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Expert Analysis

Sexual Harassment In the Health Care Workplace

By **Francis J. Serbaroli**

In recent months, many prominent persons have had career-ending allegations of sexual harassment brought against them. Those accused in these high-profile cases have come from media and entertainment, education, sports, government, finance, the arts, and other areas. The organizations with whom they were affiliated are scrambling to investigate these allegations, to do damage control, and to implement new policies and processes to demonstrate their zero-tolerance for such harassment. Questions are being raised as to whether the leadership of these organizations and their governing boards knew about the harassment, and if so, why appropriate action was not taken to stop it and prevent its recurrence.

Sexual harassment has had a long and unfortunate history in the health care sector. Many female physicians, nurses, technicians, supervisors and other employees of medical schools, hospitals, nursing homes, clinical laboratories, pharmacies, and other health care institutions have been victims of harassment and abuse for decades. That has included being pressured to engage in sexual relations, rude remarks about their physical features and personal lives, abusive language and behavior, even throwing scalpels and other items in the operating room, and derogatory remarks about women in general. In a study published in the Journal of the American Medical Association [315 JAMA No. 19, May 17, 2016] a team of researchers headed up by Dr. Reshma Jagsi, deputy chair of radiation oncology at the University of Michigan Medical School, conducted a survey of clinician researchers in which 30 percent of the female responders reported having experienced overt sexual harassment compared with 4 percent of the male respondents. In a Nov. 20, 2017 post entitled "Not Just the Rich and Famous," Jocelyn Frye, a senior fellow at the Center for American Progress, analyzed sexual harassment charges filed with the EEOC from 2005 to 2015 and found that the Health Care and Social Assistance category had the fourth highest instance of complaints—11.48 percent—following Accommodation and Food Services (14.23 percent), Retail Trade (13.44 percent) and Manufacturing (11.72 percent).

Sexual harassment in any workplace is both illegal and intolerable. It is intolerable in institutions caring for patients where harassment can disturb and distract care givers and threaten patient and employee safety. The problem is not limited to male abuse of females. There have been many cases of same-sex harassment and abuse, as well as some instances of female abuse of males. And abuse has occurred in the spectrum of health care, from small physician offices, to hospitals and clinics, to the hallowed halls of some of our most prestigious medical schools.

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Nor are the perpetrators of sexual harassment limited to those working together in the same organization. It can also come from patients, family members or friends of patients, third party vendors and service providers, and others who have dealings

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with the organization but are not employees.

Laws

Title VII of the Civil Rights Law of 1964 prohibits, inter alia, discrimation on the basis of sex, and sexual harassment is regarded as a form of sexual discrimination. Title VII applies to all employers with 15 or more employees. The federal Equal Employment Opportunity Commission (EEOC), which enforces the provisions of Title VII, explains that harassment can include:

> …"sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and 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 can be the same sex.
>
> …(H)arassment 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 EEOC's position is that illegal harassment is not limited to other employees:

> The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employer of the employee, such as a client or customer.

New York State's Human Rights Law [NY Exec. Law Article 15], which applies to all employers, similarly outlaws sexual harassment and includes harassment based on gender identity and transgender status. Various municipalities, including New York City [New York City Admin. Code, Ch. 1, §8-107], have their own statutory prohibitions on sexual harassment; indeed, the legal standard for establishing harassment under the New York City Human Rights Law is lower than that under the federal or state laws. These laws also have strict prohibitions on any kind of retaliation against individuals who notify their employers that they have been the victims of, or participated in investigations into allegation of, sexual harassment. Yet despite so many legal protections, many instances continue to go undetected because of the hierarchical nature of many health care institutions, and the victims' fear that their allegations will not be given credence, or may in fact result in their losing their jobs or hurting their careers. Moreover, cases of sexual harassment have either been the subject of a cover-up, or they have been quietly settled with some amount of compensation paid to the victim in return for a confidentiality agreement, and the re-assignment or resignation of the victim. But in these situations the underlying problem remains, and the perpetrator of the abuse not only may go unpunished, but is enabled to continue his predations.

It is a sad fact that, in the past, some hospitals would take extraordinary steps to protect a sexually abusive physician because he brought in a high volume of patient admissions, or was in a senior management position, or was responsible for obtaining substantial research grants, philanthropic gifts, or other significant income. Times are changing, however, and more people are not only more aware of their rights but also prepared to assert them.

Liability

The New York State Division of Human Rights, in its "Guidance on Sexual Harassment for All Employers in New York State," summarizes the liabilities of an employer for sexual harassment in the workplace:

- Employers are strictly liable for harassment of an employee by an owner or high-level manager. This means if one owner or manager harasses an employee, even without the knowledge of the other owners or managers, the employer is nevertheless legally responsible.
- Employers may be strictly liable for harassment by a lower-level manager, or by a supervisor if that supervisor has a sufficient degree of control over the working conditions of the victim. This means that the employer may be legally responsible for such harassment, even if no owner or manager knew about it.
- Employers may be liable for the harassment of an employee coworker, if the employer knew or should have known about the harassment and failed to take action. This means the employer will be liable if the employer was negligent about preventing or stopping harassment.
- If an employee complains of harassment to any supervisor or manager, the knowledge of the supervisor or manager will be considered to be the knowledge of the employer.

Sexual harassment may result in a lawsuit or class action by the victim(s), a lengthy, costly, reputation-harming exercise for which the losing employer may not only be

liable for a significant financial verdict or settlement, but also potentially for the plaintiff's legal costs. It can also trigger an enforcement action by the EEOC, the New York State Division of Human Rights or the State Attorney General, or other agencies. Of course, any kind of physical assault or coerced sexual relations can also be a crime.

Damages

In 2012, a jury awarded a female cardiac surgery physician assistant nearly $168 million in a case in which she alleged that she had been sexually harassed and physically abused by cardiac surgeons at Mercy General Hospital in Sacramento, California, and had lost her job after repeatedly complaining to the hospital about the harassment. The hospital countered that she had been fired for not showing up for an on-call shift, and for allegedly sleeping on the job. The trial judge later reduced the award to approximately $82 million, and then vacated the award in its entirety when the parties entered into a confidential settlement. *Chopourian v. CatholicHealthcareWest et. al*, Case No. 2:09-cv-02972-KJM-KJN (E.D. Calif.).

In 2003, the former Lutheran Medical Center in Brooklyn agreed to pay $5.425 million to settle an enforcement action commenced by the EEOC after a physician was accused of sexually harassing at least eight female employees in the course of employment-related physical examinations. According to the EEOC complaint, the harassment included invasive touching and intrusive questions about the female employees' sexual practices.

Last month, the Second Circuit Court of Appeals, in *MacCluskey v. University of Connecticut Health*, Case No. 17-0807-cv. (2d Cir. Dec. 19, 2017, upheld a district court verdict that found the University of Connecticut Health System liable for sexual harassment of a dental assistant, who alleged that she had been repeatedly harassed and physically touched by a dentist over a period of months. The dentist had a past record of harassing at least one other dental assistant, and had been disciplined and threatened with termination after the prior incident. The appeals court also upheld the $125,000 in damages awarded to the dental assistant.

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Policies

An employer protects itself and its employees first and foremost by having a comprehensive set of policies and procedures defining and prohibiting sexual harassment, and setting forth the process for an employee to lodge a complaint, and how the complaint is to be handled internally. It also involves educating (and periodically re-educating) every person in the organization—including board members and senior management—about sexual harassment policies and procedures. It involves timely and thorough investigation of an employee's complaint, and enforcement and remediation as needed and as appropriate. Education and enforcement of a health care organization's sexual harassment policies are important compliance functions.

Conclusion

It is hard to know whether and to what extent the recent spate of high-profile downfalls will have a salutary effect on sexual harassment in health care workplaces. The problem has been widespread, and has gone on for so long, that it seems that only a major change in the underlying culture will mitigate the problem. A health care organization that does not take the problem seriously may end up experiencing highly public downfalls of prominent physicians or health care executives, incurring potentially large damage awards and government enforcement actions, and damaging its reputation among patients, donors, regulators, and the community it serves. Unlike some unfortunate medical complication in a patient's care that could not have been foreseen, sexual harassment can and should be detected and addressed. Everyone from board members to executives, to physicians, to supervisors has a stake in maintaining a safe and professional workplace for all employees.

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