

management matters

Performance Evaluation: Good Management, Good Defense

By Jonathan A. Wexler, Esq.

Performance counseling and evaluation: It is something many managers find downright uncomfortable. Criticizing a subordinate's work product and conduct, whether in the context of a formal, annual performance appraisal or at any other time, is an unpleasant prospect. However, performance management is a very important practice—to motivate your employees to do their best work, to lay the groundwork for discharge in case your counseling efforts fail, and to present a defense for employment litigation.

Establish Standards and Document Results

Performance management is built on several basic principles. First, employers must establish and communicate performance and conduct standards to their employees so that employees can learn what is expected of them and employers can reasonably "hold" employees to those standards. Job descriptions, company policies, and written goals with objective criteria for measuring success are useful tools in this regard.

Second, employers must be diligent in supervising and counseling employees with ongoing feedback throughout the year. Feedback should be specific and calculated to inform the employee precisely where he or she has failed to meet expectations. Supervisors should document in writing the conversations they have with employees about performance issues and provide copies to the employee, perhaps having the employee acknowledge receipt of the memos in

writing. In this way, employees cannot credibly claim that they were never informed of their performance problems.

Third, employers should conduct regular written performance evaluations. While managers often give employees higher ratings than they deserve, an inflated appraisal fails to accomplish any of its potential purposes. It does not give the employee an accurate picture of his or her shortcomings and what improvement is necessary, and it fails as a defensive tool as well.

Practice Progressive Discipline

When your best efforts at getting an employee to improve his or her performance have failed, disciplinary action should be implemented in a consistent and fair manner. Discipline should be progressive in nature, starting with a verbal warning and moving to more serious actions such as written warnings, suspensions, and eventually, discharge. This process gives employees an opportunity to improve while allowing employers to assemble a record that will support employment termination if eventually necessary.

While employers should avoid committing to rigid disciplinary steps, a company's disciplinary practices should be consistent. In other words, employees who are similarly situated (tenure with the company, level in the organization, and nature of infraction) generally should be treated similarly. The human resources manager, administrative partner, or other appropriate person should be consulted prior to imposing any disciplinary action to review the proposed action for consistency with past practice. Disciplinary action should be documented, and the documentation should be retained in the employee's personnel file.

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Defensive Value

In addition to its use as a tool for guiding and improving the quality of your employees' work, effective performance management can play an important role in defending against employment discrimination litigation. Because there is rarely direct evidence of employment discrimination—such as a "smoking gun" statement made by a supervisor about, for example, the race or age of an individual being discharged—most plaintiffs seek to prove discrimination with circumstantial evidence. This generally involves showing that the plaintiff suffered an adverse employment action (e.g., discharge or failure to be hired) that occurred under circumstances giving rise to an inference of discrimination (e.g., someone in the protected age category was fired and replaced by a younger person).

To rebut such a claim, an employer must put forth a legitimate, nondiscriminatory business reason for its actions, such as an economically motivated layoff or a discharge for poor performance. After the employer offers its legitimate reason, the plaintiff will seek to establish pretext (i.e., that the employer's proffered reason was a lie and that the real reason was a discriminatory one). It is here that effective performance management practices can be of great value.

If an employer states that an employee was fired for ongoing poor performance

and that employee has three years of excellent performance evaluations in his or her file, the employer will have much explaining to do. On the other hand, if an employer can produce memoranda addressed to the employee which pointed out performance deficiencies and gave the employee an opportunity to improve, along with formal performance evaluations that accurately reflect the employee's performance problems, a court will be much more likely to believe that poor performance was the actual reason for the discharge. It is for this reason that evaluations must be honest and accurate. Employers should not "sugarcoat" identified deficiencies, but should explain them fully.

Various courts have dismissed discrimination claims when an employer's performance management practices included progressive discipline. In the 1998 case *Gray v. Robert Plan Corp.*, the federal court for the eastern district of New York granted summary judgment dismissing an age discrimination claim in view of the fact that the employee had been given a series of verbal and written warnings. The court found that this amply supported the employer's explanation that the employee had been discharged for poor performance. Also, numerous courts have stated that they will not sit as "super-personnel departments" that reexamine an employer's business decisions. ▀

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