

# Don't Trip on Your PIP: The Risk of Performance Improvement Plans



*Document! Document!! Document!!!* Isn't that what we are always screaming at managers to do? *Where's your documentation?* It's the number one HR question asked when a manager expresses a desire to fire an employee.

In many cases, that documentation involves a performance improvement plan, or PIP. As this new court ruling shows, be careful that your PIP isn't set up to make the employee fail ... or you could be setting yourself up for a discrimination lawsuit.

**Case in Point:** Rickie Neal Phillips, a facilities manager at a Virginia bank, was given a raise and a bonus after his bank merged with another. Phillips, age 51 at the time, then became responsible for an additional 23 branches.

Phillips had a good relationship with his boss, who gave him an "outstanding" review and noted he had "tremendous knowledge." But the relationship went sour after a year and the boss gave Phillips a negative review. At the same time, he told Phillips to request Family and Medical Leave Act (FMLA) leave, on an intermittent basis, for his migraines. Phillips applied for FMLA leave and it was granted.

Soon after, Phillip's boss went to the HR director and together they drafted a "Written Warning and Corrective Action Notice" and gave it to Phillips. The HR director sent the boss an email that said, "I have reviewed the documentation you provided. There is a lot of substance here. There is a lot of room for him to 'trip up' after this warning considering all the areas where he is below expectation and the magnitude of improvements needed. I recommend that you consider how strict you are going to be on this (i.e., zero tolerance the next time he does not provide a timely report) and communicate accordingly so that he knows this is a true warning—and that his job is truly on the line."

A few months later, the HR director sent the COO an email saying the supervisor had to turn in Phillips performance review so she could "scrub it" to ensure it was "appropriate since this will be highly sensitive and this document could end up being used in a file defending our actions." Shortly thereafter, the COO fired Phillips, but not after commending him for being a "good employee." Unfortunately, the COO said, Phillips "did not fit the criteria" for the new bank, noting that he wanted to give the new bank "a younger face."

Phillips sued the bank for violating his rights under the Age Discrimination in Employment Act (ADEA) and for interfering with his rights under the FMLA. The bank defended the claim by asserting Phillips was simply fired for poor performance and the documentation proved it.

**Result:** The court sided with Phillips and sent the case to a jury to read the emails and decide the facts. The court noted that during the HR director's deposition, she assumed "trip up" meant setting goals so high that an employee cannot reach them. (***Phillips v. StellarOne Bank***, W.D. Va., 7/16/12)

### 3 Lessons Learned...Without Going To Court

1. **Don't "trip up" employees.** Performance improvement plans are good faith efforts by employers to help employees get back on track. So it should be a win-win situation for the employee and the employer.
2. **Don't "scrub up" documentation.** Managers must know how to write performance documentation so it focuses on the job description and the underperformance of the job expectations. A jury may consider it to be dirty play when HR feels it must "scrub up" performance documents to get ready to defend a lawsuit. In this case, the bank just might have to get ready to have its own bank account scrubbed.
3. **Do "shut up" about protected characteristics.** Comments about "younger faces" are just EEO code language for age discrimination. So are comments like we are looking for "fresh blood." The jury will be out for your blood instead.