Snap, Crackle, PIP! Performance Improvement Plans Pop Up All Over

By: Phillip J. Trobaugh

Performance Improvement Plans, or PIPs, are a common management tool for many employers. They signal a last chance for an employee to perk up their performance. For employees on the receiving end, it's a lot like getting a cup of cold, stale coffee. The message is clear: shape up, or you're toast. A new round of cases involving PIPs spotlights their usage and how Courts view these workplace devices.

Attempted PIP Fizzles

The most recent PIP case is ***Bahr v. Capella University***, 788 N.W.2d 76 (Minn. 2010). Bahr was a manager in Capella's communication department, and is Caucasian. She supervised an African-American woman, identified as L.A. Bahr felt strongly that L.A.'s work performance was deficient and wanted to place her on a PIP. But Capella's Human Resources intervened and blocked the move. It told Bahr that L.A. had a "racially based" history and was concerned that a PIP could prompt a discrimination lawsuit by L.A. It suggested alternatives to a PIP. Bahr would not be dissuaded, and insisted that a PIP was the best course of action. HR even interceded on L.A.'s performance reviews, recalibrating them to minimize the perceived bad performance. Bahr next argued that she was being discriminated against in favor of L.A. At this point, HR conducted a "360" review of Bahr, and she received criticism from several of her subordinates. Bahr's supervisors lost faith in Bahr's ability to manage her department and she was fired.

Bahr sued, alleging retaliation under the MHRA for refusing to participate in employment practices forbidden under that act and for good faith reports of discriminatory treatment. The district court granted Capella's motion to dismiss. Additionally, the court found

that the practices Bahr opposed did not actually violate the MHRA because the decision not to place L.A. on a PIP did not constitute adverse employment action. The court of appeals reversed, finding that Bahr pleaded a good faith, reasonable belief that Capella's actions violated the MHRA and that was all the statute required.

The Minnesota Supreme Court reversed, holding that even under the more favorable good faith, reasonable belief standard Bahr failed to plead facts to support an objectively reasonable finding of adverse employment action. The court found that no reasonable person could believe that *not* implementing a PIP against L.A. was an adverse action either against Bahr or other employees. The case resulted in four dissenting justices, and two separate dissenting opinions. Justice Page wrote that while the non-imposition of a PIP against L.A. was surely not adverse employment action against her as an individual, it should support a viable claim of reprisal based on its impact on other employees. The proposed PIP played a critical factual role here. Bahr represents a kind of "woman bites dog" moment in the world of PIPs and workplace management. It was her insistence on a PIP in defiance of upper management refusal that led, in part, to her career pancaking. Usually, it is PIP recipients who initiate lawsuits against their former employers, not supervisors who are unsuccessful in serving up a PIP.

A Tale of Two PIPS

The next most recent case is ***EEOC v. Ceridian***, 2009 WL 1458278 (D. Minn. 2009). Dr. James Shelton was a Ceridian employee, who was fired. He filed with the EEOC, which found probable cause for racial discrimination and then sued. The EEOC voluntarily moved to dismiss, and Ceridian sought its attorney's fees. Lurking in the background was not one, but two PIPs. Ceridian argued that the EEOC knew before filing the Complaint that Dr. Shelton was not meeting reasonable expectations and continued to pursue litigation in the face of evidence that

the case was groundless. All of this went to whether or not Ceridian could maintain that it was the "prevailing party" for purposes of recovering attorney's fees.

The facts turned on what the EEOC knew and when it knew it, in regards to the two PIPs Dr. Shelton was on during his Ceridian employment. Before the Complaint was filed, the EEOC had a copy of Dr. Shelton's 2004 PIP. This PIP referred briefly to a 2001 PIP. Ceridian argued that this was enough to show that the EEOC had no case. It also argued that other, white employees had been disciplined or fired for reasons similar to Dr. Shelton. But the first PIP, from 2001, was not produced until formal litigation discovery was underway, and it weakened the EEOC's case. The first PIP showed that Dr. Shelton had been criticized for many of the same reasons that he had been the second time around. Dr. Shelton also testified that his first PIP was basically a fair one. As for the other, white employees, the EEOC said that Ceridian gave conflicting and "shifting explanations," thus jamming its ability to determine the truth.

Ceridian slogged on, maintaining that once the EEOC had the first PIP, it nevertheless continued with the litigation in the face of a no-win situation. The EEOC countered that it had countervailing evidence that Ceridian's performance review process was inconsistent. The Court declined to award Ceridian its attorney's fees, as the EEOC was able to show it had "some basis" to start and maintain the lawsuit. In terms of PIPs, this case is interesting because it is one of very few cases where an employee survived a PIP. Much anecdotal evidence exists that PIPs are workplace death warrants. While that was ultimately true here, Dr. Shelton did continue in his employment for a couple of years before being issued a second one. But, this exception proves the general rule that PIPs are, usually, a bon voyage ticket from employment. This may also be the only reported case in which an employee admitted that a PIP was "fair."

No Constructive Discharge

A reoccurring theme in the PIP cases is whether the PIP resulted in a constructive discharge. In ***Moriarty v. Wells Fargo Bank***, 2008 WL 2796643, (Minn. Ct. App. July 22, 2008), the Minnesota Court of Appeals upheld an Unemployment Law Judge's denial of benefits where the former employee quit two weeks after being issued a PIP. Moriarty admitted she quit her job, but claimed she had "good reason caused by the employer." She claimed Wells Fargo lacked factual support for issuing a PIP in the first place, that she worked in a hostile work environment, and that she was out of favor with her manager. Moriarty also alleged she thought she was about to be discharged, due to a failure to meet the PIP goals regarding the number of loans closed in a month and overall improved performance. The court found the record supported the ULJ's decision that Moriarty had not quit for good cause.

Similarly, in ***Fischer v. Andersen***, 483 F.3d 553 (8th Cir. 2006), the 8th Circuit affirmed a ruling by the District Court of Minnesota that the appellant had not shown the PIP implemented by respondent employer constituted constructive discharge. Fisher worked for Andersen for nearly 32 years at the time he was placed on a PIP following an unsatisfactory job performance review. After learning a co-worker had avoided being placed on a PIP by offering a retirement date, Fisher made a similar offer to his supervisors, who agreed that if he was retiring within the year then the time and effort of implementing a PIP was not justified.

Several months later, after continued substandard performance, Fisher was again placed on a PIP during a meeting. Fisher immediately left work, eventually went on short term disability due to stress and anxiety, and formally retired 5 months later. Fischer brought an ERISA interference claim and argued the PIP constituted adverse employment action via constructive discharge. He further argued the PIP set impossible standards, set him up for failure, and was a result of age discrimination. The court first explained that the mere

implementation of a PIP does not qualify as constructive discharge. Additionally, the court found that Fisher presented no evidence to the district court that the PIP had actually set him up for failure or that its demands were unreasonable. Rather, "Fischer simply assumed the worst and relied upon speculation and rumor to inform his fatalistic interpretation" of the PIP.

PIPs – Break a Few Eggs

Indeed, many employees probably view PIPs fatalistically. They are a last chance in many circumstances, a symbolic sign that the employment relationship is in dire straits. Many employers tend to see the sunny-side of PIPs, a way to rescue an employee who has performance trouble. Management gurus continue to debate the efficacy of such workplace tools. One recent article from an online expert is entitled "Skip the PIP." The expert believes that PIPs are unfair to employees, and put employers in a bind by forcing an artificial deadline for a re-review of performance. It can muddle already challenged workplace communication, and give false hope where none truly exists. Another online expert succinctly concluded that in Human Resources, "[a]lmost nothing is as controversial as" the PIP. That assessment seems true, as PIPs continue to pop up in litigation.

Mr. Trobaugh is a Shareholder with Mansfield, Tanick & Cohen. He thanks Samantha Harker for her contributions to this article.