



Client Alert

Failing to provide accurate performance evaluations can leave California employers open to wrongful termination lawsuits.

Recent Decision Illustrates Dangers of Uncritical Performance Evaluations

A recent decision of the California Court of Appeal illustrates the dangers of providing uncritical performance evaluations. In *Sandell v. Taylor-Listug, Inc.*, the appellate court held that an employee who used a cane made out a prima facie case of employment discrimination because he was fired for poor performance after previously receiving positive performance reviews. As a result, the employee was entitled to have a jury determine whether he had been fired because of his condition.

The case serves as a reminder of the dangers employers face in terminating employees, as well as the precautions they can take to minimize their risks. In the absence of an agreement to the contrary, employment in California is “at will,” meaning the employee can be fired for any reason or for no reason, as long as the reason does not violate public policy. However, if a terminated employee falls within a protected class — such as those with disabilities — courts will closely examine the reasons the employer provides for the termination.

The decision is noteworthy for two reasons:

- First, the employee was allowed to proceed with his claim even though his “disability” was relatively mild. Indeed, federal law does not consider the need to use a cane to be a



Russell I. Glazer

310.789.1216

rglazer@troygould.com

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disability because it is not a "substantial limitation" on one's activities. Yet California defines disabilities more broadly than federal law. Under California's standard, an individual is disabled if he or she suffers from any condition that "limits" a major life activity." Since walking is a major life activity, the use of a cane is considered a disability under California law. As a result, the appellate court determined that the employee fell within a protected class.

- Second, the decision demonstrates the risks of providing favorable employment reviews to an employee whose performance results may be mixed. The employer had given the employee generally positive reviews in the years preceding his termination. Although the reviews had noted the need for improvement in certain areas, the reviewer included comments suggesting that the problems were attributable to forces outside the employee's control. The appellate court therefore held that the employer's later claim that it terminated the employee for poor performance could be a pretext for unlawful discrimination.

Conclusion. Employers in California should be mindful that a wide range of employees can be considered to fall within one or more classes of people protected by the state's anti-discrimination laws. Therefore, any decision to terminate an employee may be subject to scrutiny. Employers should fight the tendency to provide overly generous performance reviews, because such reviews may later serve as evidence in a wrongful termination lawsuit. Any problems with an employee's performance should be expressed candidly and without making excuses on the employee's behalf.

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TROYGOULD PC

1801 Century Park East • Los Angeles 90067 • 310.553.4441
www.troygould.com

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