

## EPRMA NEWSLETTER Q&A

1. What are the major trends you're seeing in the area of employment law?

**ANSWER:** Right now, we're beginning to see an across-the-board increase in the number of employment claims. Studies have shown an inverse correlation between the economy and the number of employment claims, meaning, as the economy declines, the number of employment claims rise. I think we are beginning to see that today as the negative forces of our economy take hold.

2. What are the most prevalent types of cases?

**ANSWER:** Retaliation cases are clearly on the rise. The number of retaliation charges filed with the EEOC has increased since the Supreme Court eased the standard for Title VII retaliation claims in 2006 in its decision of *Burlington Northern Santa Fe Railroad v. White*. Just recently, on May 27, 2008, the Supreme Court expanded the scope of the Civil Rights Act of 1866 (Section 1981) to include retaliation claims. In this recent ruling, *CBOCS v. Humphries*, the Supreme Court ruled that retaliation claims are encompassed by Section 1981 (which prohibits race discrimination), even though the statute does not specifically include retaliation claims. With this newest Supreme Court ruling, I would expect retaliation claims to continue to rise.

3. What are the most common mistakes you see employers make that lead to claims or litigation?

**ANSWER:** The most common mistakes employers make occur when they terminate employees. Many times, employers do not have sufficient documentation to support their termination decision. If an employee is terminated for performance reasons, it's critically important for an employer to be able to show that the employer previously communicated with that employee about these performance deficiencies and allowed the employee the opportunity to correct the deficiencies along the way. These prior communications should be documented, just as the termination itself should be documented.

In addition, employers often do not communicate honestly and openly with employees about the reasons for their termination. Many employers simply feel uncomfortable telling employees the truth about their performance (i.e. that their performance was deficient). This is a mistake. When an employer does not honestly communicate to the employee the reasons for the employee's termination, either by saying nothing or providing a reason which is not the true reason, the employee may think that the employer terminated his or her employment because of a protected category (i.e. race, gender, age, etc.) This can certainly lead to the employee questioning the reasons for his or her termination by filing an EEOC charge or lawsuit.

4. Do you feel that recent court rulings in employment law had been generally favorable to employers?

**ANSWER:** The Supreme Court's recent retaliation rulings certainly favor employees. But for the most part, I would say that the court rulings in recent years have been fair to employers and employees. The courts determine employment cases based on the facts of each case, and with sound factual and legal defenses, and good legal counsel, employers are still able to win many of these cases outright or resolve them for small amounts.

5. Do any recent rulings from the Supreme Court in its latest session stand out as potentially significant for employment law?

**ANSWER:** Again, the May 2008 Supreme Court decision in *CBOCS v. Humphries* is perhaps the most significant ruling for private employers. This latest retaliation pronouncement by the Supreme Court will only add to the number of retaliation claims, which were already on the rise from the Supreme Court's 2006 decision in *Burlington Northern Santa Fe Railroad v. White*.