

Performance You Can Measure Is Best Defense, FMLA Case Demonstrates

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I often find myself counseling clients that the more measurable a performance issue is, the easier it is for the employer to prove that issue is the true, nondiscriminatory reason for a termination or other job action in the face of a discrimination or other employment claim. Sales employees almost always have measurable data about their performance, which seemingly provides an objective basis for employment decisions taken against individuals whose sales number are lowest. Such decisions are not bullet proof; for example, the employee may allege that he or she has a less favorable territory that was assigned on a discriminatory basis. In general, though, performance issues that can be backed up with data are more easily defended. On the other hand, while we all know there are employees who are just difficult to work with on the team, that performance issue is harder to prove. Saying somebody is a “bad fit” invites allegations of discrimination against somebody who is in the minority in a work force. Here, I try to get employers to drill down on the issue and provide specific instances with names, dates, and places, and how those instances are damaging to the company. This provides harder data than general characterizations and gets the decision closer to something measurable. A recent FMLA retaliation decision from a federal court of appeals demonstrates the value of data. In [Burciaga v. Ravago Americas, LLC](#), the Eighth Circuit addressed a claim brought by a customer service representative who was terminated for poor performance around the same time she requested leave to care for her son with a serious health condition. The company asserted that Burciaga was terminated for four identifiable shipping errors in a period of 17 days. Burciaga claimed other employees made shipping errors as well, but could not identify an employee who made four in 17 days. In the face of this data, other arguments she made were unavailing. One wonders whether, in light of the closeness in time of her leave request and her termination, the company would have prevailed had the basis for the termination not been as measurable as it was.

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