

# Employment Practices *Update*

Bringing important information to emergency service organizations

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## Why 2016 is high-risk for workplace discrimination claims

By Michael J. McCall, J.D.

*When high-profile political races heat up, often emotions do too, particularly when talking about issues involving religion, national origin, race/color, gender, sexual orientation, marital status, disability, socio-economic status or political affiliation.*

*These controversial topics are deliberated around lunch tables in emergency services organizations (ESOs) and other workplaces on a daily basis. In addition, social media sites of ESO personnel are abuzz with opposing posts.*

While co-workers may certainly share ideas and opinions about political issues, there may be a fine line of when sensitive subject matter creates an uncomfortable and even discriminatory work

environment. It's important for ESO leaders to be aware of their responsibilities to foster a safe and productive work environment, free from unlawful discrimination and harassment.

### **Personnel laws are not intended to create a general workplace civility code**

As high-profile political races heat up, so do emotions, particularly when talking about issues involving religion, national origin, race, color, gender, sexual orientation, marital status, disability, socio-economic status or political affiliation.

The United States Supreme Court in the case of *Oncale v. Sundowner Offshore Services, Inc.* stated that Title VII of the Civil Rights Act of 1964 (Title VII) is "not a general civility code." Petty slights, annoyances and isolated incidents

(unless extremely serious) will not rise to the level of illegality. To be unlawful, conduct must create a work environment that would be intimidating, offensive or hostile to

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reasonable people. Thus, Title VII is a significant federal law intended to prevent workplace discrimination, but not demand an innocuous or vague civility code.

An organization's leaders are not required to prohibit any discussions about controversial topics on the job. There is an understanding that when human beings work together, subjects will be discussed, people won't always agree and feelings may occasionally get hurt. While hypersensitivity doesn't rule the day, it is sound risk management to be aware of emotional, highly charged subjects that can increase an ESO's risk for discrimination or harassment claims.

### Behaviors that may cross the line and be considered unlawful harassment or discrimination

Consider the analysis below to help determine behaviors, conduct or conversation that may cross the line and constitute unlawful discrimination or harassment in the workplace.

**Nature of the subject matter** – Depending upon jurisdiction, employment laws protect against discrimination in the workplace based on protected class status, such as race/color, gender, religion, national origin, age, disability, genetic information, pregnancy, sexual orientation or other legally recognized characteristics. Consult with locally retained labor and employment counsel to determine laws applicable to their jurisdiction.

**Context** – Whether work-related behaviors qualify as unlawful discrimination or harassment depends largely upon the context of the conversation or conduct. Merely engaging in a respectful dialogue about controversial political issues, for example, won't constitute creation of a hostile work environment. However, targeted offensive or hostile language regarding a co-worker's religious beliefs, national origin, race/color, gender, sexual orientation or other protected class status could amount to unlawful discrimination or harassment.

**Supervisor liability risks** – Organizations face legal exposure when a supervisor is at the center of misconduct. For instance, an employer may be held automatically liable for harassment by a supervisor it has empowered to take tangible employment actions against an employee. Therefore, automatic liability may result from the actions of a supervisor with the authority to effect significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or causing a significant change in benefits<sup>2</sup>.

ESO members look to their supervisors to set the standards in the work environment and lead by example. The public and/or legal spotlight will be placed upon a supervisor's actions or statements that can be perceived as derogatory or offensive

toward a person or group's race/color, religion, national origin, gender, sexual orientation or other protected class status.

**Defining condition of the work environment** – Harassment in the workplace becomes unlawful when enduring the offensive conduct becomes a condition of continued employment. In other words, a worker may feel that he or she must tolerate harassment or discrimination in order to keep the job. Probationary members or other less-tenured ESO members may believe they have to endure wrongful conduct or a hostile environment because they are in a less powerful or vulnerable position.

**Severe or pervasive** – It must be determined whether words or conduct are sufficiently severe or pervasive enough to create an objectively hostile or offensive work environment. Pervasive means that harassment or discrimination occurs frequently over time, creating a hostile work environment that unreasonably interferes with the ESO member's ability to perform his or her job.

### Associational discrimination

It's important that ESO leaders familiarize themselves with the concept of associational discrimination, which includes unlawful discrimination against an employee because of his or her affiliation with a member of a protected class.<sup>3</sup> View these examples of associational discrimination:

**Race** – Equal employment opportunity cannot be denied because of marriage to or association with a person of a different race.

**Religion, ethnicity or country of origin** – Federal law prohibits harassment or discrimination because of an individual's association with a person or organization of a particular religion or ethnicity.<sup>4</sup>

**Disability** – The Americans with Disabilities Act protects applicants and employees against discrimination based on their relationship or affiliation with an individual with a disability, whether or not the applicant or employee has a disability.<sup>5</sup>

### Conclusion

Regardless of people's political affiliation, many believe the harsh tone of political debate today is unsettling, particularly with regards to issues involving religion, national origin, race/color, gender and sexual orientation. Opposing discussions may be appropriate on television, but significant problems can result from voicing opinions in the workplace that could be considered insensitive, inflammatory or even create a hostile work environment. In the 2016 political season, be aware of emotionally charged subjects that can result in conflict, lowered morale and even litigation.

<sup>1</sup>Ocale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)

<sup>2</sup>Vance v. Ball State University, 133 S. Ct. 2434 (2013)

<sup>3</sup>The U.S. Equal Opportunity Commission, "Facts about Race/Color Discrimination"

<sup>4</sup>The U.S. Equal Opportunity Commission, "Employment Discrimination Based on Religion, Ethnicity, or Country of Origin"

<sup>5</sup>The U.S. Equal Opportunity Commission, "Questions and Answers About the Association Provision of the Americans With Disabilities Act"