

Employment Practices *Update*

Bringing important information to emergency service organizations

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Limiting exposure to constructive discharge claims

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Emergency service organizations (ESOs) can be held liable for a worker who resigned, yet later proved he or she was either forced or had no other reasonable choice but to quit because of intolerable working conditions such as a hostile work environment. This article examines the legal concept of “constructive discharge”

and offers risk management tips for an ESO to protect its members and organization.

Risks facing emergency service organizations

At the core of many constructive discharge claims, ESO members allege they were forced out of the organization because they didn’t “fit in.” For instance, a member may claim he or she could no longer be subjected to the hostile work environment or discrimination based on protected class status, such as gender, race, color, national origin, age, sexual orientation, marital status, veteran status or any other characteristic protected by federal, state or local law. Therefore, a claimant may allege the abusive, hostile or discriminatory working environment was so intolerable that resignation was an appropriate or reasonable response.

The constructive discharge doctrine hinges upon the belief that an ESO member quitting constitutes an unlawful termination. Many constructive discharge claimants argue, “I may as well have been terminated because I had no other reasonable option but to quit to avoid further intolerable working conditions.”

Many constructive discharge claimants argue, “I may as well have been terminated because I had no other reasonable option but to quit and avoid further intolerable working conditions.”

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Hazing – ESOs probationary members may be particularly vulnerable to hazing, which can be defined as abusive or humiliating conduct directed toward a person or persons as part of an initiation into a group or organization. An ESO may be held liable for constructive discharge if hazing is the force driving a member out of the organization.

Horseplay gone too far – The purpose of civil employment laws is not to sterilize or take the fun out of the work environment. In fact, many court decisions have stated that federal employment laws do not create a general civility code in the workplace. However, behavior inappropriately termed “horseplay” may actually qualify as unlawful conduct, such as frequent or severe behaviors that would be considered offensive to most reasonable people.

Questions about diversity – Employment laws generally don't require special rights or protections in the work environment. However, equal rights and working conditions are required and all personnel must be protected from harassment, discrimination or other behaviors that could lead to constructive discharge.

Prevention of constructive discharge

Exposure to constructive discharge claim may increase when an ESO fails to take proactive and ongoing measures to prevent workplace wrongdoing such as harassment, discrimination, retaliation or hazing. Discourage ESO members from participating in behaviors that create a hostile work environment or lead to constructive discharge if they know safeguards are in place to discover misconduct and punish wrongdoers.

Take the “pulse” of the work environment – Top ESO officials may be the last to know of workplace conflict between front-line workers. Interpersonal relationship problems may worsen over time and lead to a hostile work environment. Likewise, an ESO member may be able to tolerate certain behaviors for a limited period of time, but eventually the cumulative effect of such wrongdoing may compel the member to quit. From a legal perspective, the question will be asked, “Why didn't the ESO effectively monitor its work environment to prevent or discover the wrongdoing?”

Workplace misconduct policy dissemination – Disseminate a policy to ESO members that acknowledge their understanding in writing. A common mistake is distributing policies on harassment, discrimination, retaliation and other misconduct when an ESO member initially joins the organization, but never or rarely reviewing the policies thereafter. To help protect all ESO



members, it is recommended the ESO revisit workplace misconduct policies annually at a minimum.

Training – Assess the organization's training programs designed to foster a positive work environment and deter harassment, discrimination, retaliation and other misconduct. View the effectiveness of the training program from the perspective of the least powerful members of the workforce. Importantly, provide a forum where ESO members may ask sensitive and personal questions about their work experiences. Rather than plugging in a video or asking members to stare at a computer screen for Web-based training, consider utilizing an external trainer with expertise in employment law and familiarity with the emergency services

industry. An ESO member subjected to or aware of a hostile work environment may be more likely to raise concerns with a third-party trainer, so an unbiased internal or external investigation may commence.

Explain investigative processes – Educate ESO members of the internal and possible external investigative procedures that are taken to stop workplace wrongdoing and prevent future occurrences. Members are often unclear of, or may not have faith in, the processes that are in place to respond to allegations of workplace wrongs. Transparency and open communication will increase the likelihood that members will avail themselves of the reasonable complaint and investigative processes, thus avoiding constructive discharge claims. Explain to ESO members that anyone named in a complaint of work-related wrongdoing will not be part of the investigative team or efforts and an outside third-party may be utilized when an in-house investigation would be perceived as biased.

Workplace climate survey – Organizations are increasingly utilizing workplace climate surveys or questionnaires as a tool to learn about how members view their work environment. Climate surveys are often taken electronically and administered by a third-party company to help create confidentiality and trust in the process. By providing members with another opportunity to bring to light concerns about the work environment, the ESO may better protect its membership and institution.

Conclusion

Take proactive steps to deter and discover work-related conflict and wrongdoing. Constructive discharge claims may be avoided if an ESO can demonstrate it fostered a work environment where personnel are given safe opportunities to report wrongdoing so complaints will be promptly and thoroughly investigated.

Michael McCall, J.D., provides employment practices consulting and training to emergency service organizations nationwide.