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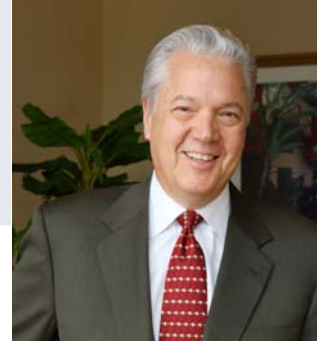
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## EMPLOYMENT LAW - APRIL 2009

### *Performance Evaluations Are Basic to Employer Protection*

By Frank J. Albetta

An inescapable fact of employment litigation is that juries are made up of other employees who will tend to identify with the plaintiff employee rather than with the defendant employer. In a termination case, every employee on the jury will imagine himself or herself in the place of the allegedly unjustly-fired employee. Accordingly, regardless of the actual legal standard applicable in any given case, the jury's determination is likely to be based largely upon the broader question of whether the employee was treated *fairly*.

Under that *de facto* fairness standard, the employer in a performance-based termination case must persuade the jury that the plaintiff employee was given notice of substantial problems and failed to improve. Even in cases in which jury instructions would make clear that the employee was "at will," and that there was thus no legal requirement for such a process, an employer should ensure that it can show that the employee was afforded an opportunity for improvement to save his or her job. Because most employees believe *they* do a good job, work hard, etc., in their employment, such evidence allows jurors to psychologically separate themselves from the plaintiff, and to satisfy themselves that they would have acted differently in the plaintiff's place.

Accordingly, wholly apart from their value as a management tool, performance evaluations are an essential part of an employer's documentation

### Primary Practice Areas

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### Education

State University of New York at Binghamton (Harpur College), (B.A., 1971)  
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Washington, D.C., 1978  
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for avoiding or winning employment claims in termination cases based on performance. An employer that does not require regular performance evaluations as a matter of policy is unlikely to have convincing evidence with which to defeat such a claim. Even with a policy, busy supervisors are usually ill-disposed to spend much time on written evaluations. Without an enforced policy requiring written evaluations, supervisors' warnings and directives to employees regarding their performance are likely to be oral, broad, and disputed. Moreover, the employer's evaluation instrument must be user-friendly, so that relevant information can be recorded quickly by busy supervisors with other priorities. Preparedness for challenges to performance-based terminations thus requires a mandatory evaluation policy *and* a focused evaluation instrument.

It is also essential that supervisors conducting performance evaluations understand that their evaluations must be accurate, honest, and based upon observable conduct and work product. Contrary to what many employees may think, performance evaluations are subject to the worst sort of "grade inflation," under which employees' ratings are often actually better than they deserve. There are many reasons for this, including that supervisors are often hesitant to provide critical evaluations to employees with whom they work closely, that some administrators hope to "encourage" better performance by giving undeservedly high ratings, and that, as performance evaluations are far down on list of priorities, it is easier to give uniformly good ratings rather than to think critically about each employee's performance. The result is often that the actual scope of evaluations scores ranges from "magnificent" to "god-like," regardless of actual performance quality.

This is not to advocate downgrading, but only fair and accurate evaluations. A "puff" job evaluation does not serve the interests of the employer or the employee. It gives the employee a false message regarding his or her standing with the employer and does not assist the employee in improving. Puff evaluations can also lead to overall declines in performance and morale problems. Employees know who the poor performers among them are, and they talk with each other about their evaluations. When good performers learn that the poor performers are receiving the same ratings they are, some will conclude that there is no point in working toward achieving or maintaining a high level of performance.

Despite the work burden evaluations can create, “fast and loose” evaluations are clearly not in the interests of managers or supervisors, either. For the reasons mentioned, current and accurate information regarding employee performance is an essential criterion of the condition of the organization. Monitoring employee performance is not just important to the employer’s ability to terminate poor performers confidently, in many industries it is essential to avoiding liability to third parties. Accordingly, the quality of a supervisor’s evaluations of his or her subordinates should be an element of the evaluation of the supervisor’s own performance, and lack of attention to evaluations should create questions about supervisors’ potential for advancement.

Soft-focus evaluations become even more acutely the employer’s problem when a termination recommendation results from a substandard employee’s performance dropping off precipitously, or when a supervisor finally loses patience with “carrying” a poor performer through indulgent evaluations. In such cases, frustration and impatience often override a lack of documentation of the employee’s problems, with the result that the supervisor and the employer are confronted in litigation with a relatively sunny evaluation record for the employee they have fired for poor performance.

One final matter: performance evaluations should not be used in response to employee misconduct. Most jurors will not expect an employee to be afforded an opportunity to improve following significant misconduct – insubordination, theft, workplace violence, etc. Accordingly, terminations for actual misconduct are far easier to defend than terminations for poor performance – usually, the only questions are as to the employee’s culpability and whether termination was warranted for the misdeed. If the employer has a policy or practice of graduated discipline, it should be followed. But if the employer’s response to misconduct is a performance evaluation or some sort of professional development plan, which the employer thereafter determines the employee has failed to meet, such an approach will allow the subsequently-terminated employee’s lawyer to accept the implicit premise that the issue was performance, and to argue that the “improvement” plan was unreasonable, or that the employee was substantially successful in meeting its terms, or that the employee did not have a fair opportunity to “improve.” Responding to misconduct with disciplinary action, rather than treating it as a

performance issue, thus helps prevent the employee from changing the jury's frame of reference to one in which it is more difficult for the employer to prevail.

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