

# THE DAILY RECORDER

---

November 3, 2009

## Evaluating Performance Based on Subjective Criteria

By: Jennifer Brown Shaw and Matthew J. Norfleet

Performance evaluations and performance improvement forms, such as warnings, receive more scrutiny during employment litigation than during employment. When the employment relationship has decayed to the point that a lawsuit occurs, employment lawyers scour annual reviews, disciplinary records, and contemporaneous supervisors' notes for evidence.

The employer's attorneys will attempt to justify negative actions by comparing the treatment of the plaintiff to other, similarly-situated employees. The plaintiff employee's attorney will look for inconsistent or unequal treatment.

Each side may view the facts differently. It is difficult for an employee to argue with a manager's decision to discharge the worker with the lowest productivity, measured in objective units. Therefore, employers' attorneys recommend the use of objective measuring criteria wherever possible.

At the same time, all employee performance may not be measurable in terms of objective criteria. For example, the quality of an employee's contribution may be as important as quantitative factors, but much harder to measure and verify. Attitude, teamwork, etc. are all highly prized employee attributes. But how does not compare one employee's "zeal" with another's after the fact?

Recent court rulings have examined when an employer can rely on subjective performance evaluations to defend against a claim of illegal discrimination.

### Subjective Criteria May Be Legitimate and Non-Discriminatory

In Hicks v. KNTV Television, Inc., Bradford Hicks was a reporter and anchor for a television news broadcast in the Salinas/Monterey area. In 2001, NBC purchased the station and expanded its signal to cover the entire San Francisco Bay Area. As part of the expansion, the employer released Hicks and replaced him with an African-American anchor, T.J. Holmes. Other staff members of different races were laid off as well.

Hicks claimed that the station discriminated against him because it perceived the need for a black on-camera anchorman. The station responded that Hicks's new boss thought he was "aloof, distant, standoffish, unapproachable, stiff, [and] too anchor-like" on the air.

The station produced a prior performance evaluation asking Hicks to stay "away from the 'Mr. Anchorman' style of delivery." At the deposition, the supervisor explained his reasons for letting Hicks go in extremely subjective terms, including the criticism that Hicks "came across like a person you wouldn't necessarily say 'hi' to if you passed him on the street."

When an employer offers a legitimate, non discriminatory reason for an adverse employment action in a discrimination case, the court has to determine whether the legitimate reason is true, or whether it was a "pretext" for discrimination. Objective reasons are almost always easier to evaluate. For example, if truck-driver loses his driver's license, he is no longer qualified for his job. That would be a legitimate, non-discriminatory reason to fire him.

Of course, it is very difficult for a court to determine whether a litigant is "too anchor-like" or "someone you wouldn't necessarily say 'hi' to." Hicks offered evidence that KNTV had a "known diversity issue" and was the only major television station in the bay area without an African American anchor. Consequently, to decide the case, the Court had to determine whether the subjective reasons given for not renewing Hicks's were the true reasons or simply a smoke screen for discrimination.

The Hicks court held that "the fact that [the supervisor's] assessment was based on subjective criteria does not, by itself, demonstrate pretext." Even though subjective factors could easily be used as a cover for discrimination, the use of subjective criteria is not illegal. To the contrary, "common sense, good judgment, originality, ambition, loyalty, and tact often must be assessed primarily in a subjective fashion, yet they are

essential to an individual's success in a supervisory or professional position." Neither the trial court nor the Court of Appeal found any reason to disbelieve the subjective evaluation, so the discrimination complaint failed.

### Federal Court Disapproves Defense Based on Subjective Qualifications

In Nicholson v. Hyannis Air Service, Inc., the 9<sup>th</sup> Circuit reached a different conclusion. In that case, the plaintiff was a female pilot who previously flew a one-pilot cockpit plane for the company's Martha's Vineyard service. She also had a previous sexual relationship with one of the airline's male pilots.

The company expanded service to Micronesia and Guam, flying larger two-pilot cockpit planes between those islands. Nicholson was assigned as first officer on the larger planes in the Pacific. One of the responsibilities of the first officer was "Crew Resource Management" (CRM), subjectively-evaluated communication and cooperation with the pilot and other members of the flight crew.

When training for the new planes, Nicholson was rated "excellent" in CRM and passed all safety training. However, Nicholson's co-workers complained she "exhibited problems with her communication and cooperation skills." The company's Director of Training reported that she had a "machismo" attitude, was dismissive of input from others, and refused to assist her co-pilots.

On the same day the Director of Training had scheduled a ride-along to observe Nicholson, the pilot with whom she previously had a sexual relationship removed her from the rest of his flights for that day, claiming "tension . . . made the cockpit unsafe." He later admitted

he was at least partly concerned about the prior relationship, and that the negative atmosphere might have been related to their relationship.

The Director of Training later flew with Nicholson and found her CRM skills were deficient. When the Director flew with Nicholson and the ex-boyfriend pilot, the Director said the flight was one of the "top ten scary and dangerous flights" on which he had flown, due to Nicholson's alleged failure to communicate with the pilot. According to the Director, there was "a total breakdown of CRM" and the pilot was "speechless and pale." Subsequently, the Director removed Nicholson from flying for the rest of the day. The airline then suspended her from flying any plane in the Pacific, sent her to CRM re-training, and removed her from flying any two-pilot planes.

After the Director's evaluation, the airline allowed Nicholson to fly single-pilot planes in the Pacific area, but no two-pilot planes. Nicholson refused to take any assignments on single-pilot planes, so the airline terminated her for job abandonment.

Nicholson sued, claiming that the airline's "purpose in disciplining her was to remove an object of sexual competition." The trial court dismissed the case, finding that the poor communication skills were a legitimate non-discriminatory reason to discipline Nicholson, so she was not qualified to fly a two-pilot plane.

On appeal, the Ninth Circuit disagreed, saying that subjective criteria should not be considered in determining whether a plaintiff is qualified. In an earlier decision, the court stated that "the qualifications that are more appropriately

considered . . . are those to which objective criteria can be applied." The court in Nicholson noted the airline rated Nicholson as "excellent" in CRM at the training center, so she was qualified for the job. Further, other federal courts previously rules CRM skills should not be considered at all in determining whether a pilot is qualified, because they are inherently subjective.

The Nicholson court did not say that employers never may rely on subjective criteria as legitimate non-discriminatory business reasons for their decisions. But it gave the subjective assessments very little credence in determining whether they were a pretext for discrimination at the pretrial stage. The court found there was at least a dispute of fact about whether Nicholson's performance was the real reason for her suspension. To support its ruling, the court noted that initial suspension was too broad, because it prohibited Nicholson from flying even single pilot planes in the Pacific area, suggesting that she was correct when she said the airline wanted her out because the male pilots were becoming jealous of her. Also, the airline did not follow its disciplinary guidelines closely, and did not respond when Nicholson complained that the pilot with whom she had the relationship, and with whom she had the most difficulty flying, told her she "would still have her job if they were still together."

### A Safe Path Between Two Courts

The different results in Hicks and Nicholson in part may be explained by the Nicholson court's finding of more irregularities than the court in Hicks. Nicholson's subjective evaluation changed suddenly, from "excellent" at flight school to "top ten scary" in the field. Hicks, on the

other hand, was told consistently to avoid acting like “Mr. Anchorman.”

Also, Hicks could not show he was treated any more harshly than other on-air talent, who were also fired. In Nicholson, though, the airline treated Nicholson’s personality shortcomings more harshly than technical failures. Other pilots who failed simulator training were simply sent back for additional training. They were not removed from a certain geographic area. The court was not persuaded by the airline’s explanation that communication skills are harder to improve and do not warrant re-training.

The California court in Hicks recognized that many professions depend on skills that are measured subjectively. But the federal court in Nicholson held the airline to more stringent proof on an issue affecting passenger safety than the state court

applied to a television news broadcast. In disapproving the use of subjective evaluation factors, the Ninth Circuit noted that its decision did not turn on the importance of the subjective qualification or the danger presented by a failure to meet it – only whether the criteria were subjective. Because subjective criteria are inextricably required for many jobs, this legal standard is an invitation to litigation.

Subjective evaluations should be from unimpeachably neutral sources. A prejudiced supervisor will always be suspected of giving unnecessarily low marks for subjective performance factors. For example, Nicholson’s ex-boyfriend made the initial complaints about her communication skills. There was some evidence he was jealous of her, and skewed the investigation of her skills. In contrast, the Hicks court noted that Hicks’ supervisor

recommended him to other stations that wanted a more formal anchor, and helped him find a better fit within the company at another station.

Of course, the court in Hicks correctly recognized it would be impossible for most employers to eliminate subjective performance factors and still remain competitive. However, the Nicholson decision teaches that if a court concludes subjective factors even might be concealing unlawful employment discrimination, the case should be sent to a jury for decision.

Accordingly, employers considering adverse action over subjective performance problems should be careful to ensure discipline policies are carefully followed and all claims of discrimination are addressed during the evaluation process.

*Reprinted by permission of The Daily Recorder.*



Jennifer Brown Shaw is a partner at Shaw Valenza LLP. Her practice includes providing regular advice and counsel to private and public sector employers. She also develops and presents seminars on legal issues in the workplace for management and non-supervisory employees.

[jshaw@shawvalenza.com](mailto:jshaw@shawvalenza.com)



300 Montgomery Street, Suite 788  
San Francisco, California 94104  
Tel: (415) 983-5960  
Fax: (415) 983-5963

520 Capitol Mall, Suite 630  
Sacramento, California 95814  
Tel: (916) 326-5150  
Fax: (916) 497-0708

<http://shavalenza.com>