

GONZALEZ
SABGIO
HARLAN

The GSH

60-Second Memo

January 4, 2012

Sponsored by the GSH Employment Group



**Bethany C. McCurdy,
Esq.**

www.gshllp.com

(414) 277-8500

Want more
information on this
topic?

[CLICK HERE!](#)

[Join Our Mailing List!](#)

Performance Reviews as Plaintiff's Exhibit A: What to Include and What to Keep Out

By Bethany C. McCurdy, Esq.

If you can't say something nice, then don't say anything at all! That's what our mothers always told us, right? The waitress comes and asks how our food is, we say "fine," even though our burger is overcooked and the fries are cold. When someone asks how you are, you say, "fine," even though you are exhausted and have been fighting off a cold for a week. Well, when it comes to employee performance reviews, taking mother's advice and claiming everything is "fine" is not necessarily the best approach.

We all know that most managers do not enjoy giving performance reviews and frequently approach them as "busy work" or just more paperwork to complete. One year of an employee's efforts is summed up in just a word or two, such as "satisfactory" or "fair" (the performance review equivalent of "fine"). Sometimes managers would rather not give honest feedback to their employees about the need to improve their job performance and just give them a pass instead. This approach, while not uncommon, is unfortunate because when managers fail to provide meaningful comments in their reviews, not only do they deprive their employees of feedback that could actually help improve their performance, but they also provide their employees with potentially powerful evidence should the company and the employee end up in litigation one day.

For example, if an employee has been performing substandard work for years and the company finally decides to take some form of action, how is the company going to justify the sudden change in direction? The company cannot reasonably assert that the employee

**GONZALEZ
SABIO
HARLAN**

Office Locations:

Arizona
California
Connecticut
Florida
Georgia
Illinois
Indiana
Iowa
Massachusetts
New Jersey
New York
Ohio
Tennessee
Washington D.C.
Wisconsin

had been underperforming for a long time when its own reviews suggest otherwise. Employers must make sure their managers are providing straightforward, meaningful assessments of their employees' performance. However, managers also must ensure that they are not including information that could potentially suggest discrimination.

One of the tricky areas is attendance - an issue that is commonly referenced in performance reviews. If your employee is absent or late all the time, this is an issue you would like to document and include in a review, right? Not so fast. What if the employee has been out on leave due to a medical condition or maybe had a baby in the past year? Perhaps the leave was Family and Medical Leave, or an accommodation to a disabled employee. In those cases, the leave should not be referenced as a negative in the review - generally just the non-medical leave should be included. Likewise, reference to an employee's use of sick days may also be risky.

For example, under the Americans with Disabilities Act amendments, it is fairly easy for an employee to establish that he or she is "regarded as" disabled - the employee only needs to show that there was a record of an impairment. That record could, for example, be FMLA leave requests, doctor's notes, or longer term restrictions. Such documents could provide the basis for an employee to claim the company "regarded" him as disabled and, as a result, discriminated against him by way of a negative review, especially if the review results in a lower raise or reduced advancement opportunities.

Additionally, companies must be cautious of including references to other potentially protected activity such as reports of harassment, disputes over wages or terms and conditions of employment. Indeed FMLA leave, report of harassment, or dispute over wages or the like should not be discussed during the performance review. Any less-than-favorable feedback in the review could be construed as retaliation for the protected conduct.

What is the lesson to be learned? Employers should use performance reviews as a tool to provide employees with an honest and useful assessment of their *job performance*. Tell them where they are doing well (something nice for Mom), as well as those areas in need of improvement. Performance issues should be addressed directly and specifically, including dates and examples, as well as goals and timeframes for improvement. Finally, and perhaps most importantly, don't forget to look at the review with a critical eye and be sure you are not handing over a valuable exhibit to a would-be plaintiff.

www.gshllp.com

The 60-Second Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Copyright 2012 Gonzalez Saggio & Harlan LLP. All rights reserved.