

Fifth Circuit Reminds Employers of the Importance of Contemporaneous Documentation and Flexible Progressive Discipline Policies

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The [United States Court of Appeals for the Fifth Circuit](#) recently reminded employers that they should create and maintain contemporaneous documentation for their personnel decisions and implement flexible [progressive discipline policies](#). Specifically, on December 7, 2020, [the Fifth Circuit affirmed](#) a district court's grant of summary judgment in an employer's favor on an employee's age discrimination claim. It did so, in part, because the employer showed that a merit raise it gave the former employee pre-dated the documented decline in her performance and that its progressive discipline policy allowed it discretion in implementation of the progressive steps.

In [Salazar v. Lubbock Cty. Hosp. Dist.](#), an employee sued her employer for discrimination under the [Age Discrimination in Employment Act \(ADEA\)](#) following the employer's termination of her employment for poor performance. She claimed that she and other older employees were terminated and replaced with younger employees for less pay. The employer argued that her performance declined over the last year of her employment and that it attempted to help her improve. The employee countered that the employer did not counsel her regarding her performance and instead gave her merit raises, which she argued indicated her adequate performance.

The employer moved for summary judgment. The district court granted it on the basis that the employee did not present a genuine issue of material fact that the employer's legitimate reason for her termination was pretext for age discrimination. The employee appealed.

The employer's "articulated reasons for [the employee's] termination were her poor performance and demonstrated lack of effort to change her behavior." To overcome those reasons on appeal, the employee was required to show that "reasonable minds could disagree that these were, indeed, the reasons for her discharge"—that they were pretextual—*and* about whether her age was the actual reason." (emphasis in original). To do so, she argued, among other things, that she received merit raises and that the employer "did not follow its typical policy or disciplinary process in terminating her employment."

First, the Fifth Circuit observed generally that "[e]vidence of a merit raise *could* call into question the sincerity of an employer's claim of an employee's poor performance . . ." (emphasis in original). But the employee in the case referred to only one specific merit raise, and it was based on her 2015 performance; whereas, the employer contended the employee's performance began to decline in 2016. Further, the employee did not allege that the employer tendered "post-hoc work reviews" or "paper[ed] her file." The court noted that, in providing her the merit raise, the employer actually documented several performance issues in the attendant evaluation. In light of these facts, the Fifth Circuit found that the employee's "claims of merit raises do not controvert [the employer's] allegations of her poor performance."

Second, the Fifth Circuit observed that "[t]ermination of an employee that does not proceed pursuant to an employer's progressive discipline policy may give rise to an inference of pretext." But, in this case, the employer's progressive discipline policy "specifically provid[ed] for the use of discretion," allowing the employer to utilize an appropriate level of discipline based on the specific facts and circumstances. Accordingly, the Fifth Circuit concluded that the employer's "digression from the terms of its [progressive discipline] policy is . . . of little value to [the court's] analysis."

The Fifth Circuit's *Salazar* decision illustrates two important points for employers to remember:

- Contemporaneous documentation of personnel decisions is crucial to convincing courts later during litigation that the reasons for those decisions were legitimate and not discriminatory. While sometimes tedious to document issues at or near the time of the event, employers are well-served to create and maintain appropriate documentation of all performance and misconduct issues involving their employees as soon as those issues arise. While the particular issue may ultimately resolve itself, employers can use that contemporaneous documentation later to show that its positions are credible and that its reasons are legitimate.

- Employment policies pertaining to employee discipline and terminations should be flexible. Employers are often confronted with a myriad of different facts and circumstances that do not lend themselves to a rigid protocol, and that is especially true with performance and misconduct issues. Thus, employers need to be able to maintain their business judgment and make the best decisions possible based on the facts presented. An inflexible disciplinary policy can hamstring that business judgment, so progressive discipline policies should allow an employer to skip rungs in the progressive discipline ladder and go straight to termination, if necessary.

Employers are therefore well-advised to revisit their documentation practices and discipline policies in light of these important considerations to ensure they are best positioned to defend themselves later during litigation with employees claiming discrimination or retaliation.

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