



Workplace Sexual Harassment: Victims, Employers and Accountability

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**Joan M. Lebow
Quintairos, Prieto, Wood & Boyer, P.A.
233 S. Wacker Drive, Floor 70
Chicago, IL 60606
P: 312-566-0040**

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Overview

Our presentation is in two parts:

- Employment
- Medical Staff

Learning Objectives

- Define the theory and rationale of sexual harassment claims in the work place, both quid pro quo and hostile work environment claims.
- Recognize the elements of an investigation that are standard for defending a claim against a practice by an employee or patient for sexual harassment, abuse or misconduct.
- Identify the range of conduct that may constitute sexual harassment, abuse or misconduct.
- Distinguish the likely defenses to a charge of sexual harassment, abuse or misconduct.
- Analyze the resources available in the event you are defending a claim of sexual harassment, abuse or misconduct.

EEOC Definition of Sexual Harassment – Title VII Civil Rights Act

- It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Harassment can include offensive remarks about a person's sex.
- Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

EEOC Definition of Sexual Harassment

- Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a **hostile** or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client, customer or **patient**.

Illinois Definition of Sexual Harassment

- **Sexual harassment is defined by the Act as including:**
 - any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when
 1. the submission to such conduct is made either directly or implicitly a term or condition of an individual's employment,
 2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
 3. such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Types of Sexual Harassment

- Quid Pro Quo = Requests for sexual favors or sexual advances in exchange for benefits
 - The benefits could include promotions, raises, work assignments, or vacation time.
- Hostile Environment = A series of events have created an intimidating or offensive environment in the perception of a reasonable person.

Sexual Harassment: Term And Definitions

- Sexism = attitudes and beliefs that prejudges an individual or group of people based on their gender.
- Sex Discrimination = basing employment decisions on an employee's gender and/or treating employees differently because of their gender, rather than on their qualifications.
- Sex-Based Harassment = denigrates or ridicules an employee or is abusive to an employee because of his or her gender.

Harassment Questions to Consider

- Who can be a victim?
- Who can be a harasser?
- Intent is not relevant.
- The Situs: To be wrongful, harassment does not have to take place at workplace.
- Who can be liable?
 - An employer is strictly liable for the harassment of an employee by another employee having direct supervisory authority over the complaining party, regardless of whether the employer was aware of the offending conduct.

Well-Written Employee Handbook & Policies

- A properly drafted employee handbook/policies can be a critical risk management tool, communication tool and cost containment tool.
 - Informs employees and supervisors of the rules and policies of the workplace in a uniform way.
 - Prohibits unlawful discrimination and ensures equal employment opportunities to all regardless of race, color, national origin, religion, sex, sexual orientation, age, disability, or veteran status.
 - Prohibits harassment based on race, color, national origin, religion, sex, sexual orientation, age, disability, or veteran status.
 - Describes what constitutes sexual harassment.

Maintaining Regular Performance Evaluations

- Performance evaluations set general expectations and behavioral standards, and reiterate expectations and requirements consistent with the applicable job description.
- A performance evaluation is a record of performance issues and will be the most important document in your defense in the event you need to take disciplinary measures, including termination.

An Effective Complaint Mechanism

- Delivered to work force in writing, visible and known to all employees.
- Respond before you receive a written complaint, when you are notified of a verbal complaint.
- Do not ignore or trivialize employee complaints.
- **No reprisal.**

An Effective Complaint Mechanism (Cont.)

- Promptly, fairly and seriously investigate any complaints of misconduct, including harassment, sexual harassment or discrimination.
- Involves interviews of involved parties and any witnesses.
- Fact finding: review of any materials, documents, and emails relating to the complaint.
- Drawing conclusions and implementation of any appropriate corrective action.
- Documentation is critical.

Anti-Retaliation Policy

- Implement a strict policy against retaliation for **reporting** complaints or **participating** in an investigation.
- Uniformly enforce the policy.
- Warn employees that violations of the policy will subject them to discipline, up to and including discharge.

Who Should Conduct the Investigation?

- Internal investigation is conducted by the employer based upon reported sexual harassment.
- EEOC and/or IDHR conducts investigations when the claim of sexual harassment is between an employer and an employee.
- Law Enforcement investigates whenever the complaint involves violent acts or threats of violence.

Conducting an Internal Investigation

- Clarify the employee is making a “complaint.”
- Sensitively gather the full story from the complainant (either in writing or through an interview).
- Speak with alleged harasser for their version of events. **Remind alleged harasser no hint of intimidation in further contact with complainant.**
- Speak with co-workers and witnesses to develop understanding of series of events.
- **Require all to maintain confidentiality,** emphasize that it must be maintained for the investigation to have integrity.

Make a Decision

- Managers can take into account history of individuals, the reliability of report, and their assessment of credibility of evidence.
- Rely on reports of witnesses and co-workers.
- There must be a sound, reasonable basis for determination.
- Employer must make independent assessment of the validity of the complaint.

Disciplining and Discharging an Employee

If the complaint is determined to be valid:

- Not pleasant to discipline – Someone has to do it.
- There is a skill to doing it; Need to identify an appropriate person to counsel/discipline.
- Must strike a balance – Match discipline to severity of the offense. Send a firm message/motivate **BUT NOT** cause employee to downwardly spiral.
- Follow employee handbook for disciplinary actions.
- Review policies regarding employee conduct and discipline procedure.
- Review applicable statements, witness information, documentation and materials before making a disciplinary determination.

Disciplining and Discharging an Employee (Cont.)

- Meet with the victim to review the process you followed and discuss remedies the victim feels appropriate.
- Have face-to-face discussion with harasser, if possible, in addition to issuing a formal written disciplinary notice.
- Reiterate anti-harassment/retaliation policies.
- Require confidentiality from all involved.
- Create a Corrective Action Plan specific to the situation.
- Document the disciplinary action in writing.
- Consider separation agreements if appropriate under the circumstances.

Responding to Sexual Harassment Complaint Deemed Invalid

- Meet with both parties separately and discuss findings of the investigation.
- Separate the individuals into different shifts, work areas, or departments, if possible.
- Provide options for both parties where possible.
- Employees may be disciplined for behaving inappropriately outside the workplace if it spills over into the work environment.

Incidence and Impact of Sexual Harassment – Co-workers

- **NIH Research on prevalence**
 - 30% of female respondents reported experiencing sexual harassment. Those women reported:
 1. Generalized sexist remarks/behavior - **92%**
 2. Inappropriate sexual advances – **41.3%**
 3. Subtle bribery to engage in sexual behavior – **6%**
 4. Threats to engage in sexual behavior – **1.3%**
 5. Coercive advances – **9.3%**
- [Research Letter, JAMA, Vol. 315, No. 19 \(May 17 2016\)](#)

Incidence and Impact of Sexual Harassment – Co-workers (Cont.)

- 2018 survey shows 3,100 physicians disciplined for sexual harassment from 1999 – present.
 - Anesthesiologists, OBGYNs, psychiatrists, ophthalmologists, radiologists, ENT physicians, etc.
- 2,400 of those involved patients.
 - Kissing a patient's genitals.
 - Grabbing a patient's breasts & ejaculating.
 - Doing "screening" genital exams on ENT patients.
 - Fondling, seduction, molestation, rape.

Incidence and Impact of Sexual Harassment – Co-workers (Cont.)

700 involved other staff or public crimes (public indecency, child pornography, sexual assault).

- [Atlanta Journal-Constitution, 50-state survey of 100,000 Physician disciplinary records.](#)
- Patients Sexually Harassing Physicians: 2018 Medscape Report.
 - 27% of physicians sexually harassed by patients
 - Allocation relatively equal between male and female physicians.
 - Majority of patients are 28 – 34 years old.
 - [https://news.aamc.org/diversity/article/when-perpetrators-are-patients/.](https://news.aamc.org/diversity/article/when-perpetrators-are-patients/)

Claims and Defenses – Medical Staff

- Claims against hospitals arising from termination, expulsion or other negative impacts on physicians accused of harassment.
 - Federal civil rights claims,
 - 42 USC 1981 (discrimination based on race or ethnicity).
 - Title VII (based on “right to control” theory).
 - Antitrust, 15 USC Secs. 1 and 2 (“conspiracy to exclude” or “monopolization” theories).
 - Action in response to their misconduct and the hospital's obligation to protect the worksite are not employment-dependent.
 - Hospital employees subjected to severe or pervasive sexual harassment by a non-employed physician with staff privileges may seek to have the hospital held vicariously liable for the physician's alleged harassment.

Claims and Defenses – Medical Staff (Cont.)

- State civil rights or “due process” claims.

Employers may be liable for failing to prevent or remedy sexual harassment by co-workers.

Section 1983 of Title 42 of the United States Code provides a cause of action for deprivation of any rights under the Constitution or other law by a governmental entity. Physicians often bring suit against hospitals under SS§1983, arguing that privileges to practice at a particular hospital are a "property right" or "liberty interest" that cannot be terminated without due process.

Claims and Defenses – Medical Staff (Cont.)

- State unfair trade practices laws.
- Tortious interference with business/referrals and/or physician/patient relationship.
- Defamation.
- Contractual/quasi-contractual causes of action (breach of bylaws).
- Beware of conduct that could be construed as retaliation against a complainant.
- Complainant is protected by state and federal law from material adverse employment actions.
- Do not attempt to influence decision makers against complainants.

Claims and Defenses – Medical Staff (Cont.)

- Healthcare Quality Improvement Act (HCQIA)
Immunity for adverse actions taken.
 - in furtherance of quality healthcare.
 - after a reasonable investigation.
 - after adequate notice and hearing procedures are afforded.
 - and the final decision by the board is objectively reasonable based on the record created at the investigation and hearing.
 - adverse "professional review" actions reportable to the NPDB include only those that are "based on a practitioner's professional competence or professional conduct that **adversely affects**, or could adversely affect, the **health or welfare of a patient.**" 45 CFR §60.3.

Claims and Defenses – Medical Staff (Cont.)

- Defense to federal civil rights claims.
 - Failure to make out a prima facie case of discrimination.
 - (Burden shifts to hospital to articulate a legitimate non-discriminatory reason for the action taken).
 - Failure to prove that the reason given was mere pretext.

Claims and Defenses – Medical Staff (Cont.)

- Claims asserted against individuals.
 - Antitrust claims against individually named board members, executives or medical staff leaders.
 - Section 1981 claims asserted against individual complainants or executives under the “cat’s paw” theory of liability.
 - Defamation claims against individual complainants/victims.
- Defenses.
 - HCQIA immunity for individual actors.
 - State law absolute or qualified immunity for reporting in good faith for most peer review actions.

Reporting Issues

- Gender Violence Act can encompass sex discrimination and harassment (740 ILCS 82).
- State Law.
 - No General Mandatory Reporting.
- Sources of Mandatory Reporting for Incidents of Sexual Misconduct By Health Care Provider.
 - AMA Ethical Opinion – 8.14 and 8.145 (1990).
 - AMA Code of Medical Ethics Opinions on Observing Professional Boundaries.
 - <https://journalofethics.ama-assn.org/article/ama-code-medical-ethics-opinions-observing-professional-boundaries-and-meeting-professional>
 - National Boards for Specialties.

Reporting Obligations

- Additional Source of Mandatory Reporting for Incidents of Sexual Misconduct By Health Care Provider.
 - Administrative Boards – “Unprofessional Conduct.”
 - Institutional Bylaws.
 - Mandatory Reporting re: Physical or Sexual Abuse of Minors (under 18) – State Law.

Reporting Obligations (Cont.)

- Criminal Reports.
- A physician convicted of or subject of these four penalties at any time will have existing license revoked and will be denied licensure in Illinois. The four penalties are:
 1. Convicted of a criminal act that requires registration under the Sex Offender Registration Act;
 2. Convicted of a criminal battery against any patient in the course of patient care or treatment, including any offense based on sexual conduct or sexual penetration;
 3. Convicted of a forcible felony; or
 4. Is required as part of a criminal sentence to register under the Sex Offender Registration Act.

Best Practices – Medical Staff

- Clear and explicit definition and prohibition against sexual harassment and retaliation.
- Consistent and fully aligned Code of Conduct, Bylaws, Policies.
- Consider sexual harassment education/training for all physician staff.
- When allegations are made against staff physicians from any source:
 - Consider external reporting obligations at all stages.
 - Maintain a complete and comprehensive record.
 - Invoke and maintain peer review privilege/ confidentiality throughout.
 - Consider voluntary cessation vs. summary suspension.

Best Practices – Medical Staff (Cont.)

- Administrative procedure for prompt and robust investigation of complaints.
 - Interview all potential witnesses – staff, patients, accused.
 - Procedures for prompt and effective informal remediation and documentation in appropriate cases.
 - Reprimand and warning.
 - Imposition of specific conduct requirements with monitoring.
 - Boundaries education where appropriate.
 - Referral to the MEC for corrective action when warranted.

Best Practices – Medical Staff (Cont.)

- Summary suspension, corrective action and recommendation for revocation of privileges.
- Consideration of chaperoned or supervised clinical privileges for a defined period of time.
 - Robust investigation to create a detailed and defensible record.
 - Include prior incidents (and their resolution) to establish a pattern.
 - Use of external expert(s), particularly when medical technique is at issue.
 - Make sure the physician is afforded a full opportunity to be heard.
 - No “rush to judgment” and “shirking of responsibility.”

Best Practices – Medical Staff (Cont.)

- Hearing before peers or an arbitrator.
 - Formal process – well prepared witnesses, complete documentary record, transcript of all proceedings.
 - Record is basis for all subsequent decisions and proceedings.
- Board appeal and final decision.
 - Maintain formalities.
 - Legal/procedural advice by Board's own counsel.
 - Well documented record of decision, with explanation and “minority opinion” if appropriate.

Questions

Joan M. Lebow

Quintairos, Prieto, Wood
& Boyer, P.A.

233 S. Wacker Drive, Floor 70

Chicago, IL 60606

Phone: 312-566-0040

Email: joan.lebow@qpwblaw.com