

GONZALEZ
SABGIO
HARLAN

The GSH

60-Second Memo

June 9, 2010

Sponsored by the GSH Employment Group



Lynn Urkov
Thorpe, Esq.

www.gshllp.com

(312) 566-0040

Want more
Information on
this topic?

[CLICK HERE!](#)

When Performance Evaluations Cause Problems

By Lynn Urkov Thorpe, Esq.

Performance evaluations are a staple in the workplace. They are an important tool for keeping employees apprised of whether they are meeting job expectations. If an employment dispute arises, these appraisals can take on a larger significance. In litigation, they can be very persuasive evidence of ongoing performance problems. However, a recent Seventh Circuit decision, [Goelzer v. Sheboygan County](#), Wisconsin, 2010 WL 1875672 (7th Cir. 2010), serves as a reminder that these evaluations can support the employee's position as well as the employer's, and, therefore, they must be drafted with care.

This issue arose in the context of a lawsuit brought under the Family and Medical Leave Act ("FMLA"). Dorothy Goelzer was fired from her job with her local county government after twenty years of employment. She had been approved for an FMLA leave for two months and was informed by her supervisor two weeks before her leave was to begin that her employment would terminate effective on the date that her leave was scheduled to end. The FMLA protects a qualifying employee's right to be restored to the same or an equivalent job that she had before she takes covered leave, and employers are prohibited from interfering with an employee's exercise of any rights under the FMLA and from retaliation. Ms. Goelzer's lawsuit alleged that her employer violated the FMLA both by interfering with her right to reinstatement and by retaliating against her when it fired her because she requested FMLA leave. The district court granted summary judgment to the employer on both claims. Ms. Goelzer appealed. The Seventh Circuit (which covers Illinois, Indiana, and Wisconsin) reversed the district court's grant of summary judgment and remanded the case for trial.

Ms. Goelzer's performance evaluations played a critical role in

**GONZALEZ
SAGGIO
HARLAN**

Office Locations:

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

www.gshllp.com

the Seventh Circuit's decision. The court noted that in the year 2000, when Ms. Goelzer's last supervisor became her supervisor, he commented in her review that she was rarely absent and gave her a very high rating in the attendance category, as well as an overall high score. She also was awarded a merit increase. This was repeated in 2001. The 2002 evaluation noted that while Ms. Goelzer had excellent attendance in the past, she used 312 hours (39 days) of sick leave for that year. In Ms. Goelzer's evaluation for 2003, her supervisor commented that she used a total of 176.5 hours of sick leave, and he did not award her a merit increase. Ms. Goelzer objected to the decision to deny her a merit increase. Her supervisor's written response pointed out that she was out of the office for surgeries in 2002 and 2003 and that her sick time and vacation time for these two years resulted in the loss of 113 office days and disrupted office operations. In 2004, she used 94 hours of sick leave and received a merit increase. In 2005, she used only 9 sick leave days and received a merit increase, albeit in a smaller amount than in the past. When she questioned her boss about the amount, he said it was because she missed too much time. Her review in 2006 again commented on the amount of time Ms. Goelzer had been out of the office for non-work related appointments. The court concluded that a jury could view this as evidence that she lost her job because she exercised her right to take FMLA leave.

Additionally, her supervisor contended that he fired Ms. Goelzer because he wanted someone with a larger skill set. Again, the performance evaluations raised questions about that assertion because her supervisor had consistently given her favorable ratings. Nor were there documents showing a plan to restructure Ms. Goelzer's job before she went out on her leave. The Court also considered the timing of the discharge, which happened just weeks before she had been approved to take a two month FMLA leave. While the Court acknowledged that a jury could choose to believe the employer's explanation, the Court also recognized that a jury could believe Ms. Goelzer's.

This case illustrates the importance of ensuring that your supervisory personnel have been provided with proper training about leaves and other rights to which employees are entitled by law or in accordance with your employee handbook. Otherwise, something as seemingly routine as a performance evaluation can expose an employer to unexpected liability.

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 2010 Gonzalez Saggio & Harlan LLP. All rights reserved.

[Forward email](#)

✉ **SafeUnsubscribe®**

This email was sent to sue_leung@gshllp.com by sixtysecondmemo@gshllp.com.
[Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).

Email Marketing by



Gonzalez Saggio & Harlan LLP | 225 E. Michigan St. | Milwaukee | WI | 53202