When a previously good performer starts to slide, carefully document decline

When an employer fires a worker for poor performance and the worker sues alleging some sort of discrimination, the employer must be ready to explain any apparent decline in its performance appraisals.

That's especially true if the worker previously received excellent reviews. Past excellent performance doesn't mean the employee is untouchable, and employers aren't bound by those past good appraisals.

They merely have to substantiate the decline, making an effort to show how performance changed over the years.

Recent case: Wayne, who is 58 years old, had worked as a warehouse manager for Coastal Pacific since 2003. He had generally received favorable performance reviews. A 2012 review noted that he was the company's highest paid supervisor.

In August 2012, Wayne told the HR manager he needed leave to care for his ailing mother. He was approved for four-and-a-half weeks of intermittent FMLA and California Family Rights Act leave to care for her.

Once he was done with the leave, Wayne complained that he had been given more work to do and asked to be demoted so he would have less to do. The company denied his request.

By January 2014, he asked for leave to handle his own medical issues. He was approved for another four weeks.

Two days after he returned to work, the company terminated him.

At the time, managers presented him with a performance review that alleged he performed poorly during the 2012-2013 year and that he had missed productivity and error-reduction goals.

Wayne sued, alleging violations of the California Family Rights Act, as well as retaliation for taking leave.

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He pointed out that he had received excellent reviews over the years and that the new, poor review was evidence he had been fired either for his age, his leave-taking or some other form of discrimination.

The company presented evidence that it had discussed productivity and error reductions with Wayne throughout the past few years and that the review was in the works before Wayne began taking intermittent leave to care for his mother. It also presented documents showing that managers had been having internal conversations about whether Wayne seemed amenable to making the changes necessary to improve his performance and align his efforts with some new initiatives the company had launched. The managers concluded Wayne would not be able to adjust.

The court dismissed Wayne's case, reasoning that while the timing was initially suspicious because just two days elapsed between Wayne's return from leave and his firing, the company clearly showed that the performance review and resulting termination had been in the works for months. (*Wierzba v. Coastal Pacific Food Distributors*, Court of Appeal of California, 2018)

Final note: Courts don't want to second-guess personnel decisions. When employers provide documentation showing exactly when they discussed performance problems and that the notes were made contemporaneously, courts get a clearer picture of the decision-making process. What may appear at first blush to be an out-of-the-blue poor performance review then looks less like an attempt to get rid of a worker for taking leave and more like a slow, careful process to deal with a workers whose performance is declining.

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