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## Documenting employee performance central to fending off potential lawsuits

In *Bragg v. Munster Medical Research Foundation Inc., d/b/a Community Hospital*, No. 21-2913 (Jan. 17, 2023) N.D. IN., the 7th U.S. Circuit Court of Appeals points out the significant impact documenting performance can have in an employment discrimination case.

After completing a 90-day orientation program for newly licensed nurses, the plaintiff, Catrina Bragg, was denied a full-time position as a registered nurse at Community Hospital, which then transferred her to Hartsfield Village, a related facility, where her pay was lower.

The plaintiff believes that these actions were based on racially discriminatory evaluations of her performance and were retaliatory. She sued the employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq., but the district court granted summary judgment in favor of the defendants. That decision was affirmed by the 7th Circuit on appeal.

The orientation program that the plaintiff complains about was run by experienced RNs, who served as preceptors and were responsible for training, supervising and evaluating the work of those in the orientation pro-

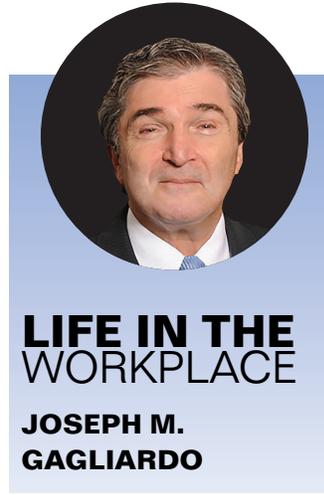
gram. As part of that process, the preceptors filled out "Orientee Progress Forms," in which they graded orientees.

Preceptors and orientees also attended bi-weekly orientation progress meetings, and these meetings were memorialized in forms that documented the orientee's progress from the perspective of the orientee, the preceptor and the supervisors.

The plaintiff had three different preceptors during her 90-day orientation. She asserts that her first preceptor intentionally race-matched patients, giving Bragg responsibility for one Black and one Latinx patient while removing a white patient from Bragg's care.

After Bragg objected, she claimed that preceptor 1 began treating her differently. After the plaintiff's complaint, she was transferred to preceptor 2, who the plaintiff claims played rap music at the nurses' station, and she felt this was targeted at her because preceptor 2 connected rap music to Black people. Preceptor 2 played other music when the plaintiff was not around.

In response to the plaintiff's claim, the appeals court concluded that the employer had abundant evidence of the plaintiff's substandard per-



### LIFE IN THE WORKPLACE

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formance, documented in the progress meetings and progress forms. The hospital produced four progress forms and records from six progress meetings, dating between Oct. 1 and Dec. 9, 2018, and the fact that the plaintiff's signature was on some, but not all, of the reports did not support the plaintiff's claim, as she did not appear to dispute the fact that these meetings occurred.

The 7th Circuit also rejected the plaintiff's claim that the fact that she was

transferred, rather than terminated, was evidence of unlawful pretext. Based on the proof of the plaintiff's performance issues, the appeals court accepted the employer's response that it had concluded that the plaintiff was ill-suited to the pace of acute care, and might do better in a long-term care facility such as Hartsfield.

Additionally, the plaintiff's evidence of satisfactory performance at Hartsfield, did not change the fact that there was no analogous evidence of her satisfactory (or better) performance at Community.

The plaintiff's further argument for why Community's reasoning was pretextual was a direct attack on the substance of the evaluations. On this point, the court concluded that the argument is a nonstarter, in the absence of any evidence indicating that Community had reason to doubt their accuracy.

Finally, the court rejected the plaintiff's reference to a white comparator who was scored higher in her evaluations despite having more severe performance deficiencies because that employee also failed the orientation program and was, like the plaintiff, denied a full-time position at Community.