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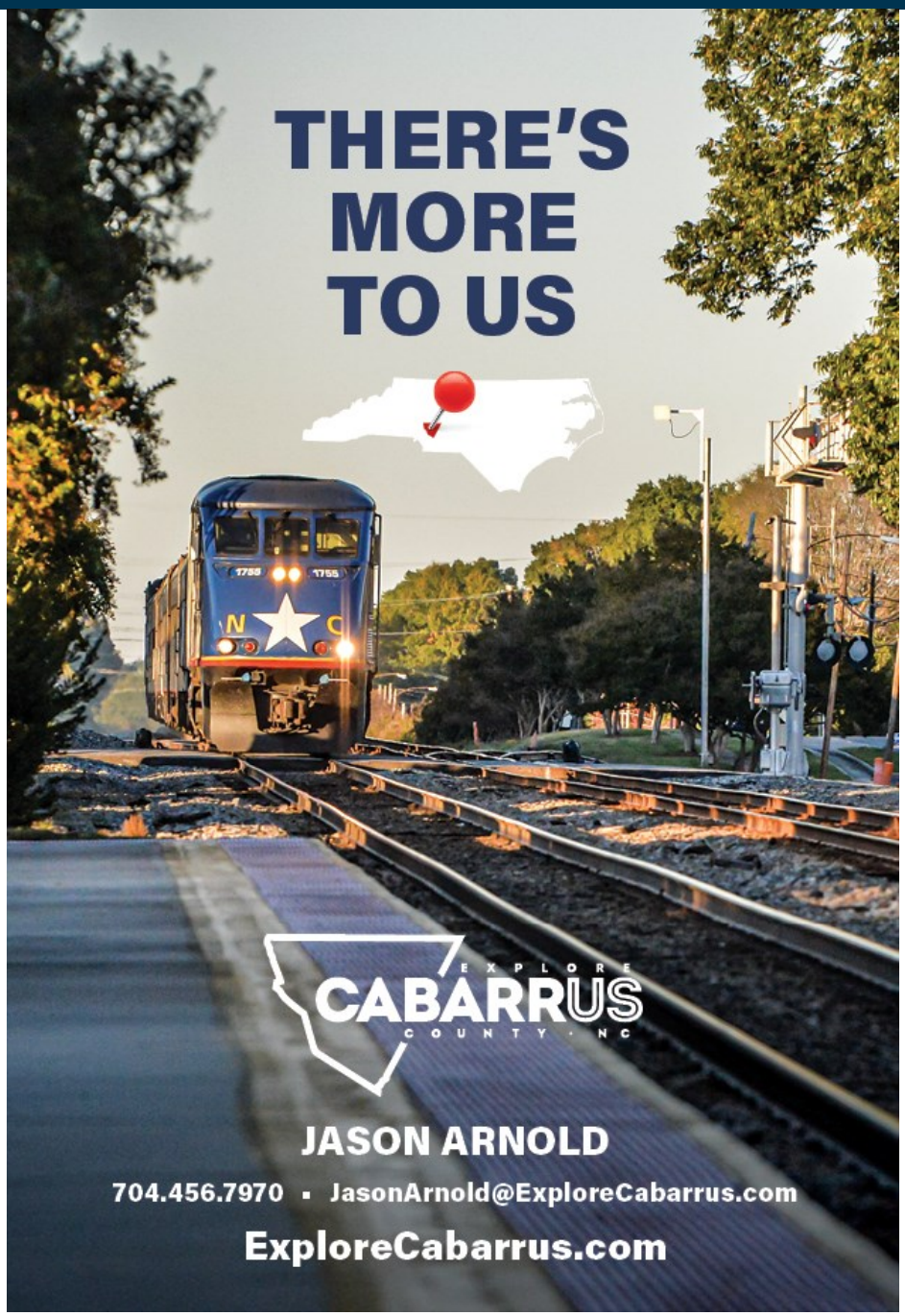

Legal Protections and Perils of Association Employee Performance Evaluations

Holly Peterson, Esq., Counsel, Tenenbaum Law Group PLLC

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Legal Protections and Perils of Association Employee Performance Evaluations

by Holly Peterson, Esq., Counsel, Tenenbaum Law Group PLLC

I frequently advise association clients on various legal issues that arise when an employer decides to separate an underperforming employee. Several variables impact the legal analysis, but, in all cases, I am interested in whether, and to what extent, the underperforming employee's poor performance has been documented over time. How a client responds to that inquiry shapes my legal advice, sometimes favorably to the employer, and other times not. Quite simply, when an employer wishes to part ways with an underperforming employee, a robust record of performance deficiencies can significantly reduce, and in some instances, virtually extinguish legal exposure for the employer.

How Do Performance Evaluations Reduce Risk Exposure?

Generally, with the chief executive excepted, association employees tend to be employed "at will", meaning that the employer can terminate them for any reason or no reason, *except for an unlawful reason.* To be clear, an employer cannot fire an employee for a discriminatory reason (race, sex, religion, sexual orientation, or another protected classification) or a retaliatory reason (taking protected leave, whistleblowing, or another protected activity), even if the employee is "at will." With that as the basic guiding principle, how does an employer prove that it is taking an adverse action for a lawful reason, and not for a discriminatory or retaliatory reason? Consider the following illustration.

Let's imagine that in June of 2023, a little over a year ago, you hired Susie Slacker as a project manager. Slacker suffers from a chronic back condition, which for the purposes of this hypothetical scenario, qualifies as a disability under federal and state law and necessitates that she schedule protected, intermittent leave. She coordinates the leave with your association's HR department, and generally, this arrangement is not particularly disruptive to the association. What *is* disruptive to the association, though, is Slacker's work ethic, non-responsiveness, and lack of attention to detail. Without regret, Slacker chronically shows up late to work and to meetings (if she shows up at all), and her work product is often sloppy, containing numerous errors. Slacker often doesn't respond to emails for days, or at all. Her colleagues are starting to complain, and you are concerned about Slacker's member interactions, the quality of her work products, and the association's reputation. After enduring these professional shortcomings for a full year, you decide that it is time to part ways Slacker, and you call me for legal advice.

One of the first things I am going to ask you is this, "Has Slacker's supervisor addressed the performance deficiencies with Slacker, and if so, how?" What I am hoping to hear is some variation of: "Slacker's supervisor has consistently addressed the various professional shortcomings in accordance with association policy, first with two informal meetings, followed by a written warning and a performance improvement plan. Would you like to see documentation of those interactions?" When I hear any approximation of this response, any concerns I might otherwise have about legal exposure diminish significantly. Just as often though, I learn that the performance concerns have not been documented at all, or even worse, that the only written documentation of the employee's performance memorializes the employee's positive

contributions to the association over time, while completely ignoring the shortcomings. You need not be an employment lawyer to intuit that this is problematic.

But why? How does a lax performance evaluation implicate employment law? The answer lies at the intersection of employment law and discrimination law. Recall that an employer can terminate an "at-will" employee for any reason or no reason, but not for an unlawful reason such as discrimination or retaliation. To successfully prevail in a wrongful termination action that is predicated on claims of unlawful discrimination or retaliation, an aggrieved employee must prove that an unlawful motive prompted the termination. Of course, the employer will offer a legitimate business reason for the adverse decision—here, that Slacker underperformed over time—but Slacker then gets another opportunity to prove that the purported legitimate reason was, in fact, pretext for discrimination or retaliation. For Slacker's situation specifically, if there is no documented history of poor performance, she is well-positioned to argue that the employer's true reason for the termination was to punish her for taking protected leave for a qualifying disability. Even if Slacker is not savvy enough to manufacture this claim, an enterprising plaintiff's attorney knows exactly how to leverage this exact fact pattern to negotiate a favorable severance package or settlement. Yet, there is no need to ever be in this scenario. Quite simply, documentation of performance deficiencies disincentivizes aggressive litigants, equips the association with a great deal of leverage, and serves as a compelling defense to any legal dispute that ultimately materializes.

Practical Advice for Supervisory Staff

Written performance evaluations are one of the best defenses an employer can produce in a wrongful termination situation to reduce legal exposure. With that in mind, here is some practical advice for supervisory staff:

1. **Ensure that performance expectations are tethered to internal policies that have been communicated to the employee.** A fundamental concept in employment law is "notice." Quite simply, as a matter of fundamental fairness, an employee must be apprised of permissible and impermissible behavior. Typically, employers detail these expectations in employee handbooks, and often, as a best practice, these expectations are re-enforced throughout the year, whether in staff trainings, in one-on-one supervisory meetings, or through some other medium. If you have not examined your policies and codes of conduct in a while, consider reviewing them to ensure that the policies, as written, align with your expectations of employee conduct. Also, make sure that each employee acknowledges that they have received and reviewed these documents as part of the employee on-boarding experience, and annually thereafter, or when the documents are revised, whichever is sooner.
2. **Follow your progressive discipline policy.** Most associations describe a progressive discipline policy in an employee handbook (e.g., oral warning, written warning, probation, termination). Follow the policy to a tee. Deviations, no matter how small, may expose the association to "due process," contract, tort, or disparate treatment claims.
3. **Address poor performance in real-time with underperforming employees.** When an employee fails to meet expectations, candidly address professional shortcomings with the employee, along with ways that the employee can either cure a discrete performance issue, or if that is not possible, perform better in the future. This puts the employee on notice of poor performance, and just as importantly, when confronted with clear expectations and a path forward, the employee may course correct, which tends to be a more optimal outcome, both financially and otherwise, than commencing a search and onboarding a new employee.
4. **Document performance discussions in dated communications.** After you meet with the employee to discuss performance deficiencies, document a summary of the conversation in a written format. An email suffices for minor

infractions; a written warning on association letterhead or a formal performance improvement plan might be more appropriate for repeated infractions or more egregious violations (of course, in all instances following your internal policies and procedures, as discussed above). These communications should be dated to formally build a performance record over time. This written trail is particularly important to defend against retaliation lawsuits to show that a pattern of performance deficiencies pre-dated any protected activities.

5. **Be candid.** You must be candid in your employee evaluations. Nothing is more frustrating that counseling an employer through an employee separation where all of the underperforming employee's evaluations specify that the employee "meets expectations." Favorable evaluations are used as ammunition to show pretext. Essentially, and using our hypothetical scenario as an example, Slacker's counsel will address a jury with the following argument: "For five years, my client met all company expectations, as evidenced by the five employee evaluations you have as Exhibits A-E. Now, just after my client started taking protective leave, the association is saying for the very first time that she *has not* been meeting expectations. Why, then, do the written evaluations speak so favorably of my client? You will need to decide whether this brand new and undocumented explanation is a cover-up—or what we call a "pretext" for an unlawful action—or whether the association's diametrically opposite and undocumented explanation is the truth." As an employer, you do not want to be in that position (in fact, we would urge you to settle long before ever getting to this point), and there is no reason you ever have to be in this position. A truthful record, built over time and memorialized in writing, can insulate an employer from this kind of exposure.
6. **Treat similarly situated employees similarly.** Finally, and importantly, you must treat similarly situated employees similarly. Imagine that you decide to part ways with Slacker, but Larry Lackluster—who holds a similar position as a project manager at the association and has a performance history similar to Slacker's—is simply given a written warning. You have just poised the association for a sex discrimination lawsuit based on disparate treatment. In other words, two similar employees, with similar titles, job functions, and performance deficiencies, were treated differently, and the only apparent explanation is that Lackluster is male and Slacker is female. As a matter of non-discrimination and fundamental fairness, you must treat similarly situated employees similarly.

Conclusion

This article distills a complicated legal framework into a few short pages. Of course, many important considerations should inform an employer's decision of whether to separate an employee. Such considerations include the size of the association organization; federal, state, and local law; the employee's protected characteristics, if any; employer policies; custom and practice; and much more. Legal counsel can advise on the technical nuances of any or all of these legal implications. Regardless of unique factual and legal circumstances, when separating with an underperforming employee, your association will be positioned much more favorably if a well-documented, robust performance history corroborates the rationale underlying the legitimate business decision to terminate an employee.

ABOUT THE AUTHOR: Holly Peterson is an attorney with significant experience in the association and nonprofit, employment, and education sectors with **Tenenbaum Law Group PLLC**. She excels at translating complex regulatory and legal issues into practical and digestible client solutions that harmonize with important cultural, ethical, political, social, and financial considerations.

Tenenbaum Law Group PLLC is a nationally recognized, five-attorney, Washington, DC-based, boutique law firm specializing in the representation of nonprofit organizations and related entities across the United States. Serving primarily as outside general counsel, the firm advises senior management and boards of directors of charities, trade and professional associations,

international NGOs, conservation groups, think tanks, arts and cultural institutions, foundations, educational and health care institutions, and other nonprofits – as well as companies and executives that work with or provide services to nonprofits – on the broad array of legal issues and challenges they face.

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