint based on the rating. After an employee files a discrimination charge, or is otherwise involved in a discrimination case, supervisors must take special care to treat that individual fairly. It might be particularly difficult to focus on fairness when there's a perceived unjust challenge, but supervisors must work to keep any acrimonious feelings in check.

Team Evaluations

Of major importance for supervisors is that all individual s participating in evaluations understand and are trained in the process, as well as EEO laws, documentation, and consistency. Should the appraisal and/or appraisal process ever be challenged, a derogatory or otherwise inappropriate comment by one of several evaluators could be seen to taint the entire process.

E-Mail and Other Documentation

When a performance appraisal is challenged in court, a plaintiff's attorney will be able to access and review a wealth of information, any or all of which could help shape the ultimate determination. The documentation reviewed might include prior performance appraisals, other employees' appraisals, and memos and e-mails concerning performance. It's important to note that e-mails are frequently the evidence of choice in employment discrimination cases because people generally take less care when writing an e-mail than writing official correspondence on company letterhead. Take heed, or your hard drive may show up in court.

The Bottom-Line

Consistently applied and up-to-date policies and procedures, preventive measures in the form of EEO training, and a general work environment of respect and professionalism go a long way toward limiting claims and reducing liability if a manager's actions are challenged.

Test Your Legal IQ

Supervisors

- ☐ Are the right rating factors objective?
- ☐ Do employees understand what is expected of them?
- ☐ Are you documenting performance during the entire rating period?
- ☐ Are you communicating with employees about their performances during the rating period?
- ☐ Are you spending the same amount of time and attention on each employee's performance?
- ☐ Have you received training on implementing the performance process?
- ☐ Have you received basic EEO training?
- ☐ Is your appraisal free from extraneous comments and personal opinions?
- ☐ Do you give specific examples on the appraisal to demonstrate employee's strengths and/or weaknesses?
- ☐ Are you rating performance solely on the bases of skills and abilities?
- ☐ Are you favoring or disfavoring any employee for reasons unrelated to that employee's performance?
- ☐ Are employment decisions regarding employees consistent with their ratings?
- ☐ Do employees have the opportunity to review and respond to appraisal?

- ☐ Are ratings consistent in process and procedure throughout your organization?
- ☐ Are ratings give a second look (and signed) by a more senior manager?

Employees

- ☐ Do you update your supervisor on all work?
- ☐ Do you ask for clarification when you need it?
- ☐ Do you understand the performance expected of you?
- ☐ Do you know why you receive the ratings you do? Do they seem fair?
- ☐ Do you track your own progress?
- ☐ Do you maintain copies of your work products?
- ☐ Do you initiate conversations with your supervisor on your performance throughout the year?
- ☐ Were your goals clear at the beginning of the performance cycle?
- ☐ Do you take responsibility for your performance?
- ☐ Do you work at full capacity/try your best?
- ☐ Do you understand the appraisal process at your organization?
- ☐ Do you have an opportunity to respond to your performance reviews? Do you respond in writing?
- ☐ If necessary, what have you done to improve your performance?

☐ If you have conflicting views with your supervisor, do you back up your perspective with specific examples?

☐ Was there enough time allotted for you performance discussion?

☐ Do you receive feedback all year?

☐ Do you have the opportunity to review your appraisals in advance, or at the beginning of the meeting?

☐ Do you receive a copy of your performance appraisal?

☐ If you have concerns, do you share them with the Human Resources department?