303 Sue While You Work: Retaliation Claims on the Rise

Mia D. Farber
Partner
Jackson Lewis

Joel P. Kelly
Of Counsel
Jackson Lewis

Faculty Biographies

Mia D. Farber

Mia D. Farber is a partner in the Los Angeles office of Jackson, Lewis, Schnitzler and Krupman, where she specializes in employment litigation. At Jackson Lewis, Ms. Farber has represented employers and individual defendants in a full spectrum of employment litigation, including sexual harassment, discrimination on the basis of sex, race, age, religion, disability and retaliation, and wrongful termination. She also provides advice and counsel and conducts training seminars on a myriad of topics all related to employment issues.

Prior to joining Jackson Lewis, Ms. Farber practiced employment law at the law firms of Walsh and Declues, where she represented management in employment litigation, and Fogel, Feldman, Ostrov, Ringler and Klevens, where she primarily represented plaintiffs in employment matters and unions in all aspects of labor relations.

Ms. Farber is a member of the California Bar and practices before state and federal agencies and state and federal courts. Ms. Farber has extensive experience in all facets of employment litigation and has tried numerous cases. She also provides advice and counsel to employers and frequently speaks on employment law issues.

She received her BA from Pitzer College and her JD from Loyola Law School.

Joel P. Kelly

Joel P. Kelly is of counsel to Jackson Lewis in Los Angeles. Mr. Kelly is a veteran employment litigation and trial attorney, and provides counsel to employers on a variety of workplace disputes from Alaska to Texas. His practice includes the defense of claims of wrongful discharge and discipline, whistleblowing and retaliation, sexual harassment, employment discrimination, and violation of employee privacy.

Mr. Kelly also has more than 20 years of experience in human resource counseling and management training, and he emphasizes a preventative approach to avoiding labor problems and reducing employer liability. He conducts annually in excess of fifty seminars for clients, bar associations, and personnel management groups on how to conduct effective internal investigations, respect in the workplace, and how to manage within the law to minimize litigation and human resource problems. Mr. Kelly provides expert witness consultation and trial testimony regarding all facets of labor and employment law, including the adequacy of, and standards for, personnel policies, employee handbooks, and investigations of workplace misconduct. He also provides expert analysis to the *Los Angeles Times* and other news media.

Mr. Kelly received his AB from Boston University and JD from the Georgetown University Law Center.

SUE WHILE YOU WORK: HOW TO PREVENT AND DEFEND AGAINST RETALIATION CLAIMS BROUGHT BY CURRENT EMPLOYEES

MIA FARBER
JOEL P. KELLY
JACKSON LEWIS SCHNITZLER & KRUPMAN

I. Introduction: A Case Study

Consider the following scenario, which is loosely based on facts presented in a lawsuit now pending before the Ninth Circuit.

Tom Radley works as a new car salesman for Atticus Finch Honda, one of the largest Honda dealerships in the southeast United States. Tom has worked for the dealership and its predecessor for the last 17 years, through four U.S. presidents, three state governors, and two changes in ownership at the dealership. Atticus Finch, a retired plaintiff's trial lawyer, bought the dealership 10 years ago. As a result of the purchase, he has improved his reputation, works fewer hours, and made some money, too boot.

At age 53, Tom is the oldest sales person at Atticus Finch. He receives a guaranteed base plus a 1 % commission on his sales. Last year, Tom earned $33,692, including a $500 holiday bonus. Tom is hardly the stereotypic "high pressure" car dealer. He is low-key and keeps to himself when he is not on the sales floor. In the words of several members of the sales team, Tom is a "Survivor," a term having nothing to do with the popular television show. Tom has lasted for 17 years despite routinely having below average to average monthly sales. He usually ranks among the bottom 50 % in sales. Nonetheless, Tom has never received a bad performance review or any warning that his job is in jeopardy. He earns enough to pay his bills and is content to work thirty seven hours per week and have every other weekend off.

Scout Finch is the daughter of the dealership owner and the new car sales manager. She is bright and a tough "no nonsense" boss. Scout studied business administration at NYU. After

completing "B-school" at Wharton in 1990, Scout worked for her father as a member of the sales team for five years before being promoted to assistant manager. She has solid sales credentials and won a state wide sales competition sponsored by Honda two years in a row. Four and a half years ago, at age 29, Scout gave up plans to join a large consulting firm and accepted a promotion to new car sales manager.

Although Scout has a knack for sales and numbers, her "people" skills are non-existent. She has a plaque on her desk that reads, "When God Created Man She Was Only Kidding." Tom jokes that the only thing Scout acquired in six years in New York City and Philadelphia was a bad attitude. She has a brash "take no prisoners" management style, reminding some of Cameron Diaz in "Any Given Sunday." In the last year, she has fired three sales people—one sales employee was fired on his birthday—and another sales rep quit after an argument with Scout about a split commission. Behind her back the sales staff calls her "Tin Man," a reference to the Oz character without a heart.

In March 1999, 2000 and 2001, Scout conducted performance reviews for the sales team using a rating from one to five, with five considered "Outstanding." She wrote glowing comments on the evaluations for her three favorite sales employees. However, the evaluation process was perfunctory in Tom's case. The only mark on Tom's evaluations for each of the past three years is a "3," meaning that he "meets expectations."

Sales at the dealership have fallen off sharply since January 2001, possibly a sign of the troubled economy. In the first half of 2001, new car sales were down by nearly 20%. Tom had only fifteen sales between January 1 and June 30, an all-time personal low and the worst at the dealership. Possibly due to declining sales, Scout has become a tyrant at work, handing out warnings like hot dogs at a baseball game. Tom has not escaped her attention. On March 15, Scout gave Tom a written warning based on his failure to attend a sales meeting. He had missed the meeting, but it was scheduled on his day off with less than 24 hours notice. On April 13, Tom received another warning because he failed to pitch underbody protection on an Accord sale. Tom acknowledged that he had not offered the $800 option, but added that he had never sold underbody protection on a Honda in 17 years and no one had ever complained to him about it.

Scout wrote him up again on June 2 because he was seen on the sales floor during the Memorial Day holiday weekend without a jacket and tie. He complained that it was 92 degrees and the air conditioning was not working, but she would not listen.

On June 12, Scout called him into the office after he failed to close a sale on a S2000 roadster to a customer who had refused to pay more than $1,000 over dealer invoice. (Because of high demand, the popular two-seater usually sells for $1,500 to $2,500 over sticker). She ridiculed what she described as Tom's "lethargic" sales style. She questioned whether he was "burned out" and "needed some rest". Tom was shocked by Scout's criticism. Tom wasn't sure how he found the nerve, but he protested that she was singling him out for criticism because of his age. Sure, he was having a dry spell, but so were others at the dealership, he said. Scout fumed that he would accuse her of age discrimination. She told him in no uncertain terms he was a mediocre employee, had always been mediocre, and would always be mediocre. She said the dealership had "carried him" for too long and she didn't have room on her team for someone "lost in a fog". She warned Tom that she would be watching him closely over the next 30 days. If he committed one more infraction, or had one more sub-par sales month, he would be fired. True to her word, Tom was discharged on June 30 for "unsatisfactory performance." The termination letter was signed by Atticus Finch.

On July 10, Tom filed charges with the Equal Employment Opportunity Commission alleging age discrimination and retaliation. The EEOC has requested the dealership to provide a Statement of Position. You are counsel to Atticus Finch Honda. What do you do?

This scenario has become very familiar in today's litigious society. According to data compiled by the EEOC, the number of retaliation claims has almost doubled in the past eight years, from about 11,000 in 1992 to 21,613 last year.[1] One probable reason for this upsurge in claims is the EEOC's liberal definition of retaliation found in the guidelines on retaliation in the 1998 EEOC Compliance Manual ("Guidelines"). In a major departure from the majority of federal court rulings across the country, including courts in the Third, Fourth, Fifth, Seventh,

[1] "Charge Statistics From The U.S. Equal Employment Opportunity Commission FY 1992 Through FY 2000," found on the Internet at www.eeoc.gov/stats/charges.html.

Eighth and Tenth Circuits, which have ruled that to state a retaliation claim under Title VII and related discrimination laws the plaintiff must show that he suffered an adverse "ultimate employment action" that results in a change in the terms and conditions of employment,[2] the Guidelines make clear that no such proof is required in order to establish retaliation. The Guidelines state:

> "Some courts have held that the retaliation provisions apply only to retaliation that takes the form of ultimate employment actions. Others have construed the provisions more broadly, but have required that the action materially affect the terms, conditions, or privileges of employment.
>
> "The Commission disagrees with those decisions and concludes that such constructions are unduly restrictive. The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."[3]

Under the EEOC's interpretation of the law, retaliation can include refusing to take an employee to lunch! The following examples are taken directly from the EEOC Guidelines, and illustrate the breadth of the EEOC's interpretation of "adverse action."

> **Example 1** - CP filed a charge alleging that he was racially harassed by his supervisor and co-workers. After learning about the charge, CP's manager asked two employees to keep CP under surveillance and report back about his activities. The surveillance constitutes an "adverse action" that is likely to

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[2] See *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (**3d Cir.** 1997) [harassment and negative evaluations not adverse action]; *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239 (**4th Cir**. 1997) [surveillance not adverse action]; *Webb v. Cardiothoracic Surgery Associates of North Texas, P.A.*, 139 F.3d 532 (**5th Cir.** 1998) [rude treatment not adverse action]; *Sweeney v. West*, 149 F.3d 550 (**7th Cir.** 1998) [employers should not be subject to lawsuits for "the slightest nudge or admonition [however well-intentioned] given to an employee. . ."]; *Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 428 (**8th Cir.** 1998) [reprimands, relocation of desk and modification of work schedule not adverse action]; *Sanchez v. Denver Public Schools*, 164 F.3d 527 (**10th Cir.** 1998) [lateral transfer of teacher not adverse action].

[3] EEOC Compliance Manual, Section 8-II.D.3 (hereafter "Guidelines"), found on the Internet at www.eeoc.gov/retal.html.

deter protected activity, and is unlawful if it was conducted because of CP's protected activity.

Example 2 - CP filed a charge alleging that she was denied a promotion because of her gender. One week later, her supervisor invited a few employees out to lunch. CP believed that the reason he excluded her was because of her EEOC charge. Even if the supervisor chose not to invite CP because of her charge, this would not constitute unlawful retaliation because it is not reasonably likely to deter protected activity.

Example 3 - Same as Example 2, except that CP's supervisor invites all employees in CP's unit to regular weekly lunches. The supervisor excluded CP from these lunches after she filed the sex discrimination charge. If CP was excluded because of her charge, this would constitute unlawful retaliation since it could reasonably deter CP or others from engaging in protected activity.

In addition to the EEOC's broad definition of adverse employment action, we believe that retaliation claims are on the rise today because many employers simply do not understand the ease with which such claims are proven, and they fail to implement appropriate steps to minimize the potential for liability. In this article, we provide an overview of the law governing retaliation and address a number of issues raised by the foregoing case scenario:

- What is actionable retaliation?
- What facts must plaintiff show to prove a claim?
- Must the plaintiff make a legally viable discrimination or harassment complaint in order to complain about subsequent retaliation?
- What is an "adverse employment action"?
- What standard of proof do the courts require to show a causation between the complaint and the adverse action?

Finally, we offer practical front-end precautions that your organization should take to avoid these costly claims, and provide sample personnel documents that you may wish to implement.[4]

[4] These samples are included in the Appendix hereto.

II. The Law Prohibiting Retaliation

Title VII of the Civil Rights Act,[5] the Age Discrimination In Employment Act,[6] the Americans With Disabilities Act,[7] and the Equal Pay Act[8] explicitly prohibit retaliation by an employer, employment agency or labor organization because an individual has "participated" in proceedings under the applicable statute or "opposed" practices made unlawful by those acts. The "participation" clause protects any individual who has made a charge, testified, assisted or participate in any manner in an investigation, proceeding, hearing or litigation under Title VII, the ADEA, the ADA or EPA. Significantly, participation is protected activity whether or not the allegations in the underlying complaint were valid or reasonable. While the "opposition" clause requires a plaintiff to have a good faith belief that the challenged conduct is unlawful, the participation clause applies to all who participate in the complaint process. Thus, courts uniformly have held that an employer is liable for retaliating against en employee for filing an EEOC charge, regardless of the validity or reasonableness of the charge.[9]

Examples of protected "opposition" include threatening to file a charge or other formal complaint alleging discrimination, complaining to anyone about alleged discrimination against oneself or others, and protesting employment discrimination to a manager, co-worker, attorney, union official or newspaper reporter.[10] The opposition must be in good faith and reasonable.

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[5] § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a).

[6] § 4(d) of the ADEA, 20 U.S.C. § 623(d).

[7] § 503(a) of the ADA, 42 U.S.C. § 12003(a). In addition, § 503(b) of the ADA, 42 U.S.C. § 12003(b) provides that it is unlawful "to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoying, or on account or his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter. Significantly, a claimant who alleges retaliation in violation of the ADA need not be a qualified individual with a disability. *Krouse v. American Sterilizer*, 126 F.3d 494 (3d Cir. 1997).

[8] § 15(a)(3) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3).

[9] *Wyatt v. Dalton*, 118 F.3d 671, 680 (**1st Cir.** 1994).

[10] Guidelines, Section 8-IB.2.

Courts have found that where a plaintiff lodges frequent and voluminous, and sometimes false, complaints, and engaged in antagonistic behavior towards her supervisor, that such actions are not reasonable and not protected by Title VII.[11] Moreover, the opposition is protected only if the complainant communicates expressly or implicitly that the practice is unlawful discrimination. Generalized complaints cannot serve as the basis for a retaliation claim.[12]

A plaintiff who is alleging retaliation under Title VII, the ADEA, the ADA or Equal Pay Act does not also have to allege that he or she was treated differently because of race, color, religion, national origin, sex, age, or disability.[13] For public employees, in addition to the statutory protections against retaliation for protesting discrimination, the constitution provides an additional basis for protection from retaliation on the basis of protected speech or conduct.[14]

A. Plaintiff's Prima Facie Case.

To maintain a claim for retaliation, the plaintiff must generally show a three-step order of proof, referred to as a "prima facie" case of retaliation:

(1) She engaged in statutorily protected activity or expression;

(2) She suffered an adverse employment action following such activity or expression; and

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[11] *Robbins v. Jefferson County School District*, 186 F.3d 1253 (**10th Cir.** 1999).

[12] See *Opp v. Source One Management, Inc.*, 591 N.W.2d 101 (**N.D**. 1999) [affirming summary judgment on retaliatory discharge claim because plaintiff could not show that he opposed an unlawful employment practice. His complaint that a female supervisor "pried into his personal life" by asking how his family was doing or what his vacation plans were did not constitute a complaint of sexual harassment and would not support retaliation claim].

[13] Guidelines, § 8-I.B

[14] *Pickering v. Board of Education*, 391 U.S. 563 (1968).

(3) There was a causal link between the protected activity or expression and the employer's adverse action.[15]

In *Galdieri-Ambrosini v. National Realty and Development Corp.*, 136 F.3d 236 (**2d Cir.** 1998), the court held that plaintiff had failed to make out a prima facie case of retaliation. Plaintiff was a secretary and claimed that she was retaliated against and forced to perform menial personal tasks and carry a heavier workload, due to her supervisors' favoritism towards an attractive female co-worker. The court ruled that plaintiff had not shown retaliation because her complaints were about having to work on personal business, not sexual harassment. Because plaintiff could not reasonably believe that she was subjected to sexual harassment, she could not prevail on her retaliation claim.

In *Montadon v. Farmland Industries, Inc.*, 116 F.3d 355 (**8th Cir.** 1997), the court ruled that plaintiff had not presented sufficient evidence to survive summary judgment on his retaliation claims, because he did not show that he had complained about sexual harassment prior to the alleged retaliation.

In *Egbuna v. Time Life Libraries, Inc.,* 153 F.3d 184 (**4th Cir.** 1998) (en banc), cert. denied, 119 S. Ct. 1034 (1999), plaintiff, an undocumented alien, failed to establish a prima facie case of retaliation because he was not eligible for employment due to his alien status. Plaintiff alleged that defendant had refused to re-hire him because he had participated in another employee's sexual harassment suit against defendant. However, plaintiff's status as an undocumented alien made it illegal for an employer to hire him, and he therefore could not show that he fell within protection of Title VII.

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[15] *Causey v. Balog*, 162 F.3d 795 (**4th Cir.** 1998); *Gonzalez v. Ingersoll Milling Machine Co.*, 133 F.3d 1025 (**7th Cir.**); *Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 428 (8th Cir. 1998); *Miller v. Fairchild Industries, Inc.*, 797F.2d 727 (**9th Cir.** 1997).

B. Defendant's Burden of Producing Evidence of A Legitimate, Non-Discriminatory Reason for The Adverse Action.

Once the plaintiff makes out a prima facie case of retaliation, the burden of "articulating" a legitimate non-discriminatory reason for the employer's adverse action shifts to the employer. To meet this burden, the employer must simply present admissible evidence to show the reason(s) for action. Not surprisingly, in the vast majority of the cases, the employer's proffered justification is poor performance, inadequate qualifications for the position sought, or insubordination/violation of work rules. For example, in *Chock v. Northwest Airlines*, 113 F.3d 861 (**8th Cir.** 1997), the court held that Northwest's concern that plaintiff was missing too much time from work to pursue an MBA and that his living arrangements with a direct supervisor presented an appearance of impropriety were non-discriminatory reasons for its actions.

Again, in *Berg v. Bruce*, 112 F.3d 322 (**8th Cir.** 1997), the Eighth Circuit held that a school district's non-discriminatory reasons, based on insubordination in plaintiff's refusal to address deficiencies in performance and evidence if threats to a supervisor, were sufficient to rebut plaintiff's prima facie case.

If the evidence supporting the employer's explanation is lacking or contradictory, then the employer's showing is weak and may be disregarded by the fact finder. However, where the showing is accompanied by documentary evidence in the form of written standards of conduct, and well-written performance reviews, counseling statements and disciplinary warnings, and accompanied by testimony from managers, co-workers, and third party witnesses, then the employer's showing is likely to carry the day, even where plaintiff has initially has made out a prima facie case of retaliation. In *Holifield v. Reno*, 115 F.3d 1555 (**11th Cir.** 1998), plaintiff alleged that he was discriminated against when he was demoted and terminated from his position as a doctor at a prison. The court found that plaintiff had established a prima facie case of retaliation by showing that he was written up for poor performance one day after he had complained of job discrimination. However, the employer's evidence was ample to meet its burden. The court ruled that where "peer review, performance appraisals, and testimony from supervisors, colleagues, and medical staff all show that the work for which Holifield was

responsible was not performed properly," defendant's "non-discriminatory reason for its action is so strong as to rebut completely the inference raised by the prima facie case."

Likewise, in *Casenas v. Fujisawa,* 58 **Cal. App**. 4th 101 (1997), plaintiff was a sales representative for Fujisawa from 1986 to 1989. She resigned in1989 because she claimed she was harassed and suffered retaliation after she filed a sexual harassment complaint against a supervisor. In response to the plaintiff's retaliation claim, Fujisawa was able to establish the following undisputed facts: (1) Casenas received an 8 % performance bonus in 1988; in 1989, she received a 7 % bonus; (3) she complained about her 1989 performance appraisal and the amount of her 1989 bonus and the matter was reviewed by different managers; thereafter, Casenas complained for the first time that the evaluating supervisor had sexually harassed her; and (5) the sexual harassment complaint was investigated thoroughly and the supervisor (who had since transferred) was given a warning letter and directed not to have further contact with Casenas. The court found that the employer's conduct was "***a textbook example of how to respond appropriately*** to an employee's harassment complaint."[16] The court rejected plaintiff's claim that Fujisawa had retaliated against her by not changing her performance review or increasing her bonus. The court accepted the employer's evidence that it had legitimate reasons for its actions.

C. Plaintiff's Evidence of Pretext: Statistics, Comments and Inconsistent Treatment.

It takes two players to play a game of tennis; so it is with litigation. The plaintiff tries for an ace serve by establishing a prima facie case. The employer returns serve, offering legitimate, non-discriminatory explanations for its conduct. The burden of persuasion remains with the plaintiff throughout however. Plaintiff can hit a winner by proving that the employer's proffered explanation is a pretext for unlawful discrimination. As the following cases demonstrate, pretext can be shown in several ways: (1) statistics; (2) comments reflecting retaliatory animus; and (3)

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[16] 58 **Cal. App**. 4th at 103.

evidence of inconsistent treatment, both between plaintiff and other similarly situated individuals, and with respect to the treatment of plaintiff before and after the protected activity.

In *Sada v. Robert F. Kennedy Medical Center*, 56 **Cal. App.** 4th 138 (1997), plaintiff worked at the medical center on a part time basis. She was denied full-time employment, and brought a filed a charge of national origin discrimination with the California state EEO agency. Within a few days after the agency contacted the medical center to investigate Sada's claim, she was terminated. Sada then filed a lawsuit alleging discriminatory refusal to hire and retaliation. The court of appeal reversed the trial court's grant of summary judgment in favor of the medical center. The court concluded that Sada had presented sufficient evidence to raise questions for a jury on whether she was a victim of unlawful retaliation. First, there was the close proximity—a matter of only a few days—between the time of Sada's discrimination complaint and the termination. Second, when the supervisor learned that she had complained he reportedly stated, "Those Mexicans. [Plaintiff] better drop her lawsuit. We are going to send all their asses back to Mexico." That supervisor knew of the discrimination complaint and made the decision not to hire Sada. Finally, Sada's job performance was praiseworthy before her final evaluation was rewritten at her supervisor's direction.

In *Champagne v. Serviastar Corp.*, 138 F.3d 7 (**1st Cir.** 1998), plaintiff, a truck driver who suffered from a mental disability, alleged that his employer threatened to fire him in retaliation for filing an ADA charge. The court found that plaintiff had established a prima face case of retaliation, but failed to prove that the employer's articulated reason for its actions were pretextual. The court found that the company's decision to require strict route rotation and to audit driving logs would not support an inference of discrimination or retaliation where the practice was applied equally to everyone. In addition, an audit of driving logs revealed that plaintiff and two other s had falsified their logs and all three were terminated.

Stratton v. Department of Aging for the City of New York, 132 F.3d 869 (**2d Cir.** 1997), held "the jury was entitled to reject defendants' explanation" for its treatment of plaintiff in light of statistical evidence and evidence that plaintiff was inexplicably treated differently than other employees in both her employment and in the process of rehiring."

In *Krouse v. American Sterilizer Co.*, 126 F.3d 494 (**3d Cir.** 1997), plaintiff alleged that his being placed on disability was a pretext for retaliation where his employer claimed that he was not adequately productive on the job. Plaintiff argued that because the employer retained another employee with a disability in the same position, his termination was pretextual. The court disagreed, citing the much better productivity statistics of the other employee, and held that plaintiff had not proved that his termination was retaliatory.

Baty v. Willamette Industries, Inc., 17 F.3d 1232 (**10th Cir**. 1999), shows that even without a "smoking gun," pretext can often be established through the employer's own explanation for its actions. Plaintiff was terminated after she filed a sexual harassment complaint with the EEOC, ostensibly because the employee who plaintiff was hired to replace did not retire as planned. The employer urged that it could not afford to pay plaintiff's salary and retain the long term employee. Plaintiff's evidence of pretext was substantial. Defendant. knew about the delay in the employee's retirement even before it hired plaintiff, and it began to advertise to fill her position soon after it fired her. Defendant's claim of "poverty" was also found unworthy of belief, since the employer earned more money in the year in which plaintiff was terminated than in prior years and paid bonuses to all of its employees.

D. What Constitutes An Adverse Employment Action?

The most obvious types of adverse actions are termination, demotion, denial of a promotion, refusal to hire and denial of job benefits. Other types of adverse action are threats, reprimands, negative performance evaluations, and loss of normal work assignments.[17] The EEOC takes the position that Title VII and related discrimination laws prohibit *any* adverse treatment that is based on a retaliatory motive and is reasonably likely to deter plaintiff or others from engaging in protected activity.[18] However, petty slights and trivial annoyances are not

[17] Guidelines, § 8-II.D.1.

[18] Guidelines, § 8-II.D.3.

actionable, as they are not likely to deter protected activity.[19] The courts have addressed the issue of adverse employment actions in numerous cases:

1. Negative Job References

In *Robinson v. Shell Oil Co.,* 519 U.S. 337 (1997), the Supreme Court treated a negative employment reference as a sufficiently adverse action to support a retaliation claim. The court ruled that Title VII prohibits an employer from retaliating against ***former*** employees as well as current employees. According to the EEOC, examples of post-employment retaliation include actions that are designed to interfere with the individual's prospects for employment, such as giving an unjustified negative job reference, refusing to provide a job reference, and informing the prospective employer about the applicant's protected activity (e.g., "Sharon's a troublemaker, I wouldn't hire her. She's always complaining about harassment this and harassment that.").[20]

In *Gibson v. Old Town Trolley Tours of Washington, D.C., Inc.*, 160 F.3d 177 (4th Cir, 1998), an employer's failure to return a reference form was held to be insufficient to support a finding of unlawful retaliation. Although the employer usually verified employees' positions and length of employment, there was no evidence that the employer typically completed narrative reference forms such as the one presented by plaintiff. Moreover, there was no evidence that the employer would have completed the form had the plaintiff not filed a complaint, nor that the employer knew at the time about the complaint.

2. Transfers and Job Reassignments

In *Dilenno v. Goodwill Industries of Mid Eastern Pennsylvania,* 162 F.3d 235 (**3d Cir.** 1998), the court reversed a summary judgment in favor of the employer, because it found that a transfer to a job that the employer knows the plaintiff cannot perform may constitute an adverse action. The court ruled that the plaintiff's job related attributes must be taken into account in

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[19] *Southard v. Texas Board of Criminal Justice*, 114 F.3d 555 (5th Cir. 1997) [undesirable work assignments are not an adverse action].

determining whether a lateral transfer is an adverse action. The employee had complained about sexual harassment, and then was transferred to a job that she could not perform because of a phobia she had, which her employer knew about.

3. Diminished Work Duties and Responsibilities

Coffman v. Tracker Marine, L.P., 141 F.3d 1241 (**8th Cir.** 1998), held that plaintiff was retaliated against when she was refused holidays off, her duties were changed to include fewer responsibilities, and her supervisor ceased communicating with her, which hampered her ability to perform her job. Taken together these actions constituted an adverse employment action.

In *Preda v. Nissho Iwai American Corp.*, 128 F.3d 789 (**2d Cir.** 1997), the court held that plaintiff's allegations that "he was excluded from meetings and client outings … and that his job duties and responsibilities were downgraded ... and his position reduced to largely clerical tasks" was sufficient to raise a jury issue as to whether he was subjected to an adverse employment action to survive summary judgment on his retaliation claim.

In *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (**3d Cir.** 1997), plaintiff complained about sexual harassment on the police force. After she complained she alleged that she experienced retaliation, including "several unsubstantiated reprimands," restricted job duties, and failure to transfer out of the command of the alleged harasser. The court held that plaintiff's allegations did not rise to the level of an adverse employment action.

4. Increased Work Duties

Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43 (**1st Cir.** 1998), held that an employee's receipt of electronic messages containing "onerous assignments" and critical reports on his productivity did not rise to the level of an adverse action because other employees received messages urging them to implement new systems quickly and efficiently too. Plaintiff also continued to receive favorable performance evaluations. The supervisor's alleged warning

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[20] Guidelines, § 8-II.D.2. *See Hashimoto v. Dalton*, 118 F.3d 671 (**9th Cir.** 1995) [negative employment references can violate Title VII and 42 U.S. C. § 1981].

that plaintiff complete his work within an 8-hour workday "or else" did not constitute an adverse action. Plaintiff was granted overtime each time he requested it and was the only employee to receive temporary assistance and payment for working overtime.

E. Plaintiff Must Show A Nexus Between The Protected Activity And Subsequent Adverse Action.

A plaintiff must prove a causal link between the protected conduct or expression and the adverse action to prove retaliation. Proximity in time has been held relevant to the question of causation. In *King v. Preferred Technical Group*, 166 F.3d 887 (**7th Cir.** 1999), the court held that plaintiff had shown a causal link between protected activity and her termination by offering evidence that she was fired one day after she completed her leave of absence under the FMLA. *EEOC v. HBE Corp*, 135 F.3d 543 (**8th Cir**. 1997), held that where the protected conduct and the adverse action occurred within hours of each, the close temporal proximity permits an inference of causation. Conversely, while the passage of time is not always evidence of a lack of retaliatory motive, absent evidence of "intervening animus," a passage of 19 months was conclusive in determining no causal link. *Krouse v. American Sterilizer*, 126 F.3d 494 (**3d Cir**. 1997).

Plaintiff also must show that the decision-maker knew of the plaintiff's protected activity. In *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145F.3d 653 (**4th Cir.** 1998), the court held that an employer must have knowledge of the protected activity in order to establish a causal connection between that activity and the adverse action. Here, plaintiff alleged that she had been demoted and terminated from her employment. She could not show, however, that her supervisor was aware that she had filed a charge. Therefore, plaintiff could not establish a prima facie case.

Retaliation will not be found where the plaintiff fails to show any nexus between her complaints and her ultimate discharge. In *Willis v. Marion County Auditor's Office, 118 F.3d 542 (**7th Cir.** 1997),* plaintiff lodged an internal complaint of discrimination and harassment against her immediate supervisor. The court found that notwithstanding plaintiff's evidence of

discriminatory animus of her supervisor, she failed to prove causation because there was not showing that the decision maker in her termination was in any way affected by her complaint against her supervisor. The court ruled that "when the relationship between the subordinate's illicit motive and the employer's ultimate action is broken, and the ultimate decision is clearly made on an independent and legally permissible basis, the bias of the subordinate is not relevant."

F. Plaintiff's Burden of Persuasion As To Causation

A plaintiff must show not only that her protected activity was a link in the chain of evidence leading to the adverse employment action, ***but that it caused the adverse action***. Courts have used different standards to articulate a plaintiff's burden of persuasion. Several courts apply a Courts in the **First, Third** and **Ninth Circuits** utilize the strictest requirement, a "but for" test; that is, plaintiff must show that "but for" the protected activity, the adverse action would not have occurred. In *Provencher v. CVS Pharmacy*, 145 F.3d 5 (**1st Cir.** 1997), the court held that a plaintiff has the burden to prove that an adverse action was caused by his prior protected activity, and that liability exists only of the protected activity was the only factor for the adverse action, not just one among many.

Woodson v. Scott Paper Co., 109 F.3d 913 (**3d Cir**. 1997), held that the trial court erred in giving a jury instruction that racist graffiti can constitute direct evidence of discriminatory animus. Instead, the court ruled that the graffiti is only circumstantial evidence, which may be considered along with other evidence to determine the employer's intent. The court also held that retaliation must be the determinative, not merely a motivating, factor behind the decision to terminate the plaintiff.

Retaliation will not be found where the plaintiff fails to show any nexus between her complaints and her ultimate discharge. In *Willis v. Marion County Auditor's Office, 118 F.3d 542 (**7th Cir.** 1997)* plaintiff lodged an internal complaint of discrimination and harassment against her immediate supervisor. The court found that notwithstanding plaintiff's evidence of discriminatory animus of her supervisor, she failed to prove causation because there was not

showing that the decision maker in her termination was in any way affected by her complaint against her supervisor. The court ruled that "when the relationship between the subordinate's illicit motive and the employer's ultimate action is broken, and the ultimate decision is clearly made on an independent and legally permissible basis, the bias of the subordinate is not relevant."

In *Merrick v. Farmers Ins. Croup*, 892 F.2d 1434, 1441 (**9th Cir**. 1990), an action for age discrimination and retaliatory discharge, the court held the company's jury instructions, which provided that the plaintiff only was entitled to recover if his complaint of age discrimination was "the determining factor of whether or not plaintiff was retained or discharged," was proper. The court stated, "[The] instructions...read together clearly state that the existence of a legitimate basis for terminating Merrick would not save Farmers if the retaliatory motive was the 'but for' cause of his discharge. This is an adequate statement of the law as it applies to pretext cases."

III. Our Practical Tips For Reducing Your Exposure On Retaliation Claims.

Companies can minimize their statutory liability by focusing on written company policies against discrimination, executive commitment, communication of company policy, regular training, complete and full investigation, appropriate discipline, and follow-up.

1. Create and Implement Written Company Policies Against Discrimination, Harassment & Retaliation

The first question after any complaint of employment discrimination is "Did the company have a policy prohibiting discrimination?" Failure to have a written policy which specifically prohibits discrimination, harassment and retaliation is strike one against the employer. Old policies aren't good enough. As employment discrimination law has evolved, new protected classes and new variations on the law have arisen. For example, a policy which prohibits sexual conduct which is offensive to employees but ignores conduct which is offensive to observers, vendors, customers and guests may also violate the law.

Company policies prohibiting employment discrimination and harassment in the workplace reduce discrimination in the workplace and are evidence of the company's anti-

discrimination attitude. The policy must confirm that all employment practices will occur without regard to protected status and that all employees are entitled to work in a discrimination and harassment free environment. It must give specific examples of conduct that are prohibited, and it must have a complaint procedure for employees who wish to report violations. Each major protected class must be mentioned, and the classes must be updated as the laws change.

2. Ensure Your Organization's Commitment from the Top Down

An organization's policies are only as effective as the actions of top management. If management writes policies which they ignore, the employees also will ignore the policies. Company executives must maintain a discrimination free environment. If the CEO tells sexual and racial jokes at the company picnic, then managers, supervisors and employees also will tell the same type of jokes.

The culture of most organizations starts at the top. If the CEO practices a discrimination free workplace, then other executives, managers and supervisors also will keep the workplace discrimination free.

3. Communicate The Organization's Policy That Discrimination, Harassment and Retaliation Will Not Be Tolerated

If the first question in a discrimination case is whether the company has written policies against discrimination, the second question is whether the employer has communicated its anti-discrimination policies to employees.

The employer should establish an employee orientation process that every employee is required to go through, where the employee receives copies of all important personnel information including company rules, benefits, conditions of employment and performance expectations. Receipt of the information should be documented by having the employee sign a receipt and by placing the receipt in the employee's personnel file.

Employee handbooks are also essential communication tools. Some state courts have considered employment policies and employee handbooks as binding contracts between the employer and the employee. On one hand, discipline and termination procedures in employee

handbooks have been considered in determining whether an employee can only be discharged with good cause. On the other hand, courts also have found that policies and handbooks can confirm the employer's right to terminate employees either for no reason or for specific reasons.

4. Conduct Regular Training On Your Organization's Discrimination, Harassment and Retaliation Policies for Both Management and Non-Management Employees

When management wants employees to engage in certain behavior, it provides training. Most companies have training programs for job skills and safety. One question asked in discrimination claims is whether the company conducted any training programs regarding employment discrimination, harassment and retaliation. Companies that have significant problems with employment discrimination are hard pressed when they are asked why they didn't implement employee training programs to correct the problem.

5. Conduct Fair, Complete and Full Investigations Into Allegations of Discrimination, Harassment or Retaliation

Often companies receive information that employment discrimination is occurring but do not act on it. Where employees can show management was aware of discrimination but failed to fully investigate it and take action, the employment liability becomes astronomical. During an investigation, always advise the complaining employee and witnesses that retaliation is prohibited and will not be tolerated. If they believe they have been subjected to retaliatory conduct, they should report it immediately.

6. Administer Appropriate and Consistent Discipline

When employees break work rules, they are disciplined. When a manager, supervisor or employee discriminates against an employee, he is violating company work rules and breaking the law. Companies sometimes forget that discrimination, harassment and retaliation are violations of company rules and attempt to treat them as personality problems between employees. This sends a signal to other employees that company rules against employee discrimination are not as important as other rules relating to absenteeism, tardiness and safety. It also increases the company's liability since the president of the company may have to explain to

a jury why the company did not discipline employees for discrimination, but did discipline for minor events such as tardiness.

7. Pay Attention To Documentation

Remember that any memo, e-mail or Post-it® note about an employee may end up being disclosed in a lawsuit someday. Once an employee has filed a charge, post-complaint documents are more likely to be disclosed in litigation.

Follow these basic rules about documentation. First, obtain as much documentation as you can during internal investigations of discrimination or harassment complaints. Employee "alliances" can change over time, and it is good practice to have the "real story" memorialized. Second, ensure that performance documentation is honest and consistent. Avoid the temptation to rate everyone as "above average"; to do so only demeans the employee and harms the integrity of the evaluation process. Do not "paper the file" for employees who have complained about discrimination. Finally, advise supervisors not to "editorialize" their views concerning employees who have complained about discrimination or harassment, unless they do so at the request of or in the presence of in-house counsel.

8. Limit Disclosure and Discussion About An Employee's Discrimination Or Harassment Complaint To Those Who Have A Legitimate "Need to Know"

Here, the fewer who know about another employee's discrimination or harassment complaint, the better. If a supervisor takes adverse action against an employee who has engaged in protected activity, there is no causation if the supervisor did not know about the protected conduct.

9. Do Not Give Negative Job References Without A Release. Period.

One of the most common reasons an employee files a claim is because they have trouble finding work after they leave your organization and become convinced that they are being "blackballed." One of the most common complaints of retaliation is that the former employer has given an unjustly negative job reference to a prospective employer. To be safe, many employers adopt a strict policy that requests for references must be in writing and must be directed to a central location. Others refuse to provide any narrative information, opting instead merely to verify dates of employment, final salary and positions held. We advise a preventative approach that requires all employees to complete a release at the time of termination permitting you to offer a job reference to the prospective employer. If the employee does not provide the release, disclosures should be limited to neutral information only.

10. Follow-Up

Companies often take all appropriate steps to stop discrimination and then sit back expecting everything to work just right. Unfortunately, the behavior that leads to employment discrimination is learned over a period of many years. It is unrealistic to expect that an employee who has been telling discriminatory jokes for twenty years will suddenly stop when he or she receives a warning notice from a supervisor. People change their habits — good and bad — slowly, and they often backslide. Following up over a period of time on discrimination complaints is just as important to minimizing liability as stopping the discrimination.

APPENDIX

1. Equal Employment Opportunity Policy

2. Employee Performance Appraisal

3. Counseling Forms

I. EQUAL EMPLOYMENT OPPORTUNITY

[Company Name] is an equal opportunity employer. We enthusiastically accept our responsibility to make employment decisions without regard to race, religious creed, color, age, sex, sexual orientation, national origin, religion, marital status, medical condition, disability, military service, pregnancy, childbirth and related medical conditions, or any other classification protected by federal, state, and local laws and ordinances. Our management is dedicated to ensuring the fulfillment of this policy with respect to hiring, placement, promotion, transfer, demotion, layoff, termination, recruitment advertising, pay, and other forms of compensation, training, and general treatment during employment.

Any form of discrimination against employees will not be tolerated and will result in appropriate disciplinary action, up to and including termination. If an employee believes someone has violated this policy, the employee should bring the matter to the attention of the [Personnel Division] or anyone else in the Company with whom the employee is comfortable. The Company will promptly investigate the facts and circumstances of any claim this policy has been violated and take appropriate corrective measures.

No employee will be subject to, and the Company prohibits, any form of discipline or retaliation for reporting in good faith incidents of unlawful discrimination, pursuing any such claim, or cooperating in any way in the investigation of such claims.

II. NO HARASSMENT

[Company Name] does not tolerate harassment of our job applicants or employees by another employee, supervisor, or any third party. Any form of harassment on the basis of race, religious creed, color, age, sex, sexual orientation, national origin, religion, marital status, medical condition, disability, military service, pregnancy, childbirth and related medical conditions, or any other classification protected by federal, state, and local laws and ordinances is a violation of this policy and will be treated as a disciplinary matter.

While it is not easy to define precisely what harassment is, harassment includes slurs, jokes, and other uninvited verbal, graphic, or physical conduct by one individual toward another. Harassment of any kind will not be tolerated and may be grounds for immediate termination.

In particular, sexual harassment includes many forms of offensive and unwelcome behavior and may include:

- Unwelcome sexual advances
- Offering employment benefits in exchange for sexual favors
- Making or threatening reprisals after a negative response to sexual advances
- Visual conduct such as leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons, or posters
- Verbal conduct such as making or using derogatory comments, epithets, slurs, and jokes
- Verbal sexual advances or propositions
- Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes, or invitations
- Physical contact such as touching, assault, impeding or blocking movements.

While sexual harassment is not easy to define, examples include verbal or physical contact of a sexual nature that (1) has the purpose or effect of creating an intimidating, hostile or offensive working environment; or (2) has the purpose or effect of unreasonably interfering with an individual's work performance, or (3) otherwise adversely affects an individual's employment opportunities. Because it is difficult to predict when conduct or comments might be "unwelcome," employees should avoid *all* such conduct and behave at all times in a professional and respectful manner.

The following steps have been put into place to ensure the work environment at [Company Name] is respectful, professional, and free of unwelcome harassment. If an employee believes someone has violated this policy (whether or not that person is a co-worker, a superior, or a

third party), the employee should bring the matter to the immediate attention of his or her supervisor or, where this is inappropriate or not practical, to the attention of the [Director of the Personnel Division] or [_____] [include positions occupied by both males and females.] The Company will promptly investigate the facts and circumstances of any claim of harassment. To the extent possible, the Company will endeavor to keep the complaining employee's concerns confidential. If the employee makes a complaint under this policy and has not received a satisfactory response within five business days, he or she should contact [_____] immediately [include a high-level executive and list the person's title, address, phone numbers, e-mail address, voice mail extension, etc.]

Upon completion of the investigation, the Company will take corrective measures against any person who has engaged in harassment in violation of this policy, if the Company determines such measures are necessary. These measures may include, but are not limited to, counseling, suspension, or immediate dismissal. Anyone, regardless of position or title, whom the Company determines has engaged in conduct that violates this policy, will be subject to discipline, up to and including termination.

No employee will be subject to, and the Company prohibits, any form of discipline or retaliation for reporting in good faith incidents of unlawful harassment, pursuing any such claim, or cooperating in any way in the investigation of such claims.

We cannot remedy claimed harassment unless you bring these claims to the attention of management. Failure to report claims of harassment prevents us from taking steps to remedy the problem.

[Note: California employers are required to distribute the California Department of Fair Employment and Housing's Sexual Harassment Information sheet to all employees. We suggest including this with the new hire package and subsequently enclosing a copy with paychecks on an annual basis.]

EMPLOYEE

PERFORMANCE APPRAISAL

Name	Location
Position	Date
Completed by: Manager Employee	

PERFORMANCE APPRAISAL RATING SCALE

NA TOO SOON TO EVALUATE OR NOT APPLICABLE

In present job for too short a time, or a factor is not applicable to job.

B. BELOW STANDARD PERFORMER

Performance is below what is expected of job. Occasionally exceeds and often falls short of desired results. Level of performance must be improved. Performance level may be due to lack of experience or training.

C. CONSISTENT PERFORMER

Generates the desired results. Consistently contributes to the success of the work group.

A. ABOVE STANDARD PERFORMER

Consistently generates results above those expected of job. Contributions serve to improve the business.

O. OUTSTANDING PERFORMER

Performance on the job represents an unusually high level of excellence. Performance requirements are consistently met in a thoughtful, judicious and timely manner with very little direction. Work is consistently accurate, thorough and impressive. Creative or new applications and outstanding contributions are made regularly. Greater responsibility is continually sought.

I. MAJOR JOB RESPONSIBILITIES

Utilizing the job description, determine what you consider to be the five (5) major responsibilities in this job. Using key words from the job description, identify the responsibilities; identify the specific accomplishments/strengths and development needs/shortcomings demonstrated in the execution of those responsibilities; circle the rating factor which best reflects the overall performance in each of those areas. Include the percentage weight of each responsibility in terms of percent of time spent. To evaluate more than five major areas, please attach a addendum.

1. RESPONSIBILITY	
ACCOMPLISHMENTS/STRENGTHS	DEVELOPMENT NEEDS/SHORTCOMINGS
RATING NA B O A O	
2. RESPONSIBILITY	
ACCOMPLISHMENTS/STRENGTHS	DEVELOPMENT NEEDS/SHORTCOMINGS
RATING NA B O A O	

3. RESPONSIBILITY	
ACCOMPLISHMENTS/STRENGTHS	DEVELOPMENT NEEDS/SHORTCOMINGS
4. RESPONSIBILITY	
ACCOMPLISHMENTS/STRENGTHS	DEVELOPMENT NEEDS/SHORTCOMINGS
RATING NA B O A O	
5. RESPONSIBILITY	
ACCOMPLISHMENTS/STRENGTHS	DEVELOPMENT NEEDS/SHORTCOMINGS
RATING NA B O A O	

II. APPRAISAL OF OBJECTIVES (If additional space is needed, please attach an addendum.)

Weight	Objectives	Trade Dates	Actual Results Achieved And Comments	Not Met	Met	Executed
%						
%						
%						
%						

III. JOB RELATED PERSONAL CHARACTERISTICS

Characteristic	Comments
Operating Judgment: How good is judgment in dealing with practical problems? Consider ability to prioritize, awareness of department/company objectives, and resourcefulness in working out realistic solutions and taking timely action. Takes the initiative rather than waiting to be told.	**RATING: NA B O A O**
Flexibility: Willingness to accept change; ability to learn rapidly and to utilize past experience in meeting new situations. Has a positive mental attitude; asks how something can be done vs. describing why it cannot.	**RATING: NA B O A O**
Time Management: Sets realistic goals and discriminates wisely between important and unimportant matters. Plans and organizes work to consistently accomplish objectives and meet scheduled deadlines.	**RATING: NA B O A O**
Ingenuity/Creativity: Is constantly searching for new and better ideas to improve the organization. Exhibits original thinking and creativeness in development of new or improved methods and procedures.	**RATING: NA B O A O**
Job Knowledge: Demonstrates the necessary skills and knowledge to meet the standards of the job. Understands responsibilities of own job and interrelationships with other jobs. Seeks to improve job knowledge through observation and pertinent questions.	**RATING: NA B O A O**

III. JOB RELATED PERSONAL CHARACTERISTICS (Continued)

Characteristic	Comments
Objectivity: Is objective with self and others. Consider frankness, straightforwardness, and willingness to accept personal responsibility for own behavior, rather than blaming others or conditions.	**RATING: NA B O A O**
Teamwork/Interpersonal Skills: Works well within a group; demonstrates a genuine concern for others; activities contribute to cohesiveness and cooperation between work groups. Is viewed as helpful, cooperative, tactful, and sensitive by peers, subordinates, and supervisors	**RATING: NA B O A O**
IV. MANAGEMENT SKILLS (If Applicable)	
Use of Leadership Principles: Focuses on the situation, issue or behavior, not on the person. Maintains the self-confidence and self-esteem of others. Maintains constructive relationships with staff, peers and managers. Takes initiative to make things better. Leads by example.	**RATING: NA B O A O**
Organization and Planning: Extent to which manager anticipates and prepares for change. Demonstrates efficiency and logic regarding staffing plans, facilities, systems and procedures, equipment. Delegates effectively.	**RATING: NA B O A O**
Staffing: Have the right people been selected for each job; is care taken to promote from within when possible; is turnover a problem; are steps taken to reduce turnover where possible?	**RATING: NA B O A O**
Employee Development: To what extent does the manager execute responsibilities of setting performance expectations, training, appraising, giving constructive feedback, and developing subordinates? Are candidates for promotion identified from this manager's employees?	**RATING: NA B O A O**

Get Ideas Across/Listening: How well is the manager able to communicate both verbally and in writing? Consider ability of this manager to communicate effectively within the company (up, down and across) and externally with customers and others. Is the manager effective at encouraging employee participation in decision making?	**RATING: NA B O A O**
Salary Administration: Consider whether or not salary recommendations made by this manager are consistent with the current appraisal of the subordinate. Does this manager emphasize salary increases as a reward and incentive for merit performance and increased productivity? Are compensation policies well implemented and communicated? Are reviews timely?	**RATING: NA B O A O**

V. OVERALL PERFORMANCE EVALUATION

I. Major Job Responsibilities	**NA**	**B**	**O**	**A**	**O**
II. Objectives	**NA**	**B**	**O**	**A**	**O**
III. Job-Related Personal Characteristics	**NA**	**B**	**O**	**A**	**O**
IV. Management Skills (If applicable)	**NA**	**B**	**O**	**A**	**O**
V. Overall Job Performance	**NA**	**B**	**O**	**A**	**O**

IV. APPRAISAL OVERVIEW

A. ACTION TAKEN AND IMPROVEMENT DEMONSTRATED SINCE LAST APPRAISAL TO IMPROVE PERFORMANCE AND/OR INCREASE POTENTIAL

B. RECOGNIZING THAT WE CAN ALL IMPROVE, WHERE SHOULD THIS PERSON CONCENTRATE IMPROVEMENT EFFORTS?

VII. OBJECTIVE SETTING - FOR NEXT APPRAISAL PERIOD

These may be job-oriented and/or may involve personal development. Include target dates. If additional space is needed, please attach an addendum. (To be developed jointly during review.)

Weight %	Objectives	Target Dates

VIII. EMPLOYEE JOB/CAREER ANALYSIS

QUESTIONS FOR THE EMPLOYEE ONLY: Please respond to the following questions which are intended to assist you and your manager during the appraisal interview to design a development plan tailored to meet personal and organization objectives.

1. What are the aspects of your job which you find most interesting?

2. What parts of your job do you find most difficult and why?

3. What are some of the things you like best about the company?

4. What are some of the things you like least about the company?

5. In which of your responsibilities do you want or need additional training or experience? What can your manager do to help?

6. Are there any changes you would like to see made in your job which would help increase your effectiveness (e.g., d duties, working conditions, procedures, reports, etc.)?

7. What are your long-range career goals? Identify specific positions and anticipated time frames.

8. What do you need to prepare yourself for these goals, and what specific development actions do you intend to take? When?

9. Are you relocatable; and, if so, under what circumstances or to what areas?

IX. APPRAISAL OVERVIEW

EMPLOYEE: At the conclusion of the discussion with your manager, please describe in your own words your reaction to the appraisal. Please sign and date the appraisal indicating you have received it.

Signature: _____ Date:

MANAGER: At the conclusion of the discussion with the employee, summarize his/her response to the appraisal. Note areas of disagreement or misunderstanding about the job, specific duties, or authorities.

Signature: _____ Date:

FINAL APPROVAL SIGNATURES

(Immediate Supervisor)	(Date)	(Other Approval, If Needed)	(Date)
(Next Level Management Review)	(Date)	(Human Resources)	(Date)

INFORMAL ORAL COUNSELING	DATE
WITH	FOLLOW UP DATE
BY	SUBJECT
MAJOR POINTS AND ACTION TO BE TAKEN	
NOTES & DATE	

Signature of Employee _____ Date _____ Witnessed By _____ Date _____

FORMAL COUNSELING	**DATE**
WITH	**FOLLOW UP DATE**
BY	**SUBJECT**

MAJOR POINTS AND ACTION TO BE TAKEN

NOTES & DATE

Signature of Employee	Date	Witnessed By	Date

FINAL FORMAL COUNSELING	DATE
WITH	FOLLOW UP DATE
BY	SUBJECT

MAJOR POINTS AND ACTION TO BE TAKEN

NOTES & DATE

Signature of Employee	Date	Witnessed By	Date