

Employment Practices *Update*

Bringing important information to emergency service organizations

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Workplace Retaliation Claims on the Rise

Workplace retaliation claims are once again in the headlines, thanks to two U.S. Supreme Court decisions that expand employee rights. The federal Equal Employment Opportunity Commission (EEOC) reports retaliation claims are now its second highest charge category overall (behind race), surpassing sex-based claims. EEOC retaliation charges now make up 32 percent of job discrimination claims nationwide, a figure that has doubled in the last 15 years.

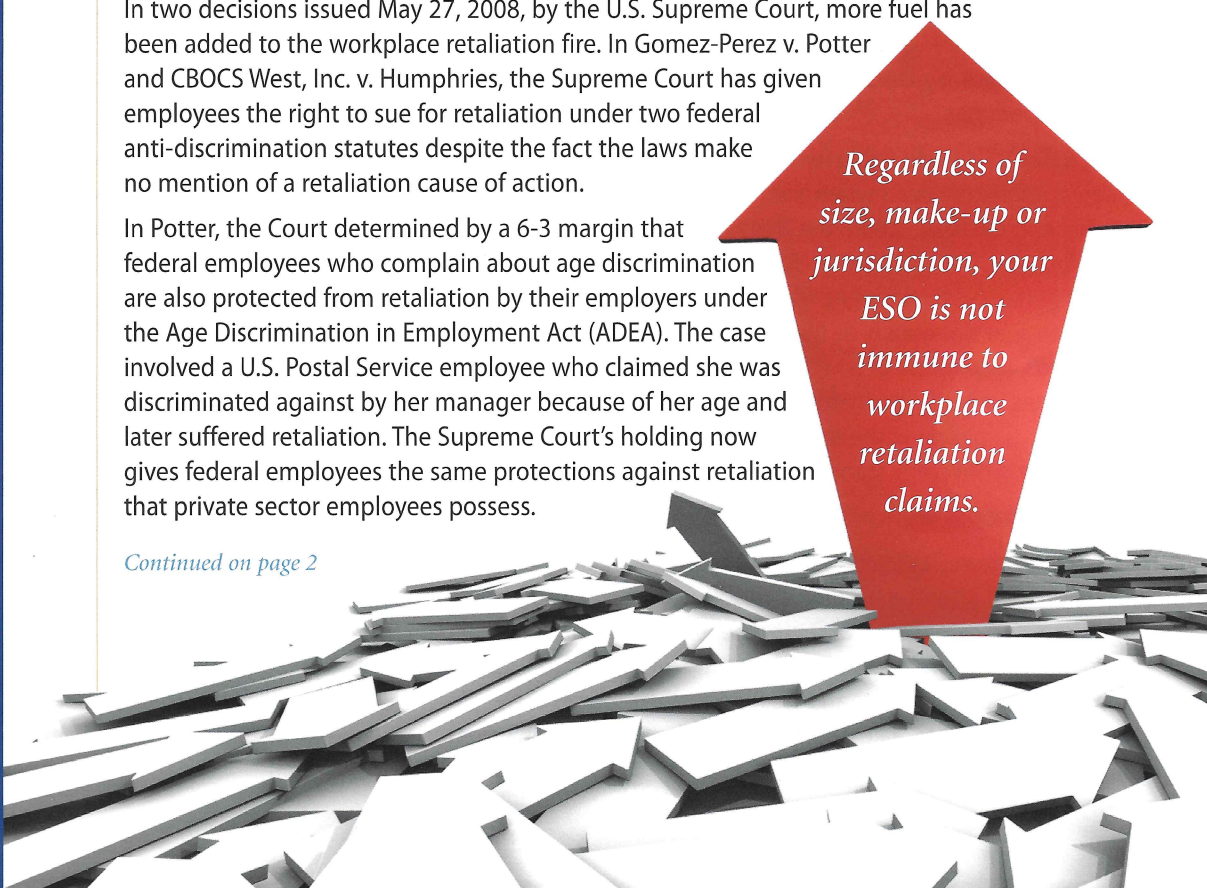
Clearly, retaliation claims are on the rise and continue to be an area of concern for emergency service organizations (ESOs). This article highlights the most recent U.S. Supreme Court decisions and provides risk management tips to help protect against workplace retaliation.

U.S. Supreme Court Decisions

In two decisions issued May 27, 2008, by the U.S. Supreme Court, more fuel has been added to the workplace retaliation fire. In *Gomez-Perez v. Potter* and *CBOCS West, Inc. v. Humphries*, the Supreme Court has given employees the right to sue for retaliation under two federal anti-discrimination statutes despite the fact the laws make no mention of a retaliation cause of action.

In *Potter*, the Court determined by a 6-3 margin that federal employees who complain about age discrimination are also protected from retaliation by their employers under the Age Discrimination in Employment Act (ADEA). The case involved a U.S. Postal Service employee who claimed she was discriminated against by her manager because of her age and later suffered retaliation. The Supreme Court's holding now gives federal employees the same protections against retaliation that private sector employees possess.

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Regardless of size, make-up or jurisdiction, your ESO is not immune to workplace retaliation claims.

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In *Humphries*, the Court held by a 7-2 vote that employees have a right to bring retaliation claims under Section 1981 of the U.S. Code, a Reconstruction-era civil rights statute (enacted in 1866) that bans racial discrimination in the making and enforcing of contracts. In the case, a former assistant manager at Cracker Barrel was terminated after complaining that he was subjected to race discrimination.

The practical implication of these cases is that retaliation claims will likely remain one of the fastest-growing charges against employers. For instance, as a result of the *Humphries* decision, retaliation claims associated with race discrimination may be brought under Section 1981, which has a longer statute of limitations than Title VII of the Civil Rights Act of 1964. Additionally, Section 1981 has no limits on the amount of damages that can be awarded, as opposed to caps associated with Title VII cases.

Many occurrences of retaliation take place well after the ESO members are put back to work.

Reducing Risk by Understanding Your Exposures

Your ESO can be held liable for work-related retaliation even when the underlying cause of action (e.g., harassment or discrimination) is unfounded. For example, an ESO member may complain about perceived harassment. In actuality, the behavior in question may not qualify as harassment according to legal standards. Regardless of whether the underlying conduct constitutes unlawful harassment, the original complainant or others participating in the associated investigation can suffer retaliation, which may stand on its own as a cause of action.

Protect against Workplace Retaliation

Many retaliation claims stem from alleged retaliation that occurred well after the perceived “resolution” of the underlying problem. For instance, an ESO member complains internally of workplace harassment. The ESO promptly and effectively stops the harassment, conducts an investigation, disciplines the wrongdoers, warns against retaliation and instructs the harmed

member to inform the ESO of further harassment or future retaliation. The ESO may perceive the issue has been resolved.

Be aware, however, that many occurrences of retaliation take place well after the ESO members are put back to work. Thus, ESO leaders are encouraged to monitor the work environment by “checking in” periodically with the interested parties. Document frequent communications with the person who lodged the initial complaint, the person accused of wrongdoing, witnesses and coworkers. Be proactive and monitor your work environment.

Update Non-Retaliation Policies

Consider instituting a stand-alone workplace non-retaliation policy. At a minimum, your ESO’s anti-harassment and discrimination policies should include statements that retaliation is not tolerated against those who lodge a complaint or against those who participate in a corresponding investigation.

All retaliation policies should offer multiple avenues of internal complaint. Policies should make it clear that ESO members subjected to real or perceived retaliation should not be required to confront the person(s) creating or participating in the retaliation. Instead, multiple (preferably three or more) avenues of internal reporting should be available.

Policies should communicate that anyone named in a report or complaint

of retaliation will not be part of the investigative team or efforts. Your ESO should include in policy and reiterate through education that the organization reserves the right to utilize an outside third-party investigator to help resolve allegations of workplace retaliation.

Conclusion

Regardless of size, make-up or jurisdiction, your ESO is not immune to workplace retaliation claims. Recognize that retaliation claims are increasing and your ESO can take steps to protect its members and reduce legal liability.

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Key Elements of a Non-Retaliation Policy

1. A statement that says retaliation is not tolerated.
2. Multiple avenues of complaint, preferably at least three.
3. A clause stating that individuals subjected to real or perceived retaliation do not have to confront the person creating the retaliation.
4. Assurance that anyone named in a complaint of retaliation will not be part of the investigation.
5. The right of the company to utilize a third-party investigator.