

# **New Legal Battlegrounds for Performance Evaluations**

by

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## **I. Introduction**

Most employers regularly assess job performance of their employees, and view such assessments as a top management priority. Yet the evaluation process is often dreaded, instead of professionally administered, by the evaluators and by the employees being evaluated. As a result, mistakes and abuses occur, which in turn become the source of potential legal liability for employers.

This article identifies weaknesses in traditional and nontraditional performance evaluation programs, and examines related legal issues.

## **Historical Perspective**

The first formal performance appraisal systems may be traced back to the federal government. Evaluating employee performance began in the mid-1800's when Congress enacted legislation mandating yearly performance reviews for certain department clerks. From this early beginning, public and private sector employers have used and continue to use performance evaluations.

Since their inception performance evaluations have been one of the more controversial aspects of organizational behavior. Historically, the objective of performance evaluations, also referred to as performance appraisals ("PAs"), has been same. They are intended to evaluate an employee's performance relative to performance standards. The ways in which evaluations are conducted, however, reflects a history of inconsistency. Well intentioned changes to improve appraisal systems have sometimes proven to be risky endeavors, as proven by successfully won lawsuits brought by dissatisfied employees.

Most compensation and human resources professionals view performance appraisals as increasingly important for organizations to manage performance, and to make timely and accurate staffing decisions. Others frequently view them as merely a necessary evil, or worse yet, as altogether unnecessary<sup>2</sup>. These differing attitudes among professionals responsible for administration of performance appraisal systems is partly the cause of employers having to face more and more legal challenges relating to performance evaluations.<sup>3</sup>

## II. Traditional Approaches

Traditional formal PAs measure performance against job characteristics, such as knowledge of job, initiative, volume of work, accomplishments, and requisite skills. Types of job skills appraised may include communication, interpersonal, analytical, problem-solving, technical, and computer literacy.

There are basically 3 categories of traditional PA approaches:<sup>4</sup> 1) *Rating scales* may be the simplest and most widely used. This method merely requires that the evaluator circle numbers, usually on a scale of 1 to 5, or appropriately mark boxes next to defined terms such as “superior” “excellent”, “good”, “fair”, and “poor”. 2) “*Checklist*” approach requires that the evaluator check off the general descriptions of performance categories deemed to be the most appropriate for the person being evaluated. 3) *Management by Objective* approach calls for the evaluating supervisor to set performance goals with the subordinate, and follow up by monitoring progress.

While the primary purpose of these evaluations techniques is to evaluate the employee’s job performance, they also have other useful purposes. They are frequently used as a versatile tool by managers to identify employees’ strengths and weaknesses, document personnel decisions (including layoffs and transfers), determine eligibility for promotions, and meet legal requirements, e.g. compliance with certain EEO guidelines.

### Reasons for Failures

The ideal performance evaluation process is valid, consistent, objective, job related, and “evidence based”, i.e. supported by reliable documentation.<sup>5</sup> Unfortunately, performance evaluations frequently fail to meet these essential criteria for several reasons. Reasons for failure include the fact that persons doing the appraisals are not prepared, serious, nor honest. Evaluators frequently use unclear and ambiguous terms, and/or lack knowledge of the performance standards. The employee being evaluated may not receive ongoing feedback regarding performance.

Common weaknesses among the foregoing traditional approaches include tendencies of evaluators to be overly subjective, overly critical, or too lenient. These weaknesses, however, may be overcome by training the evaluators to understand the essential criteria in the evaluation process and to use proper interview techniques.<sup>6</sup> Specific performance standards linked to the organization’s goals and competencies must be incorporated into the PA training program. Furthermore, it is important that senior management announce that effectiveness in appraising employees is the standard by which appraisers themselves will be evaluated.

### III. Non-traditional Approaches

Criticisms of traditional performance appraisals programs, also referred to as “top-down appraisals”, are that they all too frequently encourage short-term performance, diminish teamwork, and create destructive rivalries. Besides training the evaluators, variations of the traditional PA programs have been developed and implemented by human resources professionals to circumvent these weaknesses.

The 2 general categories of non-traditional PA approaches are 1) the *360-degree Feedback Method*, and 2) *Ranking*, e.g. “best to worst” .

#### A. 360-degree Feedback Method

*360-degree feedback* programs have been tried with moderate success by large corporations, such as Johnson & Johnson, IBM and RCA. Employees compare their own perceptions of performance with the views of others such as supervisors, peers, subordinates and/or external customers.

The strength of this method is that it is objective and evidence based when feedback is carefully managed. The supervisor, peers and customers all have input in the evaluation process. With input from more than just one trained evaluator, subjectivity is kept to a minimum and confidential. When needed, better action plans may be created to improve individual performance. While the *360-degree feedback* method requires greater organization and coordination, PAs conducted under this technique are viewed as more fair and, therefore, less susceptible to employee challenges.

Some proponents have gone so far as to propose that the only effective way to eliminate obstacles to female advancement in the workplace - “breaking the glass ceiling” - is for organizations to replace traditional top-down performance appraisals systems with the *360-degree feedback* evaluations.<sup>7</sup>

#### B. “Best-to-Worst” Method

One of the more controversial performance evaluation approaches is the so-called *best-to-worst* performance evaluation system, also referred to as “rank and yank”, “alternation ranking method”, and “forced distributions method.”<sup>8</sup>

Varieties of the *best-to-worst* methods have been tried by organizations that wanted to reduce staff for business necessity purposes, or just to try to improve overall corporate performance, e.g. Enron, Ford Motor, Microsoft.<sup>9</sup> Typically, employees are ranked in groupings of (a) top 10%, e. g. “superior” (b) next 30%, e.g. “excellent”; (c) next 30%, e.g. “strong”, (d) next 20%, e.g. “satisfactory”; and (e) bottom 10%, e.g. “needs improvement” . The bottom group usually has to improve performance within a certain period or be laid off.

Criticism of the *best-to worst* approach is that they are harsh, that the bottom group may actually contribute more than top people in another organization, and that they invite lawsuits because of the arbitrary and their inherently unfair nature. Weaknesses of this method are similar to the weaknesses of the U.S. military's "Up or Out" system designed in the 1960's. Experienced officers are asked to leave if they are not promoted. The "Up or Out" system's obvious disadvantage is that experienced employees with valuable skills are lost to private industry competitors when personnel shortages may already exist.

In determining who are the "worst", accomplishments of some employees may be unfairly ignored. For example, employees otherwise rated "worst" may in theory have accomplished goals established in their previous appraisals and met all performance criteria. Employees found to be "worst" in the *best-to-worst* system may not be non-performers, but may have actually done everything required of them by their supervisors. In such instances, the forced ranking system becomes inherently unfair and precipitates legal claims of unfairness and illegal discrimination.

One attorney who specializes in employment law advises caution for employers who utilize a *best-to-worst* method. "If ranking systems are not implemented properly, they can be grounds for suit, usually on the basis of disparate impact."<sup>10</sup> Employers cannot assume that *best-to-worst* appraisal systems used for reducing costs via layoffs are without legal risks. Wrongful termination lawsuits brought by laid-off employees may be bolstered by evidence trails laid by subjective and non-job related appraisal records produced from *best-to-worst* appraisal systems.

Advocates of the *best-to-worst* system, however, argue that the approach encourages healthy competition, rewards strong performers, and actually facilitates workforce reductions.

#### **IV. New Battlegrounds For Lawsuits**

##### **A. Age Discrimination Claims**

An employee receiving an unfavorable performance evaluation may claim that the evaluation is a subterfuge for discrimination based on age in violation of the Age Discrimination in Employment Act ("ADEA"). ADEA, as amended by the Older Workers Benefit Protection Act (Pub. L. 101-433), essentially prohibits discrimination in employment activities based on age, and is limited to employers with 20 or more employees. Protections under ADEA extends to individuals at least age 40<sup>11</sup>.

The *prima facie* case for age discrimination in a termination situation is established by demonstrating that the plaintiff/employee (1) belongs to a protected class; (2) was performing the job satisfactorily; (3) was discharged; and (4) either (a) was replaced by substantially younger persons with equal or inferior qualifications, or (b) if plaintiff was discharged as part of a reduction in workforce, the discharge occurred under circumstances giving rise to an inference of age discrimination.

Establishment of *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee.<sup>12</sup> The plaintiff/employee may also offer circumstantial evidence that tends to show that the employer's proffered non-discriminatory motive is actually a pretext because it is inconsistent or unbelievable.<sup>13</sup> Defendant employers may meet this burden by articulating legitimate nondiscriminatory reasons for its otherwise discriminatory employment action. The plaintiff/employee must then introduce evidence that "raises a genuine issue of material fact regarding the truth of the employer's proffered reasons, or evidence of pretext for unlawful discrimination."<sup>14</sup> Such evidence may take the form of inconsistent, contradictory or biased comments in a written PA. In other words, the PA may provide circumstantial evidence that the reason given by the employer for the termination (or other adverse employment decision) may be false, or that the real reason given may be discriminatory.

As demonstrated in the important California Supreme Court case of *Guz v. Bechtel National Inc.*<sup>15</sup>, a laid off employee with lengthy service may offer in evidence a poor performance evaluation record against an employer in an attempt to prove age bias. Although *Guz* was unsuccessful with the age bias claim, the court opined that plaintiffs with long service may prevail if there is sufficient evidence that the employer's proffered reasons for layoffs are pretextual. The implied warning by the court to employers is that pretextual use of performance evaluations may paradoxically become evidence against them to prove illegal retaliation or discriminatory intent.

In *Pascoe v. Mentor Graphics Corporation*<sup>16</sup> the plaintiff, age 62, alleged that he was treated differently and terminated based on his age. An important part of the plaintiff's evidence used in the suit involved the plaintiff's performance review, i.e. a "ranking summary worksheet". The plaintiff ultimately lost the age discrimination part of the suit. But the *Pascoe* case also demonstrates the increasing willingness of courts to examine adverse performance evaluations to determine whether or not employers' stated reasons for layoff are merely a pretext to avoid age discrimination claims. Employers with unmanaged PA programs are most vulnerable to this pretext argument.

## **B. Disparate impact – Age Discrimination**

Adverse PAs which unintentionally impact an individual protected under the Civil Rights Act of 1964, Title VII may also support an age discrimination claim.<sup>17</sup> Where a performance appraisal program has a disparate impact on a protected group, courts may scrutinize the program's validity and job relatedness.

Under the *four-fifth rule* established by the Equal Employment Opportunity Commission, there is a presumption of discrimination where the selection rate of the protected group is less than 80% of the non-protected group (disparate impact).

To recover under a disparate impact claim, the plaintiff must identify a specific employment practice or action which, although apparently neutral, has had an adverse impact on the plaintiff as a member of a protected class.<sup>18</sup> The burden shifts to the employer, who may then offer a business necessity as reason for the adverse employment practice or action. Then, the plaintiff/employee must show that the reason given by the employer was merely a pretext for discrimination. Usually with statistical turnover data, the older employee claiming age discrimination must prove that the adverse employment practice or activity caused a significant disparity between employees age 40 and older and those under age 40. The general standard of proof for disparate impact claims is evidence “sufficiently substantial to raise in inference of causation.”<sup>19</sup> In other words, evidence of adverse performance evaluations of older employees pursuing age discrimination claims must be “sufficiently substantial” to infer that such evaluations actually caused the disparate impact on over age 40 employees.

Before making the final decision regarding layoffs, employers should prudently review the likelihood of disparate impact with legal counsel. Determining whether PA programs contain evidence to defend or support a possible resulting class action suit by older laid off employees would be a necessary part of such review.

### **C. Retaliation Claims and Employer Defenses**

*Retaliation* in a performance evaluation context typically occurs when a supervisor gives a negative performance evaluation to “get even” with an employee for a reason unrelated to job performance.

Title VII prohibits employers from retaliating against employees who oppose any unlawful employment practice under Title VII, or who report such practice to the Equal Employment Opportunity Commission (“EEOC”) or equivalent state agency.<sup>20</sup> Age Discrimination in Employment Act (“ADEA”) also makes it unlawful for an employer to discriminate against an employee for opposing unlawful age discrimination.<sup>21</sup>

The *prima facie* case for retaliation requires a showing (1) that the plaintiff was engaged in a protected activity, such as opposing unlawful discrimination, (2) that employer subjected plaintiff to adverse employment activity, and (3) that there is a causal link between plaintiff’s protected activity and the employer’s action, e.g. termination of plaintiff’s employment. (See *Brenner v. Brown*, 36 F 3d 18 (7th Cir. 1994) for an example of a prima facie case involving retaliation.)

An employee may claim that an unfavorable performance evaluation was conducted in retaliation by a supervisor in response to the employee's exercise of a constitutional or statutorily protected right. Generally, however, the employee making a claim of retaliation in court must introduce evidence establishing a nexus between the legitimate exercise of right and any adverse employment activity, e.g. unfavorable performance appraisal.<sup>22</sup> For example, a claim under Title VII based on a retaliatory negative evaluation must include the plaintiff's establishing a causal connection between the employer's retaliatory action and either the plaintiff's protected right status or the plaintiff's EEO activity. (CRA, Title VII § 704(a), or similar state statute)

Since evaluators exercise broad discretion in the evaluation process, the opportunity for abuse exists. The evaluation process, therefore, must guard against such abuse by maintaining consistency, objectivity and job relatedness, particularly when an employee receives an evaluation resulting in adverse employment action, e.g. denial of pay increase and/or job loss. Employers may build a strong defense against a claim of retaliation if the employee being evaluated is given an opportunity to correct substandard performance before adverse employment action is taken. This procedure establishes a record of objectivity and employer fairness, and is particularly advisable when the adversely affected employee being evaluated has many years of service. Another valuable precautionary step to avoid legal challenges to adverse performance evaluations is the training of evaluators. Since employers may be held vicariously liable for retaliatory or negligent negative evaluations by a supervisor, proper training of evaluators is particularly important.<sup>24</sup>

A manager might give poor performance rating to retaliate against an employee for making an EEO charge. Such action would likely prove to be regrettable. On the other hand, if a negative evaluation would be appropriate, employers should not be fearful of making such evaluation because the employee being evaluated may charge that the negative evaluation is retaliatory in nature.<sup>25</sup>

## **D. Other Employee Claims**

### *i. Title VII Discrimination*

**Civil Rights Act, Title VII** prohibits employers from discriminating against any individual on the basis of race, color, religion, sex, or national origin. State laws may include additional groups protected from discrimination in the workplace. Discrimination comes in a variety of blatant or subtle forms, and involves small and big firms. One of numerous examples of Title VII lawsuits brought against large corporations involves Ford Motor Co. In order to avoid a class action lawsuit, Ford had to modify its policies to eliminate strict quotas under its PA system that dictated the number of employees who would receive poor job reviews.<sup>26</sup>

Inappropriate questions and comments made to employees during the evaluation process may form the basis for **harassment** or discrimination complaints. Examples of inappropriate comments include referring to the person being evaluated, who happens to

be of certain national origin or race, as “you people”, or imitating the person’s accent. Use of a PA to harass an employee with unjustifiable criticism may be interpreted by a court as an interference with a “term, condition or privilege of employment”. Such interference would be an element of the prima facie case for harassment. Therefore, a significant interference with performance evaluation process may give rise to a claim for harassment.<sup>27</sup>

A negative evaluation can even be interpreted as an “adverse employment action” covered under Title VII for purposes of a hostile work environment/discrimination claim. An employer’s best defense to a claim of discrimination involving a negative performance evaluation is sufficient evidence of poor performance.<sup>28</sup> The better preventative steps an employer may take to avoid claims of workplace harassment and other forms of discrimination are to (1) implement anti-discrimination and anti-harassment policies and procedures which include the performance evaluation program, (2) train and test of evaluators in such policies and procedures, and (3) disclose to all employees specifying where to go for help with harassment and discrimination complaints.

## *ii. Defamation*

There is general judicial disfavor for defamation suits relating to employment performance reviews<sup>29</sup>. Usually courts hold that publication of negative performance evaluations are not defamation because they are protected by qualified privilege, unless made with malice.<sup>30</sup>

Common law defamation consists of a false statement about plaintiff communicated to a third party and which tends to harm the plaintiff’s reputation or standing in the community.<sup>31</sup> An employer’s best defense to claim of defamation is truth, and to prove that there is no malice toward the employee in the evaluation process.

Courts generally view PAs as an integral of business operations, and a vehicle for informing employees of management expectations and retaining the best qualified employees. “We are therefore loathe to subject an employer to the threat of a libel suit in which a jury might decide, for example, that the employee should have been given a rating of ‘average’ rather than ‘needs improvement’ ”. However, if an employer’s performance evaluation falsely accuses an employee of criminal conduct, lack of integrity, or dishonesty, courts will be receptive to a cause of action for libel.<sup>32</sup> The employee plaintiff must show that the statement was made with actual knowledge of or reckless disregard as to its falsity.

## *Job Reference Defamation*

Employer responses to reference requests, particularly as related to former employees based on their performance evaluations, also raises concern about defamation suits. Each negative reference provided based on a poor performance evaluation runs the risk of defamation suits initiated by former employees. Because of the potential costly liability,

many employers have resorted to policies of giving little more than dates of hire and termination in response to job reference requests. Such policies are the rule rather than the exception, notwithstanding the fact that 36 states have enacted reference immunity statutes. (Refer to 11 Cornell Journal of Law and Public Policy, *Job Reference Immunity Statutes*, FALL 2001 for a listing of covered states and specific statutes.)

Some employers incorporate a reference consent provision in their employment application forms, which is acknowledged by each applicant's signature. The reference consent proviso indicates that disclosures to prospective employers, and other third parties such as creditors, are not provided unless the employee authorizes release of specific job related information. Permission from the employee, however, offers only limited protection from potential reference defamation or negligence claims. Protection is limited because all the sensitive circumstances that would need to be specified in a release to completely protect an employer could not possibly be anticipated. Furthermore, complete protection is unavailable under statutory law. (Refer to Quinones and Schaefer, *The Legal, Ethical and Managerial Implications of the Neutral Employment Reference Policy*, Winter 1996, *Employee Respon. & Rts. Journal* for more information on legal issues relating to job references.)

In California, for example, there is no statute that specifically pertains to employer reference immunity. However, California Civil Code 47 (C) and Code of Civil Procedure, section 527.3 define "privileged publications" and "qualified privilege". Essentially, these code sections grant employers some protection for giving job references, provided the communications are made in good faith, without malice and with reasonable grounds for believing they are true, and they correspond to a duty of the communicator. The "privilege" is easily lost if there is a lack of good faith, recklessness, negligence, or disclosure of confidential information, particularly when there is an agreement with the former employee not to disclose. Consequently, employers in California and in other states without job reference immunity statutes give very limited information when replying to job reference requests.

### *iii. Negligence*

An employee may have a claim based on an employer's negligence in conducting, or failure to conduct, a performance evaluation. If the employee is not given a regularly scheduled evaluation, the employer may be held liable for negligence. The employer may be liable if it is reasonably foreseeable that such unintentional oversight would cause, for example, severe emotional distress. The employee would have to prove that (1) the employer owed a duty of care to the employee and (2) breached such duty, (3) the employee suffered legally recognizable injury, and (4) the employer's failure to act caused the plaintiff's injury.<sup>33</sup> For example, the employee in *Schipani v Ford Motor Co.* (Docket No. 43298, 302 N.W. 2d 307; 1981 Mich. App. LEXIS 2649) claimed that Ford Motor Company breached its contractual duty to objectively evaluate. The court held that the employer has a duty to exercise reasonable care in PAs, and that breach of such duty would give rise to a cause of action in tort for negligence.

The risk of harm resulting from the breach of duty must be reasonably foreseeable. Although emotional distress or similar injuries would not ordinarily be reasonably foreseeable in connection with improperly administered PAs, there may be a set of circumstances which would support a reasonably foreseeable risk of harm. Examples include (1) a supervisor who is responsible for conducting an evaluation fails to do so while being aware that the employee being evaluated has a history of emotional problems; (2) an evaluator fails to inform the employee of poor performance resulting in a lost opportunity to improve; and (3) failure to disclose through appropriate authorized parties violent tendencies when responding to reference requests made by prospective employers. These types of negligent omissions may be construed as a breach of duty of care for which the employer could be held liable.

### **E. Discrimination Claims Based on Disability and Employer Defenses**

Americans with Disabilities Act (ADA) and equivalent state statutes prohibit certain employers from discriminating against disabled employees who are otherwise qualified to perform the essential functions of the job. “Disabled” is generally defined under ADA as 1) a physical or mental impairment that substantially limits one or more major life activities; 2) having a record of such impairment; or 3) perceived by others as having an impairment. (The standard for qualifying as *disabled* under state statutes are not necessarily the same as under ADA. For example, the word “substantially” is removed under California statute allowing anyone who has a disability that impacts an essential life function to be eligible for accommodation, and without respect to mitigating measures such as a prescription eye glasses. *California Assembly Bill 2222*)

Employers are required to make reasonable accommodations to permit disabled employees to do their jobs<sup>34</sup>. Therefore, performance evaluations must be applied to all employees, including disabled employees, on a uniform non-discriminatory basis.

An evaluator may give a negative evaluation to retaliate against a disabled employee for making an EEOC charge based on disability. Despite this possibility, employers must not retreat from the responsibility of giving negative evaluations when appropriate, even if the employee is disabled. The disabled employee has the burden of proving retaliatory animus, which is difficult to do if past records show a consistent pattern of valid negative evaluations.<sup>35</sup> Employers should not hesitate to conduct appropriate performance reviews, even when there is a possibility of a retaliation claim based on disability.

## V. Conclusion

Traditional performance appraisal programs and new variations are still used today by big and small organizations. There are a few exceptional companies that have done away with performance appraisals altogether, with some success. Some of these companies without formal performance evaluations have even guaranteed jobs for life.<sup>36</sup> For the overwhelming majority of organizations, however, performance evaluations in one form or another are here to stay.

PA programs, regardless of the method used, must be professionally administered. Besides the more obvious purposes, PAs should also be considered as important potential evidence for an employer's defense. Properly documented performance evaluations build "paper trails" that favor employers in defending against lawsuits.<sup>38</sup> Conversely, written comments in evaluations that are too general, taken out of context, ambiguous, or are too charitable not only undermine subsequent discipline of a poor performer, but also serve as ammunition for disgruntled former employee lawsuits. Therefore, persons responsible for input in the evaluation process must be properly trained to understand the essential criteria, as well as to minimize the employer's exposure to liability for wrongful terminations and related claims.

No one has come up with a perfect performance evaluation system to preclude lawsuits. But lessons can be learned from recent court cases involving PA programs. These cases teach us that PAs must be conducted in a uniform non-discriminatory manner, and only for reasons that are consistent<sup>37</sup>, objective, job-related, and well documented. Properly administered PAs offer the additional benefit of reducing turnover attributable to poor-quality evaluations.

One thing is certain. PA programs, even those that properly measure performance with objective job related standards, need to be managed by skilled professionals to avoid lawsuits. And, like contemporary compensation programs, PA programs should be constantly reassessed for further design improvements – at least until that flawless PA program comes along.

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1. Daniel A. Van Bogaert, J.D., Adjunct Professor, Loyola Marymount University and LMU Extension, and graduate courses at Chapman University, and professional development courses at UCLA Extension.
  2. Philip Schofield, *Do Appraisals Need Review?*, *Works Management* 52, no.2 (Feb. 1999).
  3. *Hoffman v. MCA, Inc.* 144 F3d 1117 (1998)
  4. Refer to 2002 U.S. Master Human Resources Guide, by Donald W. Myers, D.B.A., CCH Incorporated [Chapter 29] ISBN 0-8080-0682-7 for details.
  5. 2003 U.S. Master Human Resources Guide; *Job Performance Management*, supra, at 737-768.
  6. See Norman R. F. Maier, *The Appraisal Interview*, for an explanation of interview techniques used for performance evaluations.
  7. *University of Colorado Law Review*, Winter 2002 73 U. Colo L. Rev. 117, Using Evaluation To Break Down the male Corporate Hierarchy: A Full Circle Approach.
  8. Dessler, Gary, *Human Resources Management*, 8<sup>th</sup> edition, at 321-345; Prentice Hall (2000) (the author points out that attempts to overcome weaknesses of PAs have resulted in more variations, such as *behaviorally anchored rating scales*, and *critical incident methods*).
  9. John Greenwald, *Rank and Fire*, *Time Magazine*, June 18, 2001.
  10. Performance Measurement in the News, *Forced Ranking – The Right Way*, (May 15, 2001); ([www.fairmeasures.com](http://www.fairmeasures.com)).
  11. 29 USC §§ 621, 631, et al; §115 *Civil Rights Act of 1991, P.L. 102-166*, amending §7(e) of ADEA
  12. *Black's Dictionary*, Fourth Edition, at 1354 –1355.
  13. *Reeves v. Sanderson Plumbing, Inc.* 530 U.S. 149 (See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 2752, 125 L. Ed. 2d 407 (1993) and *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-67 (3d Cir. 1996) (en banc) for additional examples of where courts reviewed the issue of whether or not purported reasons for defendant's adverse employment actions were actually a pretext for intentional illegal discrimination.)
  14. *Chuang v. University of California Davis, Bd of Trustees*, 225 F3d 1127, 9<sup>th</sup> Cir. (See *Cronin v. Aetna Life Insurance Company*, 46 F. 3d 196 (2<sup>nd</sup> Cir. 1995) LEXIS 1552 for another example of a PA used as evidence against an employer to establish unlawful age discrimination.)
  15. 100 Cal. Rptr 2d 352 (2000)
  16. 2001 US Dist LEXIS 22243, CV-00-874-ST
  17. e.g. *Vaughn v. Edel*, 918 F. 2d 51, 1990 U.S App LEXIS 20947
  18. e.g. *Hogan v. General Electric Co.*, 109 F. Supp 2d 99, 104 (N.D. N.Y.)
  19. *Gonzalez v.* 135 F. Supp. 2d , 399
  20. 42 U.S.C.A. §§2000e-1 to 2000e-17 (1994)
  21. *Yartzoff v. Thomas*, 809 F2d 1371; 9<sup>th</sup> Cir. 1987
  22. *Huskey v. City of San Jose*, 204 F 3d 893, 9<sup>th</sup> Cir. (2000) (Note that, generally, the plaintiff must file an EEOC complaint within 300 days of the alleged harassment.)
  23. See related case *Bluight v. Consolidated Edison Company of New York, Inc*, 2002 U.S. Dist LEXIS 1845
  24. *Morris v. Oldham County Fiscal Court*, 201 F.3d 791, 201 F.3d 784 (6<sup>th</sup> Cir. 2000),

25. See *Cullom v Brown*, 27 F. Supp. 2d 1089 (N.D. Ill. 1998) for illustration of lesson in this regard.
26. *The Detroit News*, July 10, 2001.
27. *Ton v. Information Resources Inc.* 1996 U.S. Dist. 51; 70 Fair Empl. Proc. Cas (BNA) 355
28. *Supra, Hoffman v. MCA, Inc.* 144 F3d 1117; 1998 U.S. App LEXIS 11807; 77 Fair Empl. Prac. Case (BNA)
29. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d. 654, et al
30. *Michaelson v. Minnesota Mining and Manufacturing Co., Ct of App*, 47 N.W.2d. 174 (1991)
31. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980)
32. *Jensen v. Hewlett-Packard Company*, 14 Cal. App. 4<sup>th</sup> 958, 1993 Cal. App. LEXIS 348 (Also refer to *Landers v. The National Railroad Passenger Corporation*, Civil File No. 00-2233, 2001 U.S. Dist. LEXIS 22023, for similar case in which inconsistencies between comments and numerical ratings in performance review lead to defamation suit against employer.)
33. *Law of Torts*, Prosser, 4<sup>th</sup> Edition, pg 143 (West)
34. 29 CFR 1630, App. 1630.9
35. *Shaner v. Synthes*, 3d. Cir., No. 99-1037 204 F. 2d 494, 2000 U.S. App. LEXIS 3163
36. Lincoln Electronic, Cleveland, Ohio.
37. *Beaird v. Seagate Technology* 525 U.S. 1054, 142 L. Ed. 2d 356),
38. *Supra, Hoffman v. MCA, Inc.* 144 F.3d 1117 (1998) LEXIS 11807