

Published by the
Glatfelter Insurance Group
York, Pennsylvania

Employment Practices UPDATE

After Defending an Employment Practices Claim: “Do as I say, not as I did.”

A Chief Administrator for a Fire and Ambulance District recently told this author, *“My organization just wrapped up a workplace harassment and discrimination lawsuit that was in the judicial process for four years. Going through this litigation was the most difficult and divisive experience of my career. If only I knew then what I know now. If I could share my experience with other administrators, I would save them time and anguish. Because we never anticipated being sued by an employee or volunteer, we were completely caught off guard. I will never be caught in a reactionary position again.”*

Often the best risk managers are those who have “felt the pain” of an employment practices claim. There is no substitute for proactive risk management to prevent employment practices claims such as harassment, discrimination and wrongful discharge. The message is clear — be proactive rather than reactive.

WRONGFUL TERMINATION

“We’ve been sued for wrongful termination, and don’t really have much documentation supporting our decision.”

For an attorney who represents an emergency services organization, one of the worst nightmares is discovering an empty personnel file for a recently terminated member.

Turnover, especially involuntary termination, is rare for emergency services organizations. Ineffectively documenting steps leading up to a member’s dismissal is common, putting the organization at risk for wrongful termination claims.

When involuntarily dismissed, members are often angry, refusing to accept their performance was inadequate or conduct warranted dismissal. Many wrongful termination claims are rooted in the former member’s belief that there must be some unlawful reason for the separation, as opposed to the reason offered by the organization.

Ample documentation should exist to fully support the termination decision. Ensure written proof exists that progressive discipline steps were followed, such as counseling, reprimands, performance improvement plans, and suspensions. Termination should be considered a last resort.

Documentation also needs to support an emergency services organization’s adherence to its written investigative, grievance, appeals and other due process procedures. It may be unlawful to terminate a member if the organization fails to follow its written policies and procedures, even if the member’s performance or behavior warranted termination.

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We welcome comments, suggestions and questions from our readers.

Write to:
Editor
Employment Practices Update
183 Leader Heights Rd.
York, PA 17402

epupdate.opinion@vfis.com



Employment Practices Claims

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In order to avoid wrongful termination claims, consider the following:

- Train supervisory personnel on performance management issues, such as counseling, warnings, reprimands, performance improvement plans, and evaluations.
 - Do periodic performance evaluations reflect the member's performance or conduct that eventually led to the termination decision?
 - Were the organization's progressive discipline and/or collective bargaining regulations followed?
 - Always involve legal counsel before termination.
 - Did the member have sufficient time and opportunity to correct the behavior?
 - How have other members been disciplined for similar performance or conduct in the past?
 - What harmful impact did the member's performance or conduct have on other personnel or the community that is served? Consider potential impact as well.
 - Have those making the termination decision and those conducting the termination session received training on proper procedures?
 - Have a witness present at the termination meeting, listen to what the member has to say, and write everything down for the record.
 - Would a jury conclude the organization's treatment of the discharged member was fair and reasonable?
- The goal is to ensure that fair disciplinary and termination processes are in place. This helps eliminate procedural mistakes. Wrongful termination claims represent a tremendous exposure to emergency services organizations.

HARASSMENT CLAIM

"We've been sued by a former member for a hostile work environment based on alleged sexual harassment. We have a policy that was developed years ago and rarely conducted sexual harassment prevention training."

What is expected today in regard to sexual harassment prevention is much different than a mere 13 years ago. In 1991, the Anita Hill/Clarence Thomas matter brought society's awareness of sexual harassment to a new level. Since 1991, volatile sexual harassment litigation continues to flood American courthouses.

The high profile nature of sexual and other unlawful harassment or discrimination claims places a tremendous responsibility on leaders of emergency services organizations. Not placing top priority on preventing unlawful workplace harassment communicates to judges and juries that you don't care about your members.



Failing to update harassment prevention policies or provide periodic training translates to possible negligence and civil liability for your organization.

Below are five proactive tips for preventing workplace harassment and preparing your organization to effectively respond to complaints:

- 1. Review your policy** – A qualified employment attorney and/or human resources professional should annually update the policy to ensure employee and volunteer protections.
- 2. Solidify internal investigations** – Designate and train internal harassment investigators.
- 3. Provide training programs** – Employees, volunteers, and board members should attend mandatory harassment prevention training (annually at a minimum).
- 4. Research and select outside experts** – It may be necessary to utilize a neutral third-party investigator, such as a human resources consultant or retained labor and employment attorney.
- 5. Make a commitment from the top leadership positions** – A written harassment policy is virtually worthless

if supervisors, administrators and board members don't participate in corresponding prevention programs, such as periodic training and policy review.

IMPROPER INVESTIGATION

"Our shift supervisor conducted the harassment investigation based on his own fact finding methods."

What simple steps can an organization take to demonstrate consistent and equitable procedures were followed in conducting internal investigations of workplace wrongs?

- Select and train designated individuals in your organization to investigate issues of workplace harassment, discrimination or other serious personnel related matters.
- Develop and utilize standardized investigation forms that include fair, fact-finding questions for the accuser, accused, and any witnesses.
- Be prepared to call in a third-party investigator if a conflict of interest exists with the internal investigators or leaders of the organization.
- Publish in policy documents the commitment to providing fair and equitable investigations, including the willingness to call in a third-party investigator if necessary.
- Involve outside legal counsel.

As leaders of emergency services organizations, be prepared when a personnel related incident or lawsuit arises. Ask yourself the question "Has my organization taken every reasonable step to prevent workplace wrongdoing and properly respond to any such allegations?" Learn from others' mistakes.

Do as they say, not as they did.

Michael McCall, J.D., provides personnel litigation avoidance training and consultation to emergency services organizations nationwide.

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