



JULIE A. UEBLER

Julie Uebler is a litigator, mediator, and investigator of employment law-related matters in the greater Philadelphia region. She spent the first part of her legal career representing employers: first, in a large Philadelphia law firm; and then as in-house counsel for a global pharmaceutical company where she had responsibility for all corporate and U.S. employment, employee benefits, and executive compensation matters. Julie made the switch to representing individuals when she opened a solo practice in 2003, and has been focused on making a difference in the work lives of individuals ever since.

HOW THE PERFORMANCE REVIEW CAN MAKE OR BREAK YOUR DISCRIMINATION CASE AND WHAT TO DO ABOUT IT.

By Julie A. Uebler, Esq.

Although there always seems to be a new opinion out there on how or whether to implement the annual performance review, it's hard to imagine the modern workplace without some sort of performance evaluation system. The way in which Human Resources teams structure, and supervisors implement, performance reviews can often impact the risks of employment litigation – for good and bad. This article will highlight the legal risks associated with poorly administered performance reviews, identify how such evidence can be used as a sword by employees in litigation, and identify practical steps employers can take to reduce those risks.

IS THERE EVIDENCE OF DISCRIMINATION LURKING IN YOUR COMPANY'S PERFORMANCE REVIEWS?

When a prospective client comes to my office for advice relating to potential discrimination claims, I always ask to see his or her most recent performance reviews. Sometimes, if the employee was terminated for “poor performance,” the reviews reflect a thoughtful, objective recitation of the ways in which the employee has not met the employer's expectations over a period of time despite notice of the need to improve. In those cases, I usually remind the terminated employees to file for unemployment, and wish them well in their job searches.

More often than not, however, the performance reviews themselves provide potential evidence of discrimination or retaliation – either directly or in the way in which they were administered.

For example:

- A review in which the manager complained that the employee's time off had been “disruptive” to the team, where he had taken intermittent FMLA leave for medical treatment.
- A review of a long-service employee by his new manager that he was “resistant to change” or was “not as productive” as expected.
- A review of a relatively new sales person who met all her production quotas, but who was criticized for being “abrasive” or “judgmental” in her communications with colleagues.

In those situations, I usually investigate the case further, and the performance reviews can become evidence in FMLA retaliation, age discrimination, and/or gender discrimination claims, respectively.

In addition to finding arguably biased statements in the reviews themselves, I also often see evidence of bias where the same manager has a sudden change of heart about an employee that

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may have been precipitated by a change in circumstance. For example, the office manager who was praised for her boundless energy and attention to detail, but is then questioned about her work ethic shortly after announcing her pregnancy. Or, consider the newly promoted supervisor who was identified as an effective leader whose next review identifies her as having strained relationships with her peers in the aftermath of filing a sexual harassment complaint about a co-worker.

WHAT CAN EMPLOYERS DO TO REDUCE THE RISKS OF BIAS IN THEIR REVIEWS?

Implement checks and balances. At the risk of adding extra work to the piles already on the plates of hardworking Human Resources professionals, in-house counsel can remind employers how they can reduce risk by requiring an HR professional to review performance evaluations before they are delivered to employees. A little extra investment up front can save employers a big headache in the form of a lawsuit later. Alternatively, with some training or guidance, supervisors can serve this role for each other, whether at a peer or higher level. More and more, we are seeing diversity programs at companies recommending that managers proactively address language that can suggest bias. For example, encouraging men and women to speak up and acknowledge that a new idea originated with a female colleague if the group is inadvertently following up on it only after a male team member articulates the same idea. This dynamic can work in reviewing each other's performance assessments as a way to spot any red flags.

Require examples. The stereotypes contained in performance reviews, such as the phrase "resistant to change" as applied to an older worker, or "abrasive" as applied to a woman, will often lose their value as evidence of bias if the supervisor can identify specific examples to explain the subjective assessment (better yet, use the examples, and skip the subjective perception). The other way to look at this is to require supervisors to evaluate the employee's performance, not his or her personality. Even when a performance assessment tool calls for the supervisor to rate both "objectives" and "core competencies," the rating should reflect what the employee demonstrated within the "competencies," not character assessments. We are not supposed to tell our kids they are "lazy" when we mean we are disappointed they did not turn in their homework assignments regularly. The same principle applies for performance reviews at work.

WHEN CAN AN EMPLOYER'S OWN PROCESS MISTAKES CREATE EVIDENCE OF PRETEXT?

In my practice, I am regularly confronted with the question of how to prove an employee has been subjected to discrimination. Sometimes, building a case to prove discrimination is less about direct evidence or biased statements, and all about a company's inability to explain any legitimate reason for actions it has taken – or not taken – with respect to a client.

Many times, a plaintiff's attorney will rely on an employer's failure to follow its own process as evidence of disparate treatment. This happens more than you think, and these are just a few recent situations I have personally observed.

CIRCUMSTANCE: The instructions on the performance review form require the supervisor to complete the comment section if the rating on any performance measure is exceptional or below expectations. Employee A received multiple performance ratings that were below expectations but the comment section is blank.

PROCESS MISTAKE OBSERVED: This leaves room for me to argue that there were no legitimate business reasons for the rating or they would have been identified on the form at the time as required.

CIRCUMSTANCE: The employer's written performance management policy includes an appeal process allowing the employee to appeal a negative rating to the department head. The employee appeals, and never receives a response.

PROCESS MISTAKE OBSERVED: This leaves room for me to argue that the discriminatory supervisor did not follow the process to hide her bias, and/or that the employer had no legitimate reason to deny the appeal, or it would have been articulated as part of the procedure.

CIRCUMSTANCE: Every manager is required to identify developmental goals for each employee to focus on during the next performance cycle. An older employee's supervisor has left that section blank two years in a row without explanation.

PROCESS MISTAKE OBSERVED: This leaves room for me to argue that the supervisor did not want to invest in the employee's development because of his or her age.

Of course, the only fix to these process mistakes is not to make them in the first place. If an employer is unable to consistently follow its own administrative processes relating to reviews, then it should revise and rescale its commitments.

DO YOUR EMPLOYEES PERCEIVE THE PERFORMANCE REVIEW PROCESS AS UNFAIR?

We all know it is not illegal for an employer to be unfair, right? Or, to be mean or short-sighted or implement a decision that makes no business sense? Technically, that is correct. Even so, the question of whether the employer treated an employee "fairly" will be a theme in most discrimination cases.

Is your performance review process implemented fairly? When new managers conduct reviews for a new team the first time, are the supervisors encouraged to communicate their expectations, and how they may differ from the prior supervisors? Do you encourage your employees to prepare self-evaluations as part of the review process, but then allow supervisors to all but ignore them? Do you include an employee comments section on the review, but then put the finalized review in the file without examination or action?

WHAT STEPS CAN EMPLOYERS TAKE TO IMPLEMENT A FAIR PROCESS?

1. Encourage honesty and manage expectations. One of the most common ways in which performance reviews can become evidence in discrimination cases is when a new supervisor is introduced who happens to be outside the employee's protected class, and rates the employee's performance much lower than a prior supervisor. If the company's culture allows supervisors to avoid difficult conversations about performance deficiencies, the employer is going to have a hard time defending itself when the employee's actions remain the same, but his poor performance becomes a big enough problem that action is required. Instead, create a culture that encourages honesty.

A change in supervision is unsettling for even good performers. Encouraging a manager to invest time with a new team to set (or reset) expectations can go a long way to preventing perceptions of bias when a new manager rates people differently.

2. Make coaching and feedback an on-going conversation. I vividly recall a conversation I had with a fellow junior associate about performance reviews when I first started practicing law. I expressed the view that if the associate was surprised by negative performance feedback in his review, then the manager was not doing his job correctly. What a radical idea. I continue to believe that the element of surprise has no place in the performance management process, and will be used against an employer whenever possible. ("If the supervisor had advised Employee A of the allegedly egregious mistake at the time it happened, it could have been addressed. Instead, because of supervisor's bias against Employee A, supervisor preferred to allow her to struggle, and set her up to fail.")

A potential problem with many review processes is that they try to do too much all at one time. The performance review cycle may seek to satisfy many needs. According to research recently published in their book "Thanks for the Feedback: The Science and Art of Receiving Feedback Well," Shelia Heen and Douglas Stone identified three purposes of feedback: appreciation (what you do matters); coaching (helping you get better); and evaluation (how you are rated against standards). Many performance review processes, especially if they are conducted annually, attempt to address all of these goals in one review at one time. Employers may be better served if they created a structure to encourage (or

even require) periodic check-ins for the purposes of appreciation or coaching, and left the rating process to a separate assessment. Another option is to require assessments or ratings more regularly to allow flexibility and adjustment throughout the year. For example, IBM recently announced a decision to replace its prior annual performance review system with a program in which employees set shorter goals and are rated quarterly.

3. Invite active participation by employees and follow up on employee comments. Another way to improve the perception of fairness in the performance review process is to invite employee participation. Employee involvement can come in many forms, including encouraging workers to speak up when a goal needs to be adjusted, to pass along praise from colleagues or clients as it comes in, or proactively seeking support or guidance when tasks get off track. Self-evaluations can also be useful, as long as they are reviewed and incorporated into the discussion. When I see a supervisor's comments on a review for an employee that are starkly different than the employee's self-assessment, and the supervisor has not acknowledged the disparity, it raises a red flag.

Also, if you invite employees to populate an "employee comments" section in a review, don't forget to review and follow up on it. I once had a case in which an employee explicitly identified concerns that her boss was treating her differently because of her age, including dates in which he made age-biased statements, in an employee comment box on her annual review. As required, the employee sent it to HR located at another office, and it was promptly filed in her personnel file without any follow up or investigation. When we later sued for age discrimination after her termination for allegedly poor performance, guess what was Exhibit A?

Employees may never reach a point where they enjoy receiving performance reviews, but with a little investment of time and effort, employers can make sure those reviews do not appear on an exhibit list someday.



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