

Chapter 6

ROMANTIC PATIENT ADVANCES [Medical Office Sexual Harassment Issues]

Vicki L. Buba
David Edward Marcinko

The lesson for fledgling doctors comes early in medical school: Getting romantically involved with a patient is forbidden. The problem is that not every patient plays by the rules, and a patient prone to flirtation can create a dicey ethical dilemma for a doctor—or at least make office visits uncomfortable for physicians and staff. Later, in his/her medical career, of greater interest to the physician-executive or medical practice owner is under what circumstances can doctor employer's be held liable if an employee claims she has been sexually harassed.

So, let us start at the beginning.

INTRODUCTION

Within the medical practice, clinic, hospital or university setting, faculty and supervisors exercise significant power and authority over others. Therefore, primary responsibility for maintaining high standards of conduct resides especially with those in faculty and supervisor positions. Members of the medical faculty and staff, including graduate assistants, are prohibited from having “Amorous Relationships” with students over whom they have “Supervisory Responsibilities.” “Supervisory Responsibilities” are defined as teaching, evaluating, tutoring, advocating, counseling and/or advising duties performed currently and directly, whether within or outside the office, clinic or hospital setting by a faculty, staff member or graduate assistant, with respect to a medical, nursing or healthcare professional student. Such responsibilities include the administration, provision or supervision of all academic, co-curricular or extra-curricular services and activities, opportunities, awards or benefits offered by or through the health entity or its personnel in their official capacity. Employees are prohibited from having “Amorous Relationships” with employees whom they supervise, evaluate or in any other way directly affect the terms and conditions of the others’ employment, even in cases where there is, or appears to be, mutual consent.

CONSENSUAL AMOROUS RELATIONSHIPS DEFINED

An “Amorous Relationship” is defined as a consensual romantic, sexual or dating relationship. This definition excludes marital unions. The term also encompasses those relationships in which amorous or romantic feelings exist without physical intimacy and which, when acted upon by the faculty or staff member, exceed the reasonable boundaries of what a person of ordinary sensibilities would believe to be a collegial or professional relationship. The faculty/student and supervisor/employee relationship should not be jeopardized by question of favoritism or fairness in professional judgment. Furthermore, whether the consent by a student or employee in such relationship is indeed voluntary is suspect due to the imbalance of power and authority between the parties. All members of the healthcare entity should be aware that initial consent to a

romantic relationship does not preclude the potential for charges of conflict of interest, or for charges of sexual harassment arising from the conflict of interest, particularly when students and employees not involved in the relationship claim they have been disadvantaged by the relationship. A faculty, staff member or graduate assistant who enters into an “Amorous Relationship” with a student under his or her supervision, or a supervisor who enters into an “Amorous Relationship” with an employee under his or her supervision, must realize that if a charge of sexual harassment is subsequently lodged, it will be exceedingly difficult to prove blamelessness on grounds of mutual consent. This policy is superseded by the laws governing inability to consent based on age.

HANDLING ROMANTIC PATIENT ADVANCES

While physicians vary in their approaches to managing flirtatious patients, many agree that nipping the behavior in the bud is critical to maintaining professionalism and upholding ethical standards. “It’s flattering to have a flirtatious patient,” said Dr. William P. Scherer MS, Professor of Radiology at the Barry University School of Medicine, Boca Raton, Florida. “But, we have an obligation to protect the integrity of our medical profession, and to our marital contracts and spousal relationships and family, and to act professionally at all times” [personal communication].

Dr. Scherer finds it helpful to put some professional distance between himself and a flirtatious patient. “I have no problem saying to a patient: I appreciate what interests you may have, but I have to draw the line to take proper professional care of you, instead.”

And a good way to derails flirtatious behavior from patients is by deflecting their unwelcome comments. “And, you can’t act sheepish about it.” When a patient’s remark crosses the line from complimentary to something uncomfortable, the doctor may either curtly laugh it off or ignore it. “I don’t acknowledge the statement and immediately move the conversation into something clinical in order to put the rest of the visit in a serious tone.”

On the other hand, Dr. Barbara S. Schlefman MS, a fitness trainer and retired podiatrist, instructed her nurses to have another staffer accompany them into an examination room when a patient is known for being flirtatious was waiting to be seen; and to leave the door open [personal communication].

Likewise, other physicians use a “more is merrier” approach for themselves and their staff as a defense against flirtatious behavior. This is a problem that can be avoided by having physicians never see patients alone. So, as Dr. Schlefman advised, be sure to always have a nurse or medical assistant in the room with the physician, even if you have to see somebody in the office on call after hours. And, be sure to have a call schedule for the nursing and medical assistant staff that includes patients of both genders, regardless of physician gender, since flirtatious behavior can be same-sex flirtatious behavior. Fortunately, adjunct or visiting clinical professors, or doctors on a medical school clinical teaching staff, rarely have patient encounters without a medical student, intern, resident fellow or nurse in the room during examinations.

Recognize the Signs

While it's important that physicians don't act on a flirtatious patient's advances, it's equally critical to recognize subtle flirtatious signs from a patient; according to Donna Petrozzello MD, an otolaryngologist at the California Sinus Centers.

A patient that maintains unusually long eye contact with their doctor, or engages in talk not related to their visit, or makes a habit of touching the physicians when not medically necessary may be flirting. Additionally, doctors can protect themselves when performing some common procedures that put the physician in close proximity to a patient's face, breasts, genitals, legs and even feet. That closeness could turn a clinical exam into a flirtatious event. Wearing a mask to perform each of these local or regional examinations is not only for the purposes of infection control but gives the added benefit of establishing some personal space and protection, to avoid any potential misunderstanding. For example, auscultating lungs through a shirt, not underneath, is a good idea with this type of exam on a young woman patient.

Potential Outcomes of Flirtatious Behavior

Although flirting may seem innocent in most situations, it can have serious consequences if it persists and escalates between a physician and patient, particularly if the physician becomes sexually involved with that patient.

For starters, physicians who become romantically involved with patients may lose sight of their professional obligation to be objective in treating them. "When you're biased in your decision making, or so emotionally attached to a patient that you can no longer be objective, then you're no longer on your game, and you're no longer able to provide the best quality of response that the patient deserves", according to Render Davis MHA CHE, a medical ethicist formerly from Crawford Long Hospital, and Emory Healthcare, in Atlanta, GA [personal communication].

Additionally, a physician may be the target of a civil lawsuit by a patient when the relationship comes to an end. Using the defense that the relationship was consensual is typically not a strong one, given societal views that physicians are in the power position when it comes to initiating, or ending, a physician-patient relationship.

If a physician is found to have engaged in sexual misconduct with a patient, he or she may be sanctioned by a state medical board, which can dole out any number of punishments, not limited to censuring the physician privately or publicly or revoking his or her license to practice medicine, said Dr. Charles F. Fenton III, JD PC; a doctor and health care attorney, in Atlanta, GA.

Fenton advises physicians to tell patients, in no uncertain terms, that flirtatious behavior isn't welcome. "It's very clear that a physician cannot engage in flirtatious activity with a patient. If the activity continues on, the physician has no option but to terminate the relationship," he said. "I would follow up a termination letter in writing and tell the patient: You may seek a physician of your choice, or, if you need a recommendation, we are happy to provide three names."

How to Discourage Flirtatious Patients

- Bring a medical assistant into the exam room. A third person can squash a patient's urge to flirt and also serve as a witness to the appropriateness of the physician-patient encounter.
- Don't let a reassuring pat on the back, warm handshake or comforting hug become misconstrued. Doctors must be careful that patients don't perceive their compassionate care to mean they are interested in pursuing a deeper relationship.
- Preserve the personal space between yourself and your patient. Wear a protective mask when performing sensitive clinical procedures and exams that require you to be close to a patient's head.
- Keep the conversation polite but focused on a clinical topic. Don't engage in flirtatious banter with patients or entertain their suggestive comments.
- Be sensitive to the fact that flirting can occur. Learn to recognize the subtle signs of flirting and quickly put an end to the behavior.

Now, let us progress from flirtation to harassment.

SEXUAL HARASSMENT DEFINED

According to the EEOC, sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Facts about Sexual Harassment

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must

stop. The victim should use any employer complaint mechanism or grievance system available. When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

The Courts

The courts have extend EEOC definitions and defined sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is an explicit or implicit term or condition of employment;
2. Submission to such conduct is used as the basis for a favorable employment decision or the employee's rejection of such conduct is used as the basis for an adverse employment decision; or
3. Such conduct unreasonably interferes with an employee's work or creates an intimidating, hostile or offensive working environment.¹

This definition, although accurate from a legal perspective, offers little or no guidance to a physician or other employer who is trying to articulate to professional or nonprofessional employees what behavior is prohibited and what is acceptable. Unfortunately, there is no clear-cut line to provide an answer to the relevant question: what specific acts are classified as sexual harassment?

Of greater interest to many small employers, such as physicians and healthcare professionals, is under what circumstance can the doctor--employer become liable if an employee claims s/he has been sexually harassed.²

PREFERENTIAL TREATMENT

¹ See *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

² Laws prohibiting discrimination and sexual harassment apply equally to behavior of men and women. Throughout this chapter, references to "she" can be read as "he or she."

The most easily recognized sexual harassment occurs when a doctor, medical office or other supervisor offers an employee a raise or promotion in exchange for sexual favors or when a supervisor demotes or fires an employee who refuses a request for sexual favors. This type of harassment has been referred to as *quid pro quo*.

Over the past decade, a great deal of publicity has been given to this type of behavior. As a result, most employers fully understanding the perils of the office romance and little commentary is necessary. Suffice it to say that it is never acceptable for any doctor or supervisor to offer an employee job-related rewards in exchange for sexual favors. If a supervisor engages in such behavior and the employee complains, it is highly likely that the employer will be liable for sexual harassment. .

HOSTILE MEDICAL OFFICE WORK ENVIRONMENT

Less obvious, and the basis for the majority of the sexual harassment suits brought today, is the area of sexual harassment referred to as “hostile work environment.” A hostile work environment claim results from any conduct, verbal or physical, which embarrasses, degrades, offends, or shows hostility toward an individual or a group of individuals, based on gender. Harassing conduct may include gender-related slurs, sexual remarks, negative stereotyping, unwanted touching or any other type of gender-related behavior that would be offensive to a reasonable person.

It is important to recognize that hostile work environment is merely a sub-category of sexual harassment. It is unnecessary for a physician employer to become caught up in terminology. Rather, it is important to understand the general characteristics of sexual harassment so that the harassing behavior can be eliminated from the work environment.

Any claim of sexual harassment necessarily involves behavior based on gender, but does not necessarily involve sexual comments or sexual activity. The behavior may be directed toward a particular individual or a group of individuals. It may involve written or graphic material. It may be actions or comments that create a sexually charged atmosphere. It may be conduct by a supervisor or a co-worker. Finally, it can be any type of gender-related behavior that creates an intimidating, hostile or offensive work environment. The key question in deciding whether behavior is sexually harassing is whether the conduct is offensive and unwelcome and whether it has the purpose or effect of unreasonably interfering with an individual’s work performance.

UNREASONABLE INTERFERENCE WITH WORK PERFORMANCE

The most frequently asked question is where the threshold lies for behavior that reaches the level of unreasonable interference with work performance. In other words, what is offensive to the level of interfering and what is merely annoying? The measure is two-fold: how severe is the behavior and how pervasive is it?

The United States Supreme Court has stated that the behavior must be “sufficiently severe or pervasive” so as to interfere with work performance, but what does “sufficiently” mean? It is actually a test of weight and can be viewed as a continuum of behavior. At one end of the

continuum, a single episode may be “sufficient” if that single act is extremely severe. For example, if a doctor or supervisor forces sexual contact with a subordinate, e.g. genital fondling or sexual intercourse, that single event will likely be sufficient to constitute sexual harassment.

At the other end of the continuum is behavior which, taken in isolation, appears innocent or innocuous, such as a casual remark. Doctor Arni says to Employee Betty, “Nice dress — sexy.” Obviously, the comment is inappropriate in the workplace and potentially, Employee Betty might be offended or embarrassed by the comment, but if that single comment is the only event that occurs, it would not be sufficient to create a hostile work environment because it is unlikely that this single remark will interfere with Employee Betty’s work performance.

Such is the analysis a court will employ in deciding whether behavior is sexually harassing. In the context of the continuum described above, the court will ask how severe was the behavior and how often did it occur. Behavior that is less severe; but occurs on a repetitive or frequent basis, is likely to create a hostile work environment. Similarly, behavior that occurs on an infrequent basis, but is exceptionally crude and offensive is likely to be sufficient to interfere with an employee’s work performance and thus form the basis for a claim.

TWO-PRONG TEST FOR OFFENSIVE BEHAVIOR

One question that often arises is how can anyone ever know for sure what behavior is offensive and what is not. After all, some language may highly offend a person of extreme sensibilities, but be everyday language to someone else.

To resolve this issue, courts have established a two-prong test for offensive behavior. That test asks first whether the conduct was severe and pervasive enough to create a hostile and abusive work environment and then whether this victim subjectively perceived the environment to be hostile or abusive.³ In other words, would a “reasonable” person be offended and was this particular person offended. Both questions must be answered yes before the behavior will be classified as sexual harassment.

EXAMPLES OF SEXUAL HARASSMENT

Using the continuum approach and the two-prong test, let’s examine several examples of behavior and see which might be considered sexual harassment.

[A] Compliments

Simple compliments are part of every day’s social interaction, but under certain circumstances, they may create a hostile work environment. Consider the following examples:

Example 1

“You look nice today. That dress really accents your dark hair.”

³ See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

This comment is simply a pleasant remark. Even if the employee to whom it directed was offended or felt it was too personal, it would not rise to the level of sexual harassment since a reasonable person would not find it offensive.

Example 2

“You look really nice today. With your dark hair, that color really makes you look sexy. You ought to be a model.”

Obviously, this comment is more personal than the first. The overtone is that the employee to whom the remark was directed is sexually attractive. Thus, in deciding whether the comment is sexually harassing, a little more analysis is necessary.

The first question is whether a reasonable person would be uncomfortable or embarrassed by such remarks. The personal nature of this comment makes it more likely that a reasonable person would be offended, particularly if such comments were made on a repeated basis. This example illustrates the fluid nature of the continuum described above. The comment is not extremely severe, but certainly is inappropriate for a medical or other office environment. Consequently, if there were several occurrences of this or similar comments, the behavior will likely be determined to be sexually harassing.⁴

Example 3

“Nice boobs! Are they real? Come on over here so I can really check out your tits.”

This comment certainly falls further down the continuum as to the degree of severity. Such a comment is not only inappropriate, but is highly offensive and would warrant disciplinary action. One occasion may not reach the level of interfering with work performance, but very few repetitions such as this would be necessary to reach the threshold for sexual harassment.

[B] Sexist Words

Often certain words are associated with one gender or another and if used repeatedly, may form the basis for a sexual harassment claim.

Example 1

“You are such a bitch.”

There is no question that the term “bitch” refers to a female. However, in today’s society, this term has become so commonplace that it is often accepted in conversation. Consequently, use of this term, if there were no other events, would likely not be sufficient to constitute sexual harassment.

Example 2

“All women are c__s and don’t deserve to be treated with respect.”

⁴ Of course, this assumes the second prong of the test has been satisfied and that this particular victim is offended or embarrassed.

Again, the referenced word refers to females only. However, the crudeness of the language places this event further along the continuum in terms of severity. This particular comment becomes even more offensive since it is combined with a stereotyping remark about women. For all of these reasons, it is likely that a few repetitions such as this would be sufficient to constitute sexual harassment and to create a hostile work environment. Accordingly, such language should be prohibited in the workplace.

Example 3

“Men are such idiots. I guess that’s because they let their little head do all their thinking.”

There are several problems with this remark. First, there is a not so subtle reference to the male anatomy. There is also the blanket assumption that not only are all men less intelligent than women, but the reason for this anomaly is that men are more interested in sex than in intelligent pursuit.

Again, one comment such as this is probably not sufficient to form a claim. However, in combination with other behavior or similar behavior on a repeated basis, a claim might be asserted.

[C] Office Jokes

For decades, joke telling has been part of our social interaction, both on and off the job. Over the last several years, thanks in part to Bill Clinton, political jokes have taken a turn to include sexual overtones. What happens when these jokes are introduced into the working environment? The criterion remains the same: would a reasonable person be offended by the jokes and was the complaining individual offended.

When an employee complains that office jokes are too “off-color,” such that they are embarrassing and interfere with work performance, the defense is nearly always the same — “it was just a joke; I didn’t mean anything.” However, such a defense will not be effective.

Remember the basic definition of sexual harassment is any conduct that has the purpose *or effect* of interfering with work performance. Motive; or lack thereof, is irrelevant. Jokes of a sexual nature that are offensive and embarrassing can create a hostile work environment, *even if the jokester harbored no intent to do so.*

Does this mean an employee cannot tell jokes at work? Of course not! It does mean that if any employee tells jokes which might offend, the employee had better be sure of his audience. Two friends who are kidding around does not mean that one of the friends can suddenly decide to complain of sexual harassment and prevail. However, if one of the parties does decide to complain, an employer may have problems defending the action if the jokes are of a sexual nature and do not belong in the workplace.

It is important to understand a few other aspects of office joke telling. The first is that offensive language and embarrassing jokes may create a hostile work environment, even if two people

voluntarily engage in the conduct. The hostile work environment occurs when the off-color jokes are inadvertently overheard by others who find the jokes embarrassing or offensive. Of course, the solution to this potential problem is to keep all such joking out of the office, hospital or work environment.

Another pitfall of sex jokes may be seen when an individual brings a cartoon to the office and gives it to a friend who finds it highly amusing. That person makes a copy and passes it on to a third person that again finds it amusing, not offensive. This chain continues until eventually the cartoon comes into the hands of people who are not so amused. Depending on the crudeness (or severity) and the frequency with which such conduct occurs, a hostile work environment could evolve, even though it started as two friends engaging in what they perceived to be harmless fun.

[D] Touching

Touching is an area subject to various interpretations by different individuals. Some people simply do not like touching of any type. Others have difficulty talking to another without some touching. Like compliments, touching can be analyzed along a continuum to see if it is sexually harassing.

Example 1

A dentist walks over and says “good job” and simultaneously pats the employee on the shoulder. Such touching cannot rise to the level of sexual harassment because no reasonable person would consider such conduct offensive.

Example 2

A female internist says “nice tie, you always wear such professional looking clothes.” The comment is combined with the woman fondling the tie followed by rubbing the male employee’s arm.

The comment sounds harmless, but combined with the touching described above, it takes on a personal feeling and becomes more intrusive. Although not extremely severe, if such conduct occurs on a regular basis, it is likely to make the male employee uncomfortable and create a hostile work environment.

Example 3

A chiropractor employer walks over and says, “you look tired; let me give you a massage.” This conduct definitely has a personal overtone and is inappropriate in the workplace. The problem is that even if the employee is uncomfortable with such touching, she may not feel comfortable telling her doctor employer to stop. Consequently, the conduct can recur, resulting in the employee feeling very oppressed or uncomfortable about what goes on in the workplace and eventually she may complain of sexual harassment.

Example 4

A male podiatrist says “good job” and pats the female employee on the rear. Again, she may not feel comfortable telling the supervisor to stop. However, the personal nature of the conduct can create a hostile work environment if the behavior is repetitive.

[E] Invitations

Employees often ask if the state of current sexual harassment law means there can no longer be any romance or dating between persons who work together. Of course not! Employees and even healthcare supervisors and subordinates are still free to engage in consensual relationships. However, this area warrants a few pertinent comments.

[1] When “Yes” Becomes “No”

Two individuals may engage in a romantic relationship without any legal consequences. However, if one of the individuals becomes disenchanted, the rules change. Any further pursuit, which may be unwanted, can create a hostile work environment, regardless of what the previous relationship was like.

[2] A Sense of Obligation

Often, when an employee asserts a claim of sexual harassment against a doctor supervisor, the defense will be “but it was mutual. She participated voluntarily.” The employee will respond by saying “I didn’t feel like I had any choice; he was my boss.” This issue has come before the courts on many occasions and the U.S. Supreme Court has resolved the issue by affirming that a plaintiff who voluntarily participates may still have a claim. The test is whether the conduct was unwelcome, not whether participation was voluntary.⁵

Obviously, a doctor who engages in office romance had better be sure the other party’s participation is voluntary and not something that stems from a sense of fear or obligation. Under any circumstances, a supervisor who engages in such relationships in the workplace runs the risk of having a sexual harassment complaint filed against him.

[3] Listening for Clues

Another word of advice, particularly to physicians, is to be perceptive in listening to the response to an invitation. An employee may feel nervous about refusing an invitation from a medical supervisor, but may still give hints as to her feelings.

For example, the doctor supervisor asks, “How about dinner Friday?” and the employee responds, “No thanks, I already have plans.”

⁵ See *Meritor*, 477 U.S. 57 (1986).

The following week, the doctor supervisor again asks, “How about dinner Friday?” and the employee responds, “I’d love to, but I’m visiting a sick friend.”

The following week, the doctor supervisor again asks, “How about dinner Friday?” and the employee responds, “Sorry, I have to stay home and sort my sock drawer.”

Consider what is going on. The employee has not said, “Please don’t ask me out; I don’t want to go out with you.” However, the message should be just as clear as if she had.

[F] Demands or Threats

Demands for sexual favors, sometimes combined with threats if sexual favors are not forthcoming, often form the basis for sexual harassment complaints. If the demands or threats are made by supervisors, there is no question that such conduct is sexually harassing. However, similar behavior, occurring between co-workers, may also form the basis for a claim.

An employee who repeatedly invites another employee on dates sets up a hostile work environment if the second employee refuses. In some cases, the invitations may be combined with following the employee home or the giving of gifts to persuade the employee to change her mind. In extreme cases, it may be combined with threats against the invitee if she does not agree to some relationship.

As an employer physician, if you learn of such a situation, it is imperative that it be stopped. If knowledge of the threats or persistent unwanted demands are ignored, you will be held liable if a claim is raised.



GENDER BASED ANIMOSITY

A sexually hostile work environment often results from comments or actions that contain some

sort of sexual connotation. However, this cause of action stems from actions that are based on gender. Consequently, sexual content is not required. Acts that fall into this category are easily recognized because they are generally based on negative stereotyping.

Example 1

“Women are not as intelligent as men, so men make better physical therapy department managers.”

Obviously untrue, this comment demonstrates a bias against women and if often repeated, certainly is likely to interfere with a female’s work performance. Notice that the characteristics of gender-based animosity are much like ordinary gender discrimination. Consequently, it would not be uncommon for a woman to bring both a hostile work environment claim and a discrimination claim. Since they both arise out of the same body of law, either claim could be viable.

Example 2

“I don’t understand why she works in this office. Women belong at home, taking care of the house and raising kids. They don’t belong in the workplace.”

Again, there is no reference to any sexual terms, but there definitely is an overtone of gender bias. These two examples are obvious ones. Consider the following example of gender bias that might not be so obvious.

Example 3

“We have an opening for a computer medical technician. Since men tend to be better at wiring and configuring a computer, let’s hire a man.”

Obviously, gender has nothing to do with technical ability. Does this mean that if an employer hires a man, the decision will be challenged? Certainly, if the hiring is accompanied by statements like those outlined above. However, the best way to avoid lawsuits in this area is to refrain from making remarks and to utilize neutral testing procedures to screen candidates.

SAME SEX HARASSMENT

Before 1998, courts around the country were split on the issue of whether sexual harassment claims could be asserted only if the behavior occurred between a male and a female. Some courts held that sexual harassment can occur only if the harasser and the victim are of different sexes. Other courts held that sexual harassment is illegal, even if both parties are of the same sex. Still other courts held that sexual harassment between two persons of the same sex can occur only if one of the parties is a homosexual.

In 1998, the U.S. Supreme Court settled the issue in its ruling in *Oncale v. Sundowner Offshore Services, Inc.* when it ruled that sexual harassment is behavior based on gender and it applies whether the parties are different sexes or the same sex.⁶ The Court also said that the relevant

⁶ See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

question was whether there was a hostile work environment because of gender, and therefore, the sexual orientation of the parties was not to be considered.

With this ruling, the Court expanded the body of law previously delineated as sexual harassment. The ruling affirmed that the test was whether the behavior was offensive and whether it was sufficiently severe or pervasive to be actionable. The Court emphasized that male-on-male horseplay is not prohibited. However, when it rises to the level of more serious acts, such as genital grabbing, threatened sexual acts or severe language which offends or frightens the victim to the extent it interferes with the victim's work performance, it is prohibited under the law governing sexual harassment.

DOCTOR EMPLOYER LIABILITY

A key question is under what circumstances will the physician or other employer be liable for sexual harassment in the workplace? The rules vary, according to whether the harassing party is a supervisor or a non-supervisor.

[A] Liability for Supervisor's Harassment

For many years, the courts held that where the harasser is also a supervisor, the employer will be absolutely liable. This liability is based on the premise that a doctor, or other employer, must have notice of the harassment in order to be liable and that since supervisors are agents of the employer, there is notice. In 1998, the U.S. Supreme Court clarified the employer's liability and although the Court said that employers are not absolutely liable, the course prescribed for avoiding liability placed a high burden on the employer.

The Court outlined an affirmative defense that would permit the employer to avoid or limit liability. An affirmative defense exists where the employer exercised reasonable care to prevent and promptly correct harassing behavior and where the victim unreasonably failed to take advantage of any preventive or corrective opportunities to avoid harm.⁷

What does this mean in everyday language? It means the physician employer must have a strong policy defining and prohibiting sexual harassment. It must be adequately disseminated to all employees and it must include a reporting procedure. It is important that the policy specifically identify the individuals to whom an employee may address a complaint and also include alternate reporting procedures in cases where the harasser is the supervisor of the complaining individual.

It is not sufficient to merely have a policy in place and to disseminate it to employees. In addition to developing the policy, the physician employer must be prepared to uniformly enforce the policy once it has been established.

[B] Reporting Procedure

It is also essential that the doctor employer have some procedure in place for investigating sexual

⁷ Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

harassment complaints. As noted above, the efficiency with which an employer investigates a complaint will play into the court's decision as to whether the employer is able to take advantage of the affirmative defense. This means that you should take all claims seriously. The result of an investigation may be a report back to the complaining individual that there is no evidence to substantiate the complaint but that all individuals involved, including the alleged harasser, have been warned that such behavior will not be tolerated and will be the subject of disciplinary action.

DISCIPLINARY ACTIONS

Many events may contribute to a sexual harassment claim, but even though each of them standing alone may be insufficient to prevail in a court of law. However, because the threshold for a sexual harassment claim falls in a gray area, employers have the right to protect themselves by establishing rules which may be more stringent than those imposed by a court. Many doctors and employers adopt a "zero tolerance" policy. Such a policy means that when any employee engages in behavior described above, that employee will be disciplined, even for a single incident.

The important point to remember is that the discipline must be uniformly imposed. In other words, an employer cannot discipline one employee for telling off-color jokes and then ignore the same behavior by another employee because "he was only joking around." Disciplinary action may be something as simple as a verbal conversation explaining to the alleged harasser that these things do offend some people and the harasser should avoid such behavior in the future. Obviously, more serious violations may warrant more serious disciplinary action, up to and including termination of employment.

The bottom line is that doctor employers must be able to show they have done everything within their power to prevent sexual harassment and when complaints are made, they have immediately investigated and, when necessary, taken corrective action. Such is the only way in which a doctor employer may avoid liability for sexual harassment complaints.

TANGIBLE EMPLOYMENT ACTION

If harassment results in a tangible employment action (e.g. discharge, demotion, or undesirable reassignment), and the harasser is a supervisor, the affirmative defense is not available.⁸ A tangible employment action does not necessarily mean the employee has lost some economic benefit. It could also mean a loss of status, loss of promotion opportunities or loss of anything perceived to be a benefit of the job.

Further, threats of loss of tangible benefits may form the basis for a hostile work environment claim, even if there is no follow through with the threatened action.⁹ An example of this would be where a doctor or supervisor continuously threatens to fire or demote a female employee because "as a woman, she's not smart enough to do the job." The threat itself is sufficient; no

⁸ *Id.*

⁹ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)

action is required.

PUNITIVE DAMAGES

Punitive damages are sums of money that are awarded to a plaintiff to punish the defendant. The sum of money awarded relates to the assets of the defendant and the need to punish that defendant, rather than to the economic loss of the plaintiff.

Until recently, many courts felt that although an employer could be held vicariously liable for damages resulting from a sexual harassment complaint, that punitive damages would not be appropriate. However, the U.S. Supreme Court addressed the issue in 1999 and stated that punitive damages may be imposed if the conduct is “that of a managerial agent.”¹⁰ Punitive damages do not require a showing of egregious or outrageous discrimination. However, punitive damages will not be imposed when the decisions of the managerial agent are contrary to the employer’s good faith efforts to comply with the laws governing sexual harassment.

The question becomes, who is a managerial agent? A court will look at all of the circumstances to determine if the individual is a “managerial agent.” Questions a court will ask may include, what is the supervisory responsibility of the individual, how much power does the individual have to enforce company policies, how much authority does the individual have to hire and fire employees and other similar questions. In a small medical office, an office manager who has merely a title and no real managerial duties will likely not be deemed to be a managerial agent. Conversely, a doctor in an office, even if he does not ordinarily hire and fire staff members, may likely have sufficient authority and power to be deemed a managerial agent of the group.

FINANCIAL AND ECONOMIC COSTS

There are positive reasons to consider your medical practice climate. Preventing discrimination and harassment boosts worker morale and productivity. But, there are also costly negatives you want to avoid: Discrimination and harassment lawsuits cost companies more and more each year. A study released in January 2002 by Jury Verdict Research, Inc., found that:

- The national median jury award for employment-practice liability cases, which include discrimination and retaliation claims, rose 44% — from \$151,000 to \$218,000 — between 1999 and 2000. The median award had stayed level at about \$150,000 between 1997 and 1999.
- Of all discrimination types, age discrimination plaintiffs won the most money from 1994-2000
- The overall median jury award in discrimination cases was \$150,000 for the seven-year span.
- The study also showed an increase in public awareness and jury sympathy for the plaintiffs in discrimination cases:
- In 2000, 62% of plaintiffs in sex discrimination cases (including sexual harassment) won their cases, compared with only 43% in 1994

¹⁰ Kolstead v. American Dental Association, 527 U.S. 526 (1999)

- 67% of race discrimination plaintiffs won their cases in 2000, compared with 50% in 1994
- A 1999 survey of 496 companies published by the Society for Human Resource Management it was found that:
- Sexual harassment complaints increased at those companies by almost 140% between 1995 and 1998
- Small businesses averaged nearly one claim per 100 employees in 1998 — five times higher than the rate of one claim per 500 among large businesses
- Only 51% of small businesses said that they offered sexual harassment prevention training, while 76% of large companies did.

These statistics suggest that whether your medical practice is large or small, you need to take harassment and discrimination prevention training seriously.

OVER HEARD IN THE DOCTOR'S LOUNGE [Do We Need More Medical Chaperones?]

First of all, it's clear that both men and women are capable of illicit sexual behavior. And, that's just in the traditional straight sense. However, with ever evolving definitions of sexuality, how is our view of chaperones altered?

From what I have read online, one of the fundamental beliefs of LGBT physicians is that nobody feels they should be compelled to reveal their sexuality. Fair enough. But, what does that mean in terms of chaperones?

If a gay physician examines a straight man's genitals, or performs a rectal exam on him, should that physician bring a male, or a female, chaperone? What about the sexuality of the chaperone? If the gay physician has a male chaperone, shouldn't we ensure that the chaperone is straight? And, if the female chaperone is a lesbian, I suppose it would be better than having a straight female chaperone, as she might also find the exposed man sexually interesting. Or, if a lesbian physician performs a pelvic on a woman, it makes sense that she have a straight female chaperone. But, would a gay male be just as good? A straight man certainly wouldn't do.

Wait, what if the patient is gay? Would a lesbian physician need a chaperone? Or, would a lesbian patient need for her gay physician to have a chaperone? What about a patient or provider who is bisexual? Does that require two chaperones? Should chaperones be chaperoned? What a vast cauldron of lust might ensue if we kept adding chaperones to the mix! And, would we explain the sexual melting pot to the poor patient, who reclines in stirrups or bends over the table, potentially unaware that he or she is the object of so much potential controversy, lust, and litigation?

Sexuality aside, what happens when patient, or physician, have alternate genders? And what if those genders have alternate sexualities? I mean, I'm a baby-boomer and a little behind, I admit. But, it stands to modern reason that a man who self-identifies as a woman could be a lesbian who is thus attracted to women and comes sort of, you know, full circle. Can a female physician, who is a self-identified male, be trusted to examine, alone, a lesbian patient? Or indeed - a gay patient?

Dare we inquire, in medicine, about both gender and sexuality as it pertains to being alone with a patient? And, should we update the charts of our patients regarding gender, which appears to be endlessly mutable, unlike what our culture believes sexuality to be, which is carved in stone? And is it the duty of the provider to discuss his or her own personal sexuality before performing such exams on patients?

And, what happens when the accusations fly in any of these scenarios? Who will be liable when someone alleges that they were assaulted or touched by someone who was sexually attracted to them, but whom the patient never realized was of an alternate gender or sexuality? Who will be liable when the provider is the one faced with unwanted, and unforeseen, advances? And, will we be concerned that chaperones can, themselves, be compromised by attraction or group allegiance? After all, that's one reason we had females chaperone males; for fear, in part, that "the boys" would cover up misbehavior.

Finally, is this an open field for litigation? Or simply an open field for more and more regulations in health care?

Of course, this is not to suggest that any of the above groups are particularly prone to sexual predation. This is not some "everyone but straight people are dangerous" assault on those who are different. However, neither is it safe to assume that those of alternate sexualities and genders are not prone to such behaviors. Most of us, even the whitest most male and straight, were not sexual predators. But; for the good of our patients, it was always assumed that we might be.

Edwin Leap MD

[Emergency Room Physician]

Source: <http://www.kevinmd.com/blog/2015/04/were-going-to-need-more-medical-chaperones-heres-why.html>

CONCLUSION

This chapter does not begin to cover all of the examples of behavior that may constitute sexual harassment or hostile work environment. It is, however, intended to illustrate that a physician

employer who wishes to avoid sexual harassment claims will be more successful if he or she exercises common sense in this area. A work place, even a small doctor's office, should always be viewed as a professional environment. Employees should be viewed as just that. When an individual walks through the office door in the morning, that individual is not a female, not a Jew, not a black, but is simply an employee there to do a job. An employer who makes attempts to enforce such an attitude will go far in eliminating sexual harassment in the work place.

COLLABORATE

Discuss this chapter online with others at: www.MedicalExecutivePost.com

REFERENCES

- Buba, VL: Sexual Harassment Risks in Medical Practice [He said, she said ... there is no quid pro quo]. In, Marcinko DE [editor]: Risk Management and Insurance Planning for Physicians and Advisors - A Strategic Approach. Springer Publishing, New York 2004
- Jessani, A and Marcinko, DE: Special Situations Financial Planning. In, Marcinko DE [Editor] Comprehensive Financial Planning Strategies for Doctors and Advisors. Productivity Press, Boca Raton, Florida, 2015
- Miller, C: Asset Planning and Protection Principles. In, Marcinko DE [Editor] Comprehensive Financial Planning Strategies for Doctors and Advisors. Productivity Press, Boca Raton, Florida, 2015
- Petrozzello, D: ENT Today. September 2012.

READINGS

- Ethics in Practice: Managed Care and the Changing Health Care Environment: Managed Care Ethics Working Group Report, American College of Physicians and Harvard Pilgrim Health Care Ethics Program; Annals of Internal Medicine, Vol. 141, Issue 2, July 20, 2004.
- Davis, Render: The Business of Medical Practice: Medical Ethics for Challenging Times. In, Marcinko, DE [Editor] Springer Publishing, New York, NY, 2010
- Ethics, Trust, and the Professions: Philosophical and Cultural Aspects. Pellegrino, Edmund D., MD., Veatch, Robert M., PhD., Langan, John P., S.J: Georgetown University Press, Washington, D.C., 1991
- Medicine at the Crossroads: Konnor, Melvin, M.D., Vintage Books, New York, 1994.
- "Preserving the Physician-Patient Relationship in the Era of Managed Care," Emanuel, Ezekiel J. M.D., Dubler, Nancy N., LL.B. JAMA, Vol. 273, No. 4, January 25, 1995.
- The Right Thing: Ten Years of Ethics Columns from the Healthcare Forum Journal. Friedman, Emily. Jossey-Bass Publishers, San Francisco 1996
- Mixing Business, Medicine: La Puma, John, MD, Managed Care Magazine, July 1998

SAMPLE
[SEXUAL HARASSMENT POLICY FOR HEALTHCARE FACILITY EMPLOYEES]

To: All Hospital / Medical Office and Clinic Employees

From: CEO

Subject: Sexual Harassment Policy

Date: _____

This healthcare facility believes that each employee has the right to be free from harassment because of age, color, creed, national origin, or sex. Because of the current rise in sexual harassment charges across the country, we wish to clarify our procedure for dealing with this problem.

It cannot be stressed enough that this hospital will not tolerate any form of sexual harassment. Should you feel you are being harassed, please follow these guidelines to help remedy the problem.

Harassment by other employees or by patients at the individual units should be brought to the attention of the head nurse, who will then investigate the matter. If the allegation is sustained, the responsible employee or parties will be disciplined. If harassment continues, the responsible individual will be terminated immediately. Responsible patients who do not change their behavior after a polite request from the head nurse will be provided legal counseling.

Should you feel the head nurse has not investigated the matter to your satisfaction, contact _____ at _____ immediately!

Should the harassment originate from management or the head nurse, the regional medical or administrative supervisor for that unit is to be contacted. If, for any reason, that supervisor cannot be reached, any supervisor will respond to your complaint.

Should the harasser be the regional supervisor, medical or healthcare administrator, please contact me directly.

Sexual harassment is defined as any of the following:

- Unwelcome physical contact
- Sexually explicit language or gestures
- Uninvited or unwanted sexual advances
- An offensive overall environment, including the use of vulgar language, the presence of sexually explicit photographs or other materials, and the telling of sexual stories

It can come from superiors, fellow employees, doctors, nurses, medical technicians, or patients. Men as well as women can be victims of sexual harassment.

Please sign and date the attached, acknowledging that you have read this notice.

Signed _____ Date _____

THE END