

Poor performance review and improvement plan alone aren't signs of retaliation

Good news for managers and supervisors: Giving an employee a poor performance review and then placing the employee on an improvement plan isn't an adverse employment action on its face.

Employees can't successfully sue unless a pay cut, lost benefits, a lost bonus or some other tangible, negative results accompany that poor evaluation or improvement plan.

Recent case: Notoka Marbles, who is black, took a job with Medica Health Plans and was soon promoted. Shortly after, she applied for another promotion to project manager. She interviewed for the job and learned during the interview that her current boss had some reservations about her follow-up and organizational skills. Marbles believed she was being discriminated against and filed an EEOC complaint.

Marbles didn't get the promotion—but neither did anyone else, as managers concluded no one who interviewed had the skills they were seeking.

Marbles then was put on an improvement plan, which included objective goals such as meeting deadlines and following up with customers. Medica doesn't view an improvement plan as disciplinary action, but rather as a career development program, and Marbles didn't lose any benefits or pay.

Marbles then learned about another promotion and asked the hiring manager whether being on the plan meant she wasn't eligible. He told her that she could apply and that the improvement plan didn't disqualify her. He pointed out, however, that the very things she was working on in the plan were qualities he was seeking in the candidate. Marbles didn't apply.

Instead, she sued, alleging that the company had retaliated against her for filing the EEOC complaint.

The court disagreed, concluding that the plan didn't create a "material employment disadvantage" like a termination, pay cut or change interfering with future career prospects might. It pointed out that Marbles' underlying problems—not the fact that she was on an improvement plan—made it unlikely she would have received the promotion had she bothered to apply. (*Marbles v. Medica Health Plans*, No. 07-00006, DC MN, 2008)