

7th Circ. Race Bias Ruling Provides Reminders For Employers

By **Kimberly Shen, Timothy Rusche and Dana Howell** (July 18, 2022, 3:59 PM EDT)

Picture this: An employee who is a member of a protected class receives a negative performance review and later files suit against their employer, alleging employment discrimination. Meanwhile, the employer claims that the negative review was justified due to poor job performance.

Such conflicts are all too common in the employment world, leaving many employers with the question: What factors help influence the outcomes of such cases?

A recent case from the U.S. Court of Appeals for the Seventh Circuit helped shed some light on this question.

Case Background

In *Abebe v. Health and Hospital Corporation of Marion County*, Lily Abebe, a Black woman of Ethiopian descent, started her employment in 2014 as a dental assistant at the Health and Hospital Corporation of Marion County, also known as Eskenazi Health.

Throughout her employment, Abebe amassed a record that showed a history of behavior problems. For example, in her 2016 performance review, the clinic manager gave her a low score in a category called "respect," citing her negative attitude and poor interactions with co-workers.

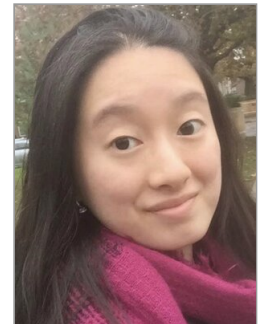
Later, in her 2017 performance review, Abebe was disciplined after she had an argument with a co-worker and received a negative performance review in the category of "professionalism." The review noted that "when she gets upset, her attitude turns shocking." That same review also highlighted Abebe's consistent interpersonal difficulties with co-workers, noting that many of them saw her as unapproachable.

In 2018, Abebe received another negative performance review that cited her problems with teamwork and communication. Given her persistent history of negative reviews, Abebe was denied a merit-based raise. In response, Abebe filed a charge with the Equal Employment Opportunity Commission, or EEOC, alleging discrimination based on race and national origin.

Abebe, thereafter, complained that she was placed on a performance improvement plan shortly after her contact with the EEOC. Abebe sued Eskenazi Health, alleging discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and Title 42 of the U.S. Code, Section 1981.

The Court's Decision

The U.S. District Court for the Southern District of Indiana granted summary judgment in Eskenazi Health's favor and Abebe appealed the decision. The Seventh Circuit affirmed the lower court's decision. The Seventh Circuit held on May 31 that Abebe failed to identify a proper comparator to



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support her allegations of discrimination.

To establish a prima facie case of discrimination on the basis of race under Title VII, a claimant has to show that other similarly situated employees were treated more favorably. The Seventh Circuit explained,

Abebe focuses on the wrong features, precluding a meaningful comparison. Abebe received low scores on her performance review not because she was involved in these incidents, but because she addressed them in a confrontational way.[1]

Because Abebe did not identify a similarly disrespectful employee outside her protected class who was treated more favorably, the court dismissed her Title VII claim.

The Seventh Circuit also rejected Abebe's retaliation claim, holding that Abebe failed to establish a causal connection between her contact with the EEOC and the issuance of the performance improvement plan.

Implications for Employers and Best Practices

As many employers are acutely aware, employment discrimination lawsuits reflect poorly on their companies' reputations and brands.

Allegations of discrimination not only make it more difficult for companies to recruit and retain diverse talent, but also promote a conflict-ridden work culture that undermines employee morale and productivity.

Unfortunately, Abebe is only one of many cases amid a growing landscape of discrimination and retaliation claims. As this ruling demonstrates, discrimination cases often involve complex considerations with detailed factual stories.

As in Abebe, courts generally hold that an employee cannot defeat a legitimate, nondiscriminatory reason for an employer's business decisions merely by disagreeing with the employer's assessment of job performance.

The employer in Abebe avoided a potentially adverse legal outcome because it had extensive documentation, consistent over a period of years, proving that it had legitimate, nondiscriminatory reasons for denying her a merit-based raise and placing her on a performance improvement plan, including past performance reviews detailing Abebe's behavioral issues.

Thus, Abebe reiterates the importance of employers clearly and consistently documenting performance issues to prevent even the appearance of discriminatory intent behind corrective job actions.

Relevant documentation regarding performance issues should be accurate, proportional to the event, communicated to the employee appropriately and maintained in the employee's personnel file, as such documentation could later save an employer from a lengthy trial and costly judgments.

Supervisors should be trained on the importance of documenting performance issues and how to assess, with the input of human resources, what type of documentation is best for a given situation.

Many supervisors may prefer to have face-to-face meetings with underperforming employees, without formally documenting the performance issues. While face-to-face meetings may sometimes add a personal touch to an otherwise uncomfortable discussion and ensure the proper tone of the message, supervisors should memorialize these meetings.

Any meetings regarding performance issues should be followed up with an email to the employee confirming what was said during the meeting, including any discussions regarding goals, criticisms and expectations as well as an email to human resources noting the same.

Although some well-intentioned supervisors may be reluctant to formally document performance issues, they should bear in mind that failure to record the discussions may open the company to greater litigation risks in the future and greater loss of productivity resulting from litigation.

A jury deciding these cases may be more likely to believe that an employee had been terminated for discriminatory reasons if there is no documentation — or poor documentation — of performance issues.

Further, while overdocumenting for trivial issues itself can appear discriminatory or retaliatory, consistency is key. Supervisors should be sure to record employee transgressions to the same degree regardless of the employee.

Depending on the circumstances, employers should adjust their documentation strategies. However, the documentation process does not always need to be formal. For minor one-time incidents, an email to an employee may be sufficient.

Meanwhile, for recurring issues, concerns may be best articulated in formal performance reviews with examples of performance and behavioral issues. When managing employees with serious recurring performance issues, supervisors should consider implementing a performance improvement plan, with detailed and concrete goals and consequences, if goals are not met.

Documentation that is poorly written, exaggerated or not shared with the employee can be problematic. For instance, when supervisors have concerns regarding an employee's attitude or approach to work, supervisors should provide specific examples in their documentation to avoid later claims that the criticism is unfounded.

Furthermore, a procedure should be in place to notify supervisors of leave or disability accommodations. Supervisors should report performance issues to HR to evaluate the best approach and ensure consistency of treatment and that reasonable accommodations and protected leaves are being taken into account and handled properly when documenting performance issues.

Finally, before any termination decisions are made, employers should always consider any special circumstances that could be tied to their employees' performance as reflected in the write-ups, including but not limited to medical issues, requests for accommodations and leave.

While decisions like terminating an underperforming employee can sometimes be an emotionally difficult process for all parties involved, such actions are often unavoidable realities in a professional setting.

When assessing how to effectively manage employees, employers should always strive to maintain appropriate documentation regarding performance issues as this can help demonstrate the legitimate, nondiscriminatory reasons for personnel actions.

Thorough documentation can ultimately help an employer show that performance issues are addressed consistently for every employee, regardless of race, sex or other protected class.

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[1] [Abebe v. Health & Hosp. Corp. of Marion Cnty](#) , 35 F. 4th 601, 607 (7th Cir. 2022).