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Employment Practices UPDATE

CONSTRUCTIVE DISCHARGE:

*“I was **forced** to quit!”*

Certain “red flags” or warning signs may exist indicating that a member of your ESO is being subjected to a hostile work environment.

“The working conditions I was subjected to became so intolerable that I had no other choice but to quit. I was driven out of the organization.”



Your emergency services organization (ESO) can be held liable to a worker who resigned yet later proved that he or she was forced off the job because of intolerable working conditions, such as a hostile work environment. This article explores the legal concept of “constructive discharge” and what steps your ESO can take to protect its members and avoid such damaging and costly lawsuits.

What is “Constructive Discharge”?

An ESO may be held liable for constructive discharge if a former member demonstrates that an abusive working environment became so intolerable that resignation qualified as an appropriate response. Although a member

may formally resign or quit, the law treats the resignation like a discharge if it is proven that a reasonable person would have felt compelled to quit.

“Wrongful discharge or termination” claims stem from organizations taking tangible employment action by terminating the employee or volunteer. While the member quits in a “constructive discharge” case, an organization may still be held accountable for workplace wrongs that essentially forced the member to quit. As the Equal Employment Opportunity Commission has stated, an employer is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party.

Typically Linked to Hostile Environment Claims

Constructive discharge claims are often linked with hostile work environment allegations, such as sexual harassment or discrimination based on race, color, religion, disability, national origin, or age. For instance, a claimant may allege not only that they were subjected to a hostile work environment, but the harassment drove them to quit. To prove a case of constructive discharge, there must be evidence that resignation was a reasonable reaction under the circumstances.

It would make sense that in order for the resignation to be regarded as a reasonable reaction, the underlying wrongdoing would need to meet the legal standards of unlawful harassment. For example, a constructive discharge claim will not likely be successful if a hypersensitive member misinterprets jokes or comments as unlawful harassment and subsequently quits his job. To establish a hostile work environment claim, a complainant

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must show harassing behavior sufficiently severe or pervasive to alter the conditions of employment or the workplace.

Is Your Organization Vulnerable?

ESOs may be particularly vulnerable to constructive discharge allegations. In order to protect against workplace wrongdoing, be aware of some of the unique factors that may be present in an ESO.

Probationary Members

ESO members may be required to complete a probationary period, typically three, six or twelve months. There may be a perception that probationary personnel may be treated very differently than those who have completed the probationary process. Some more tenured workers may make life extremely difficult for probationary personnel that don't fit in or aren't cutting it.

While there is certainly nothing wrong with terminating the working relationship during the probationary period, ESO leaders are encouraged to look out for inappropriate, unfair, or even unlawful treatment of probationary members. For instance, hazing or other rites of passage may historically be part of the tradition at an ESO. Traditions or behaviors that may be perceived as normal in the emergency services industry may be viewed by others as contributing to a hostile work environment, causing a reasonable person to resign.



Lack of Diversity

Traditionally an ESO may have been made up primarily of male Caucasians. Some outsiders may perceive ESOs as a “good old boy” network, with a lack of

gender, racial, or ethnic diversity.

ESOs must strive for equitable treatment and working conditions for hiring, selection, testing, promotion, training, assignments, and benefits. Take steps to ensure all members of your ESO are treated fairly.

Risk Management Tips

Certain “red flags” or warning signs may exist indicating that a member of your ESO is being subjected to a hostile work environment, which may result in the member feeling that there is no other option but to quit.

- ▶ **Refusal to work with a coworker or group of coworkers**
- ▶ **Coworkers ignoring or isolating a fellow worker**
- ▶ **Coworkers complaining about a fellow member with no substantive reasoning behind their complaints**
- ▶ **One member appearing to be picked on, teased, or the main subject of others' jokes**
- ▶ **A sudden drop in job performance**
- ▶ **A member missing work or frequent tardiness**
- ▶ **A request for a transfer**
- ▶ **A member becoming uncommunicative or difficult**
- ▶ **Rumors that a member may quit for no apparent reason.**

By investigating these warning signs, your ESO may retain a valuable member of your organization and prevent a constructive discharge claim.

U.S. Supreme Court on Constructive Discharge

In June 2004 the U.S. Supreme Court decided the case of *Pennsylvania State Police v. Suders*, clarifying constructive discharge as a viable claim in Title VII cases (i.e., sexual harassment). To establish constructive discharge, a plaintiff alleging harassment must show that the abusive working

environment became so intolerable that resignation qualified as a fitting response. The opinion explained that constructive discharge cases are unique because “harassment so intolerable as to cause a resignation may be effected through coworker conduct, unofficial supervisory conduct, or official company actions. Unlike actual termination, which is always effected through an official act of the company, constructive discharge need not be.”

Also of importance, the Supreme Court held that an employer may avoid liability in a constructive discharge case by asserting an affirmative defense by proving:

1. it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment; and
2. the plaintiff unreasonably failed to avail themselves of that employer-provided preventive or remedial apparatus.

The Court also enumerated that a plaintiff may avoid the affirmative defense, thus opening the employer up to strict or automatic liability. The employee must show they quit in a reasonable response to an employer-sanctioned adverse action officially changing their employment status or situation — for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which they would face unbearable working conditions.

Conclusion

ESO leaders should be keenly aware of the constructive discharge doctrine. The goal is to encourage members to utilize safe internal complaint procedures in order to stop workplace wrongs and prevent future occurrences.

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