



# Documentation and the Defense of Discrimination Claims

One of a school board's responsibilities is to hire a wide variety of employees to fulfill the district's educational mission. Unfortunately, sometimes those hiring decisions are not successful, and boards are faced with considering an employee's termination. In making termination decisions, boards must comply with a number of procedural and substantive legal requirements. For example, by statute, boards must follow a specific statutory process to non-renew the contracts of full-time teachers and statutory administrators.<sup>1</sup> Boards might also have employment contracts, handbook provisions or policies that establish a process they must follow and/or a legal standard they must meet to terminate a given employee. In addition, boards must consider whether an employment termination or contract non-renewal creates a risk that an employee will assert that this action violated discrimination laws.

A recent case from the Seventh Circuit Court of Appeals, whose interpretations of federal employment law govern Wisconsin districts, provides insight into how districts can minimize the risk of an employee successfully asserting a discrimination claim.<sup>2</sup> That case highlighted that perhaps the most important step districts can take to limit potential liability for discrimination when terminating employees for poor job performance is to have detailed and accurate records of performance issues. This Legal Comment will review the elements of federal and

state discrimination claims, and the facts and analysis of this recent Seventh Circuit Court of Appeals case, to provide guidance about how districts can document employee job performance deficiencies to limit potential discrimination claims.

## ■ Overview of discrimination claims

A terminated employee may file a discrimination claim against a district alleging that the district unlawfully terminated the employee due to discrimination based on the employee's legally protected class status, such as sex, race, disability, age, etc. Federal law, such as Title VII of the Civil Rights Act of 1964, state law, such as the Wisconsin Fair Employment Act, and for some districts, local ordinances, all establish protected classes that apply to a particular district's employees. Those discrimination laws also empower government agencies to enforce these laws and provide a complaint mechanism by which employees can assert discrimination claims. That complaint mechanism can ultimately result in a civil lawsuit against a district in federal or state court.

If a terminated employee asserts a discrimination claim against a district, the employee must initially establish four criteria to proceed with the claim: (1) The employee was a member of a protected class; (2) the employee was subject to an adverse employment action, such as termination; (3) the employee was meeting the district's legitimate job expectations at the time the district terminated the employee; and (4) the

employee was treated differently than a similarly situated employee outside of the employee's protected class. If the employee makes this initial showing, the district then has the burden to show that the termination decision was based on factors other than the employee's protected class, such as poor performance. If the district provides such evidence, an employee can still prevail if the employee can prove that the district's proffered reason is pretext for discrimination and that the real reason the district terminated the employee is the employee's protected class.<sup>3</sup>

A typical defense by a district to a discrimination claim is that the employee's performance did not meet the district's legitimate expectations and standards. Accurate, written documentation of the employee's poor performance history is the most effective means of proving this. An employee can use inadequate, incomplete or missing documentation of poor performance to show that the district's defense of poor performance was pretext for a discriminatory termination.

Districts have various means by which to create accurate written documentation. For example, districts are required by law to evaluate, in writing, the performance of all certified school personnel at the end of their first year and at least every third year thereafter.<sup>4</sup> Additionally, boards must establish specific criteria and a systematic procedure to measure the performance of licensed school personnel. The written evaluation must be based on a

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board-adopted position description, including job-related activities, and must include observation of the individual's performance as part of the evaluation data.<sup>5</sup> Boards must adopt one of two systems to evaluate teachers and principals. The Department of Public Instruction has developed the Wisconsin Educator Effectiveness System for boards, who can also choose to adopt an equivalent system based on DPI regulations.<sup>6</sup> For districts that use Educator Effectiveness as the sole evaluative instrument when deciding to terminate or non-renew the contract of an employee for poor performance, district evaluators need to have the evaluations completed by the time the board votes to terminate or non-renew the contract of an employee. Incomplete or absent evaluation data at the time of the termination or non-renewal hurts its value as evidence the district can use to defend against a discrimination claim. Even for districts that do not use Educator Effectiveness as the sole evaluative instrument, district evaluators should be aware that the documentation provided by Educator Effectiveness will likely become evidence in any subsequent discrimination claim. These laws provide excellent opportunities for districts to create detailed documentation of poor performance of employees, provided evaluators are careful and diligent in complying with the district's evaluation system.

### **■ Seventh Circuit Court of Appeals case**

David Igasaki was a staff attorney with the Illinois Department of Financial and Professional Regulation from 1994 until the department terminated him in 2015. Igasaki identified as a gay, Japanese-American man and, at the time of his termination, he was 62 years old and had gout, a form of inflammatory arthritis. Therefore, Igasaki fell into no fewer than four protected classes. Igasaki received periodic performance reviews and received a positive review in 2011. In 2012, however, his supervisor "[r]ated Igasaki poorly, describing him as

requiring improvement in 'job knowledge,' 'productivity,' 'quality,' 'initiative,' 'use of time,' 'planning' and 'follow-up.'" The supervisor listed specific examples of his deficient performance, including that he could not be located during work hours and had poor work product.

For the next three years, Igasaki's performance failed to improve. In 2013, the department placed him on a six-month corrective action plan that included 12 requirements for improvement and warned that failure to adhere to these requirements could result in discipline. When Igasaki's performance did not improve at the end of six months, the department renewed the corrective action plan, issued him verbal and written warnings for incompetence and inefficiency, and rated him poorly in his next performance review, specifically noting that he had fallen asleep during meetings. In 2014, Igasaki's corrective action plan was renewed for a third time, and the department noted in the plan that, while Igasaki had made limited progress, five out of the 12 action requirements had not been met. The department placed him on a 10-day suspension and renewed the corrective action plan for a fourth time, listing the same 12 specific improvement requirements. Following this, Igasaki received an additional 10-day suspension for insubordination. In his next performance review, his supervisor rated him as needing improvement in all categories. The supervisor explained this rating in detail, including that Igasaki continued to fall asleep during work hours.

In 2015, Igasaki's supervisor provided feedback on the corrective action plan and noted that he had not progressed on six of the 12 requirements. Rather than renewing Igasaki's corrective action plan for a fifth time, the department decided to terminate his employment in March 2015. Igasaki filed a federal discrimination claim alleging his termination was because of his race, sex, age and disability. A federal district court judge dismissed his claim before trial. Igasaki appealed that decision to the Seventh Circuit Court of Appeals,

which ruled in favor of the department based on the department's evidence of his poor performance.

The court observed that Igasaki produced no evidence to dispute the department's abundant documentation demonstrating that he failed to meet expectations. Even though Igasaki received positive performance evaluations prior to 2012, the court concluded that "past positive evaluations do not guarantee future employment. Nor does such evidence, without more, show discrimination. Igasaki was not performing well when terminated, and he had not been performing well for some time."

Igasaki's inability to refute the department's documentation, coupled with the department's evidence-backed explanation for his termination due to performance issues that spanned multiple years, led the court to conclude that Igasaki's protected class did not play a role in the department's decision to terminate his employment.

### **■ The importance of good documentation**

A key takeaway for districts from this case is that the quality of employee performance evaluation matters. The department did several things right when documenting Igasaki's ongoing poor performance. The department likely had far more documentation than necessary to prevail on the claim, but the rigor of the documentation gave the department a very straightforward path to victory for several reasons.

First, the documentation was comprehensive and covered a long span of Igasaki's employment. At the first instance of his performance deficiencies in 2012, Igasaki's supervisor documented the issues in his performance evaluation. When Igasaki's performance continued to decline, the department documented the failure of his increasingly rigorous corrective action plans. The department noted all the written and verbal warnings given to Igasaki, detailed his failure to improve, and provided a history of his suspensions and insubordinate

behavior. Having this documentation of poor performance that spanned multiple years undoubtedly helped the court more easily conclude that the department had terminated Igasaki for poor performance. Districts should not hesitate to document poor performance when it arises, even if the employee in question has performed well in the past. Had the department failed to implement discipline or document Igasaki's poor performance in a timely manner, he might have been in a better position to argue that the department's reliance on performance issues as the reason for termination was pretext for discrimination. This argument could have led the district court judge to allow the case to go to trial, which ultimately could have led to the department being liable for discriminatory termination.

Secondly, the department had detailed performance documentation on Igasaki. The department's performance reviews did more than simply check a box stating the employee either met expectations or needed improvement. In its documentation, the department (1) described the specific areas in which Igasaki needed to improve; (2) provided specific examples of where he fell short; (3) listed the areas in which he lacked knowledge; and (4) enumerated the deadlines he missed. The department's specificity not only made it difficult for Igasaki to refute his poor performance, but likely gave it more credibility in the eyes of the court. Vague claims of poor performance that are not supported by detailed contemporaneous documentation can undermine an employer's claim that the employee's poor performance was the employer's reason for terminating the employee. This makes it easier for an employee to claim that an employer's allegation of poor performance was actually pretext for discrimination. Here, the department presented a clear story that made it easy for the court to understand (1) in what areas Igasaki was not performing; (2) why that was a problem for the department; and (3)

how his failure to improve led to the department's decision to terminate his employment.

The department likely further increased its credibility when the documentation highlighted certain limited improvement by Igasaki because that made the evaluation more objective. However, employers should not include irrelevant positive comments in an evaluation just for the sake of saying something positive. This could diminish the credibility of the documentation and send a mixed signal to the employee and any government agency or court that reviews the documentation.

Finally, the employer provided Igasaki with measurable performance targets and laid out a clear roadmap of what he needed to do to succeed. When Igasaki's behavior became a pattern rather than an isolated disciplinary event, the department responded by placing him on a corrective action plan. Such corrective action plans (sometimes called performance improvement plans) can be an extremely helpful tool for employers when an employee's poor performance is able to be improved. However, corrective action plans are not appropriate in every situation, and corrective action plans should generally not be a condition precedent to employee termination or non-renewal of a contract. Corrective action plans serve multiple functions. They can give the employer the chance to sit down with the employee to explain the areas where the employee is failing to meet expectations. They can provide the employee with clear expectations moving forward. They can give the employee a timeline and chance for improvement, and they can explain the employment consequences that may occur if the employee fails to improve. In this case, the department's corrective action plans served all of these functions.

## Conclusion

The quality of an employer's disciplinary documentation can often determine whether a district will be

able to successfully defend itself against an employee in a discrimination lawsuit following that employee's termination or contract non-renewal for performance reasons. Districts that regularly provide constructive performance feedback, document the entire disciplinary history process with specific details, and provide employees with measurable performance targets are in a much better position to defend their termination and non-renewal decisions. While good evaluation and documentation practices can be a district's best defense, bad evaluation and documentation practices can substantially undermine a district's ability to defend against a discrimination claim. Boards should ensure that supervisory employees are properly trained in good employment evaluation and documentation practices. Boards should also periodically review their performance evaluation and documentation processes to ensure poor job performance is reviewed accurately, addressed in a timely manner, and documented properly. ■

## Endnotes

1. Wis. Stat. ss. 118.22(2); 118.24(6).
2. *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948 (7th Cir. 2021).
3. It is beyond the scope of this Legal Comment to analyze the employee's ultimate burden of persuasion in greater detail because this Legal Comment focuses on the employer's burden to produce evidence that the termination decision was based on factors other than the employee's protected class.
4. Wis. Stat. s. 121.02(1)(q).
5. Wis. Admin. Code. Pl s. 8.01(2)(q).
6. Wis. Stat. s. 115.415(1)(a).

*This Legal Comment was written by Michael J. Julka and Brian P. Goodman, of Boardman & Clark LLP, WASB Legal Counsel. For related articles, see Wisconsin School News: "Employment-Based Retaliation Claims" (Nov. 2016); "Discrimination Standards Involving Arrests and Convictions of School District Employees" (Mar. 2016); and "Discrimination Based on Genetic Information is Prohibited" (Feb. 2009).*