

Seventh Circuit Opinion Highlights Importance of Proactively Addressing and Documenting Employee Performance

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Every employer has faced the unfortunate experience of hiring an employee whose performance fell well below expectation. As highlighted in the Seventh Circuit's recent [Ferrill v. Oak Creek-Franklin Joint School District](#) decision, employers faced with poor performing employees should carefully address and document such shortcomings to ward off potential Title VII charges.

Ferrill involved an under-performing black principal in a predominantly white Milwaukee suburb. The School District hired the principal to a 2-year contract, with an optional 3rd year. During the 2-year contract period, staff morale was low, the district fielded ongoing complaints describing her as confrontational, inconsistent in her treatment of staff, and quick to accuse others of racism or racial insensitivity.

The School District took several measures to address the principal's reported shortcomings. First, the superintendent and teacher's union representative addressed the complaints and low morale with the principal verbally in separate meetings. When that did not work, the superintendent hired an outside consulting firm to work with the principal on her management style. That did not work either. Next, the School District addressed each of the principal's weaknesses in her year-end evaluation. At the beginning of the next school year, it provided the principal with a list of objectives aimed at improving the weaknesses identified in her review. The School District also required the principal to regularly meet with a mentor, which she did not do. The principal showed no improvement, so the School District met with her again to discuss its ongoing concerns, then issued a formal performance improvement plan (PIP).

During the discussion concerning the PIP, the principal's attorney alleged the real problem was that white faculty members did not want to take direction from a black principal. Later, the principal wrote the School Board about various racial issues facing students at the school, which she blamed on the superintendent

Ultimately, the School Board elected to opt out of the contract and the principal secured employment elsewhere. Afterward, the principal filed suit against the School District alleging discrimination and retaliation.

The Court of Appeals agreed with district court's determination that the principal could not establish the second element of her prima facie case of discrimination—that she was meeting the School District's legitimate performance expectations. In so holding, the court relied on the principal's documented performance problems, the consultant's independent confirmation of those problems, and the School District's efforts to address and improve her performance. It also rejected the principal's retaliation claim citing the ongoing documented problems predating her protected activity.

As illustrated in *Ferrill*, proactive measures to address performance coupled with documentation are an employer's best weapon in combating Title VII claims. Waiting to address or ignoring poor performance increases Title VII risk. For example, it is more likely that an employee whose performance issues have not been addressed will attribute an adverse employment action to a protected class. If suit is filed, lack of corrective action raises the question of why action was not taken, increasing the likelihood a fact-finder will attribute the adverse action to the employee's protected class no matter how deficient the employee's performance. For these reasons, it is important to remind managers and supervisors to raise performance issues with HR or management and to adequately rate and address performance in annual reviews.

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