

Performance falling short? Offer second chance with new boss before terminating

Sometimes an employee who seems destined to fall short of performance expectations blames his problems on a biased supervisor. Even if an investigation reveals that such claims seem to have no basis in fact, it may be prudent to give the employee a second chance to succeed under a different supervisor.

If, after a reasonable trial period, the second supervisor also believes the employee has performance problems that he can't or won't fix, then it's OK to go ahead and terminate. Such an employee will have a hard time winning any subsequent lawsuit, since he had an additional chance to prove himself.

Courts are naturally reluctant to question employment decisions when it seems clear that the employer was fair to the employee.

Recent case: Ammar worked for Dow Chemical as an engineer. He is of Jordanian heritage, has dark skin and is of Arab origins.

After 18 months on the job, his supervisor reviewed his performance and gave him a rating of 1 on a 5-point scale, the lowest possible score. He was placed on a performance improvement plan.

Ammar soon filed an EEOC complaint, alleging national origin and other forms of discrimination. He claimed his supervisor had once made a comment he interpreted as anti-Arab, occasioned by an incident at a meeting when Ammar said religious dietary restrictions prevented him from eating the catered meal the company provided. Instead, he went off campus for his lunch. Nothing came of the EEOC complaint.

When his supervisor concluded that Ammar was not succeeding under his performance improvement plan, Dow decided to transfer him to another supervisor for a second chance.

Within a few months, that supervisor, too, gave Ammar a rating of 1. His assessment included a scathing critique of Ammar's engineering ability, stating, "He does not seem to possess basic engineering skills. He does not seem to possess basic mathematical skills for engineers."

Dow terminated Ammar, and he sued. In court, Ammar claimed he had been set up to be fired in retaliation for filing the earlier EEOC complaint.

But the court dismissed his lawsuit. It noted that Dow had given Ammar the benefit of the doubt when it transferred him to another supervisor for a second chance. It saw no evidence that this was a subterfuge. Nor did it find any evidence that national origin discrimination played a role in Ammar's termination. (*Alkhawaldeh v. Dow Chemical*, 5th Cir., 2017)

Slow and steady is best with poor performers

The best performance appraisal systems give low performers a chance to improve and show that their initial poor assessments were wrong. Here are some best practices for reviews that improve performance:

- Standardize the process. Every supervisor should conduct evaluations using the same standards and on the same schedule.
- Allow employee input into what is being evaluated. Make sure the employee acknowledges that the job description being used in the evaluation is in fact his or her job description.
- Give below-standard employees an opportunity to do better if necessary by using performance improvement plans.
- If you are going to offer second chances to poor performers, be sure to do so to everyone similarly situated. Otherwise, you may open yourself up to accusations of disparate treatment.