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The Role of Performance Evaluations In Employment Discrimination Claims

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Employment discrimination lawsuits often turn on the employer's state of mind. Did the decision maker act for discriminatory reasons? Or was the decision based on factors having nothing to do with the plaintiff's membership in a protected class? As the state Supreme Court put it, "direct evidence of intentional discrimination is rare," so "such claims must usually be proved circumstantially." *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 354 (2000).

A plaintiff's performance reviews can provide powerful evidence of the reasons behind an employment decision. A history of negative reviews lends

credence to an employer's claim that an employee was fired for poor performance. On the other hand, an employee can point to positive reviews as proof that the employer's stated reason for the termination is actually a pretext for discrimination.

California follows the framework for adjudicating employment discrimination claims established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under California's articulation of the "McDonnell Douglas Test" in *Guz*, "the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive."

If the plaintiff meets this burden, the employer must produce evidence showing "that its action was taken for a legitimate, nondiscriminatory reason." The plaintiff must then prove that the employer's explanations for the employment action are "pretexts for

discrimination." As a consequence, the validity of the employer's stated reasons for terminating an employee are crucial to the outcome of an employment discrimination case. In fact, "[i]n an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias."

Virtually any employee's evaluations may someday become evidence in a lawsuit because California law protects a broad range of people from employment discrimination. The Fair Employment and Housing Act prohibits discrimination based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation."

A Sept. 7, 2010 decision of the California Court of Appeal, *Sandell v. Taylor-Listug Inc.*, 188 Cal. App. 4th 297 (2010), illustrates the dangers to employers in providing overly generous performance evaluations.

In 2004, Taylor-Listug, a manufacturer of acoustic guitars, hired Robert Sandell as its vice president of sales. As a result of a stroke that he suffered six months after starting with the company, Sandell used a cane to help him walk. In 2007, Taylor-Listug fired Sandell on the grounds that he lacked leadership skills and was not producing satisfactory sales results. Sandell sued for employment discrimination, claiming that he was fired because he suffered from a disability. The trial court granted summary judgment in Taylor-Listug's favor and Sandell appealed.

The appellate court rejected Taylor-Listug's claim that Sandell was not disabled and therefore could not sue for disability discrimination. Federal law does not consider the need to use a cane to be a disability because it is not a "substantial limitation" on one's activities. *McDonald v. Coldwell Banker*, 543 F.3d 498, 505 fn. 6 (9th Cir. 2008).

Yet under California's standard, an individual is disabled if he or she suffers from any condition that "'limits' a major life activity," whether or not the limitation is substantial. Since walking is a major life activity, the use of a cane is considered a disability under California law. As a result, the appellate court determined that Sandell fell within a protected class.

The appellate court also ruled that Sandell had produced sufficient evidence that the stated reasons for his termination were pretextual, and so he was entitled to a jury trial on his employment discrimination claim. In reaching this conclusion, the court relied heavily on the three annual performance evaluations Sandell received during his employment. Taylor-Listug had attempted to use the reviews in support of its contention that it had a legitimate, non-discriminatory reason for the firing, claiming that the evaluations documented "multiple problems and concerns." However, the court concluded that the reviews supported Sandell's employment discrimination claim for the following reasons:

Although though two of Sandell's performance reviews contained negative comments, and his last review indicated that his performance "must improve" in three of eight performance areas, the reviews were on the whole favorable to Sandell. His 2006 review, which was the least favorable, contained several negative comments, including that Sandell "does not have the drive that this position requires." However, the overall comments at the end of the review were positive, noting that Sandell

"contributed positively to the company," and is "generally on top of what is happening in sales."

Alongside the negative portions of the review, Sandell's reviewer had included several comments suggesting that the stated problems were attributable to forces outside of Sandell's control. For example, in Sandell's 2004 review he received a "must improve" in the "results" category, but in the accompanying comments his supervisor "indicated that he felt he had to say that because sales had declined that year" and took some of the blame for poor sales by "noting that Sandell had come into a sales department that was in turmoil." In trying to soften the blow of the negative comments, the reviewer completely negated their impact.

The court held that "the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria." Instead, the negative comments in Sandell's performance reviews were mostly subjective. For example, the supervisor noted that he "sure would like to see more enthusiasm," from Sandell and that "it would be nice if Robert were more outgoing and friendly." The court reasoned that because many of the comments in the reviews were so subjective, "one could reasonably infer that these complaints, and the negative performance evaluation, were themselves motivated by discriminatory animus."

Sandell is the only published California case that specifically addresses the effect of positive performance reviews in an employment discrimination lawsuit. However, courts in other jurisdictions have likewise relied on performance evaluations to support employees' discrimination claims. In *Parrish v. Immanuel Medical Center*, 92 F.3d 727 (8th Cir. 1996), the 8th U.S. Circuit Court of Appeals emphasized that, among other facts suggesting that the employer's reasons for firing Parrish were pretextual, she consistently received above-average ratings on her employment evaluations over the course of her 10 year career. Although there was one negative comment regarding her rate of production, it was not sufficient to support the employer's claim that it had non-discriminatory motives for firing Parrish.

Similarly, in *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000), the 7th U.S. Circuit Court of Appeals noted that while overly positive performance reviews are common, "by going out of his way to say nice things about the plaintiff, [the employer] made it possible for a reasonable trier of fact to infer that his later denigration of her performance was invented for purposes of the litigation."

Still, positive comments in employment reviews do not always subject an employer to liability. In a 9th U.S. Circuit Court of Appeals case from Idaho, *Pottenger v. Potlach Corp.*, 329 F.3d 740 (9th Cir. 2003), the plaintiff claimed he was the victim of age discrimination after being forced to take an early retirement. To support his claim, he pointed to positive comments he had received in earlier performance reviews. The 9th Circuit nonetheless upheld the district court's order granting summary judgment to the employer. The appellate court noted that, while Pottenger's performance evaluations contained some positive comments, they also included negative ones. The negative comments were specific and related directly to the precise performance concerns that the employer later claimed were the basis for the termination decision.

Employment evaluations can be strong evidence for either side in an employment discrimination case, depending on how the reviews match up with the employer's stated reasons for making the employment decision, and how the evaluations themselves are worded and supported. The *Sandell* decision demonstrates the risks employers face if they provide favorable employment reviews to an employee who has performed poorly or if they qualify negative comments with excuses. *Sandell* also demonstrates the importance of providing objective and honest evaluations, based as much as possible on measurable performance standards. Wholly subjective negative comments do little to assist an employer in the event of litigation. To the contrary, such comments can themselves be used as evidence of bias. On the other hand, even reviews containing favorable comments can help show that an employer has not acted with a discriminatory motive, as long as the reviews are objective, specific and provide the whole picture of an employee's performance.

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