

Sexual Harassment in Healthcare #MeTooMedicine

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Agenda

- Define workplace harassment in the healthcare setting
- The statutory rubric: Title VII, state law, municipal ordinances
- Identify Risk Factors
- Clarify Employer Responsibilities/Prevention Strategies
- Review Reporting Requirements

What is actionable sexual harassment?

- Unwelcome sexual advances,
- Requests for sexual favors, and
- Other verbal or physical conduct that result in one of three consequences:
 - Victim's employment is made conditional to submitting to sexual advances
 - Submission to or rejection of such requests by the employee becomes the basis for future employment decisions affecting that individual; or
 - The conduct has the purpose or effect of unreasonably interfering with the employee's work performance or creating an **intimidating, hostile, or offensive** working environment



What is actionable sexual harassment?

- Both victim and harasser can be of the same or opposite gender: male, female or cisgender
- 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. Frequency and severity are questions of fact to be decided by a judge or jury.
- 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, patient, or vendor

Statistics



- 50% of female nurses, physicians, and medical/nursing students report experiencing sexual harassment
- In 2016, 1/3 of female physician-scientists reported having experienced sexual harassment during their careers
- In 2017, 66% of nurses, both male and female, stressed that harassment is an issue in the healthcare field
- In 2017 the US Bureau of Labor Statistics released data that 52% of all workplace harassment occurs in the healthcare environment
- The healthcare industry has the 4th largest overall incidents of sexual harassment

Verbal Sexual Harassment

- Offensive teasing, joking, questioning
- Suggestive remarks or sounds
- Terms of endearment
- Requests for sexual favors
- Whistling/catcalls
- Inappropriate emails, letters, memos, telephone calls
- Comments about appearance/clothing
- Threats
- Spreading rumors about a person's personal or sexual life

**Catcalling
is
Harassment**
it's never okay.

Non-Verbal Sexual Harassment

- Sexual gestures
- Winking
- Leering/Looking/Staring inappropriately at a person's body or body parts
- Blocking a person's path, especially subject to a hug/kiss/other display of affection or promise of a subsequent act
- Giving presents, particularly of a personal nature



Visual Sexual Harassment

- Sexual exposure
- Offensive pictures, pornography, posters, pin-ups
- Offensive screensavers
- Emails containing offensive jokes, cartoons, and pictures
- Facebook posts containing all of the above
- Use of other social media for the purpose of making intimidating or sexually suggestive commentary
- "Publication" to third parties



Physical Sexual Harassment

- **Raping**
- **Sexual assault**
- Touching
- Brushing against the body
- Patting
- Stroking
- Hugging
- Kissing
- Fondling
- Massaging neck or shoulders





In an ongoing study conducted by the Centers for Disease Control, over 50% of American women reported that they had experienced "unwanted sexual advances" BUT fewer than 2%, historically, confronted their harassers, preferring to alter their routines to avoid harassment.

Who is at risk?

- Healthcare workers
 - Complex power dynamics in large institutions
 - Multiple departments
 - Multiple supervisors
 - Multiple levels of authority
 - Superior/subordinate relationship historically inherent in the doctor/nurse relationship
 - Professors vis-a-vis nursing and medical students
- Nurses and other healthcare workers may also be frequently harassed by patients
 - May be spat on, hit, and grabbed by patients
 - Patients may also expose themselves, make inappropriate comments or engage in other forms of harassment

Unintended consequence: Justice Center Investigation

Sexual Harassment of Nurses*

"I suspect that if you ask nurses if they've been harassed by patients, a majority would say yes. Nearly every nurse will run into it at some time in their career." - Executive Director of the Missouri Nurses Association, Belinda Helmericks

- Due to the "sexualization" of nurses by the media, many nurses must deal with unwanted sexual advances from patients
- This type of harassment can range from offensive jokes or sexual comments to inappropriate touching
- Patients may have reduced self-awareness due to medication, illness or senility or may feel that they have "Teflon" defenses
- Federal and state laws protect nurses from sexual harassment by patients

* The paradigm for healthcare workers

Sexual Harassment of Nurses



- Nurses may be subject to harassment by their superiors
- Nurses may be at risk for harassment if hospital administrators value physicians and surgeons over nurses
- Example:
 - In 2009, a nurse at Flushing Hospital in New York was awarded **\$15 million** after being sexually harassed by her superior, a physician, for years, ultimately resulting in two violent attacks in 2001
 - No action taken: Notwithstanding complaints to her superiors, they did not intervene despite the knowledge that the physician had been sanctioned, on a previous occasion, by the OPM/C for the "moral unfitness to practice medicine"
 - In 2012, a California jury awarded a female surgical PA **\$168 million** based on allegations that she was sexually harassed and physically abused by CT surgeons

Sexual Harassment by Patients

- Patients may react adversely to medication or have illnesses, including dementia and mental illness, that make them unable to understand the inappropriateness of their conduct
- While it is impossible to prevent all inappropriate conduct, the duty to protect employees still exists.
- Sexual harassment is a subspecies of workplace violence, the risk of which can be diminished by implementing training and systemic changes
- Healthcare personnel may fear retaliation for reporting sexual harassment or advances to the administration



Sexual Harassment by Patients

"There is no excuse for knowingly and repeatedly subjecting employees to a sexually hostile and abusive work environment." - EEOC

- In 2009, the Equal Employment Opportunity Commission sued Nurse One/Team One LLC, a home health agency alleging that the company condoned a sexually-hostile work environment and then retaliated against an employee for filing a complaint
- The EEO received 25 written reports from female certified nursing assistants complaining of sexual harassment by the same client of Nurse One
- Nevertheless, Nurse One continued to place female CNAs in the home rather than taking steps to stop the behavior
- **NOTE:** Sexual harassment can occur both in the healthcare facility and in outside locations, any of which would be deemed to impose a duty of care on the healthcare organization
- Sexual harassment is a sub-species of Workplace Violence and Hostile Work Environment

Addressing Sexual Harassment by Patients

- Once aware of the harassment, a patient care entity is liable if the conduct continues and no action is taken
- Awareness includes putative knowledge, in which the entity knew or should have known
- Healthcare entities must take the following steps to address harassment by patients:
 - Create policies and procedures specifically addressing sexual harassment
 - Provide training on how an employee should respond and report incidents of sexual harassment, including chain of command
 - Investigate and take affirmative steps to address the harassment
 - HR dynamic
 - Patient dynamic and collateral issues (i.e., NYS Justice Center)



Costs

- Include:
 - Litigation
 - Employee Turnover
 - Lost Productivity
 - Negative Publicity
- One study noted that a single sexual harassment complaint could cost a Fortune 500 company an average of \$6.7 million.



TITLE VII

- Makes it unlawful to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin
- In order to establish an actionable case of sexual harassment under Title VII, four conditions must be satisfied:
 - The victim must belong to a class or group protected under Title VII
 - The victim must be subjected to unwelcome sexual harassment
 - The sexual harassment in question must be shown to have been based on the alleged victim's sex
 - The type of sexual harassment must be either a quid pro quo scenario or a hostile work environment

Quid Pro Quo Harassment

- Submission or rejection of sexual advances is made explicitly or implicitly a condition of the victim's employment
- The effect must be tangible:
 - loss of job,
 - loss of promotion,
 - loss of a pay increase,
 - assignment to an undesirable shift
 - poor performance evaluations
- Limited to the actions of supervisory personnel and other members of management
- In the healthcare setting, this would include the actions of non-employee, attending physicians as well as personnel appointed by the organization
- Healthcare managers should assume that **any** individual directing, disciplining, and working in close contact with employees, including drug salespersons, is likely to be viewed as a supervisor should a sexual harassment allegation be made



Hostile Environment Harassment

- The alleged victim demonstrates that the conduct of a sexual nature was sufficiently severe or pervasive as to have the effect of unreasonably interfering with work
- Fellow employees can create the hostile environment
- Conduct that is merely offensive to the victim is not enough
- It must be shown that the discriminatory conduct was **severe** or **pervasive** enough to create an objectively hostile or abusive working environment



N.B. Predicate for the Bronx Lebanon shooting was sexual harassment

Courts' Interpretation of Hostile Environment

- The Supreme Court has rejected the requirement that hostile environment claims be substantiated only if the plaintiff can prove that the complaining party's psychological well-being had been adversely affected
- Federal courts have held that the mere utterance of an epithet which merely engenders offensive feelings or amounts to normal job stress, does not, in and of itself, violate Title VII
 - Simple teasing, offhand comments, and isolated incidents do not make out violations of the law
 - Nevertheless, these must be discouraged or subject an employee to disciplinary action in order to give rise to a potentially hostile environment



Liability of Employers- Hostile Environment

- Direct
 - For an employer to be directly liable for hostile environment harassment, the employer **either knew or should have known** that the sexual harassment was occurring and then failed to take immediate and appropriate corrective action
- Vicarious
 - Holds the employer liable for wrongful actions of its employees regardless of whether or not the employer knew or should have known of the sexual harassment



Affirmative Defense- Hostile Environment

- Per the U.S. Supreme Court, reasonable care is an affirmative defense, pursuant to a rational theory of advancing Title VII goals. An entity may avoid liability provided that it has fulfilled two prerequisites:
 - *The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior and*
 - *The complaining party unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm*



Liability of Employers- Quid Pro Quo Harassment

- The Supreme Court has required the complaining party to establish four facts
 - The employer acted with malice or reckless indifference to the employee's Title VII rights
 - The supervisory individual representing the employer (qua employee or other status) committed the violation
 - The supervisory individual was working within the scope of his or her employment
 - The supervisor's action was contrary to the employer's good faith efforts to comply with Title VII



What can an Employer do?

- EEOC guidelines encourage employers to
 - Take all steps necessary to prevent sexual harassment from occurring such as:
 - Affirmatively raising the subject,
 - Mandating training,
 - Expressing strong disapproval, including the development of appropriate sanctions,
 - Educating employees with respect to their right to raise issue of harassment under Title
 - Developing methods to sensitize all concerned,
 - Providing multiple means of access for employee concerns.



What can an Employer do?

- Establish policies
 - Policies should contain the following key elements
 - A clearly written, comprehensive statement of the employer's **zero tolerance** of sexual harassment by anyone in the workplace
 - Assurances that employees who make harassment complaints and witnesses who provide information will be protected against retaliation
 - A clear process that encourages aggrieved employees to raise concerns/complaints and which provides multiple avenues through which to do so
 - Protection of confidentiality to the extent possible, sharing information only on a "need to know" basis
 - A complaint procedure that provides for prompt, thorough, and impartial investigations by disinterested parties, preferably outside counsel
 - Assurances that if harassment is found the employer will take immediate and appropriate corrective action, up to and including termination



What should an Employer do?

- Offer training
 - Employers also need to train employees continually of their rights and responsibilities
 - Collaborate with labor unions in the development and implementation of policies to protect employees
 - Utilize the services of an EAP (Employee Assistance Program)
 - Exercise the ability to suspend/bar violators of the prohibition against sexual harassment
 - Collaborate with law enforcement agencies and regulators

Our Recommendations

- SET THE EXAMPLE
 - Managers, supervisors, and physicians need to set the example of behavior for all employees
 - Understand power dynamics in the workplace and their relationship with harassing behavior
- BE PROACTIVE
- DO NOT BE COMPLACENT



What are the steps to reporting sexual harassment?

- Employers are required to take reasonable care to prevent sexual harassment and take reasonable care to promptly correct sexual harassment once it occurs
- An employee who has been harassed should always notify the employer
Options open to Employees include:
 - Consult with union shop steward, HR department, or legal counsel
 - Employees may choose to go through the employer's complaint process or file a charge with a municipal, state or federal agency (i.e., NYC Human Rights Commission, NYS Division of Human Rights, EEOC, DOJ)
 - Employee may file a civil suit seeking injunctive relief and/or monetary damages
 - Employee may report to law enforcement



Complaint Process

- Consensual behavior is not sexual harassment! Did the employee "just say no?"
- Did the employee document every incident of potential harassment with sufficient detail, including date, time, description and/or witnesses? v
- Was the employer's complaint protocol complied with?
- Has a comprehensive written record been created?
- Did the employer conduct a complete and impartial investigation?



Thank you for your time and attention!
Questions or concerns?

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