

# Preventing Liability for Sexual Harassment by Creating a Culture of Civility

By Joan M. Gilbride

Given the close quarters, intense pressures and at times informality of communication surrounding the provision of medical care, it is no wonder that healthcare facilities can be breeding grounds for harassment and sexual misconduct allegations and claims. Unlike an office setting, a hospital environment exposes patients and co-workers as potential victims of harassment, which not only often leads to lawsuits, but also negative publicity, legal fees and all types of complications and complexities. To avoid this quagmire, it is important that risk managers are aware of potential liability and ways to foster a safe working environment at a healthcare facility. The seriousness of preventing sexual harassment and sexual misconduct grabbed the public's attention when earlier this year, a shocking news story reported a Mt. Sinai emergency room doctor was indicted for sexual assault of a patient. In graphic detail, the reporter described the sexual assault alleged by a patient who was sedated, but aware that she was being violated by a physician, and incapable of reacting. The type of sexual misconduct described by this patient is a nightmare for the patient and the hospital and, thankfully, happens rarely. To prevent this type of conduct and less egregious variations, it is crucial that employers implement training programs to promote an environment that encourages civility, peer reporting and clear avenues for complaining of sexual harassment and sexual misconduct in the healthcare profession.

As a first step, the employer must be aware of the risks before deciding which tactics would be most effective in preventing liability and determine whether its workplace culture needs to be transformed.

## Risk Factors for Sexual Harassment and Sexual Misconduct

In June 2016, the United States Equal Employment Opportunity Commission (EEOC) Select Task Force on the Study of Harassment in the Workplace (the "Task Force") released a report. In its report, the Task Force identified factors that increase the likelihood of harassment in a workplace, which include characteristics typical of healthcare environments, such as: "high value" employees, significant power disparities, and decentralized workplaces.<sup>2</sup> Based on these factors, hospitals and healthcare facilities are extremely susceptible to allegations of a hostile work environment based upon harassment and indeed, to unknowingly allowing such circumstances to develop. The Task Force also noted that in addition to the expected legal and financial implications of sexual harassment, harassed employees were found to be less productive, and employers often suffered reputational damage and risked losing patients.<sup>3</sup>

## Understanding Potential Liability for Healthcare Facilities

In egregious events of sexual misconduct (like the case of the emergency room doctor at Mt. Sinai), under New

York law, healthcare facilities face risks to the extent that the conduct was foreseeable. A hospital may be able to defend successfully against liability for a doctor's outrageous or near criminal behavior, but not against a hostile work environment that breeds such behavior. It is essential that healthcare facilities implement procedures to prevent harassment and successfully defend against allegations of harassment regardless of the legal risks.

A hospital's duty to protect patients and visitors as a caretaker is governed by a standard of foreseeability.<sup>4</sup> New York courts have limited the duty to protect persons lawfully present on a hospital's premises from the reasonably foreseeable criminal or tortious acts of third persons.<sup>5</sup> For example, a New York hospital faced potential liability when a male nursing assistant allegedly sexually assaulted a female patient while preparing her for a surgical procedure. The court found in favor of the hospital and held that plaintiffs failed to show the hospital knew or should have known of the assailant's propensity for the conduct that caused plaintiff's injury. In a decision rendered by the Appellate Division, First Department, the court found that it was not reasonably foreseeable that a hospital's independent contractor would sexually assault a patient while conducting her vaginal sonogram, and the patient therefore was not entitled to recover on her negligent supervision claim against the hospital. In that case, the court considered the sufficiency of the independent contractor's background check on its employee and examined whether the hospital was on notice of the independent contractor's employee's potential for violence or sexual abuse.<sup>6</sup> The hospital was lucky that its independent contractor thoroughly vetted its employee and plaintiff failed to rebut the lack of reasonable foreseeability based on the background check. Although the court found in favor of the healthcare facility in these cases where patients sued, when a hospital is sued as an employer by its own employee, it is less likely to avoid liability.

In *Salamon v. Our Lady of Victory Hosp.*, a former employee attempted to hold the hospital liable for conduct of a doctor on staff.<sup>7</sup> The hospital argued it was not liable as a matter of law for the harassing conduct of a doctor who was not an employee, but an independent contractor. *Id.* The federal district court in *Salamon* denied the hospital's motion for summary judgment, finding the Second Circuit had not definitively ruled on the question of whether an employer can be liable for a non-employee's harassing conduct.<sup>8</sup> The court recognized, however, that the Second Circuit limited any potential liability for non-employees to "instances in which the employer provided no reasonable avenue of complaint or knew of the harassment but did nothing about it."<sup>9</sup> Thus, an employer could be exposed to liability for even a non-employee's conduct if the employer does not have a complaint procedure in

place. As such, not implementing a complaint procedure or failing to educate your employees about an existing procedure can exponentially increase risk.

Harassment often involves multiple missteps by more than one employee. A recent case<sup>10</sup> involved allegations of harassment against a nurse's colleague where one long term pediatric nurse alleged she was harassed by another long term nursing employee; the harassment included late night phone calls, adjusting the plaintiff's label on her underwear and discussing plaintiff's medical history with other employees.<sup>11</sup> In addition, plaintiff claimed that she suffered harassment from her treating physician, a surgeon who worked at the same facility<sup>12</sup> and made comments to her while at work that she perceived as references to her personal medical history. For instance, her physician referenced the movie *40 Year Old Virgin*, teased plaintiff about getting pregnant when she mentioned taking vacation to visit a male friend, and made comments about her not having children. Plaintiff also alleged that she complained to human resources about the harassment, but nothing was done. In the Complaint, plaintiff implicates several actors who allegedly contributed to her damages: a fellow nurse, a doctor, and human resources staff. The court denied the hospital's motion to dismiss as to negligent retention and supervision, hostile work environment, sexual harassment, and disability discrimination.

Another scenario which has potential for posing great risk to healthcare facilities is relationships that might occur between interns and residents in medical teaching facilities. If the facility allows or empowers a resident in his or her second year of postgraduate residency (PGY2) to supervise and direct a first year postgraduate student (PGY1), the facility may be liable for sexual harassment based on PGY2's behavior. It is not hard to imagine two postgraduate students dating, but if a PGY2 uses his or her supervisory position to persuade the PGY1 to go on a date, this can pose serious risk for the hospital. Environments where supervisors do not constantly observe their subordinates, and are not trained to spot troubling inappropriate behavior, are more likely to breed a culture of acquiescence rather than a culture of civility. Managers and supervisors are the heart of an employer's prevention system.

### Implementing Solutions<sup>13</sup>

Regardless of the legal outcome, the defendants will be forced to pay substantial legal fees and the incident can have lasting effects on the hospital's reputation. Accordingly, preventative measures are in everyone's best interest. As noted previously, to create a culture in which employees believe that the organization will not tolerate harassment, managers and supervisors must receive clear messages of accountability. Compliance training translates those expectations into concrete actions that managers and supervisors are expected to

take – either to prevent harassment or to stop and remedy harassment once it occurs. Employers should begin by taking complaints of sexual harassment and misconduct made against their current employees very seriously and evaluating current employees to ensure employees who demonstrate a propensity toward such misconduct are not retained.

Compliance training provides managers and supervisors with easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information. This includes practical suggestions on how to respond to different levels and types of offensive behavior, and clear instructions on how to report harassing behavior up the chain of command. Training should also stress the affirmative duties of supervisors to respond to harassing behavior, even in the absence of a complaint. This training should be tailored to the specific worksite, organization, and/or industry, so that the examples used are helpful to managers and supervisors.

The EEOC encourages strong anti-harassment policies that provide a clear explanation of prohibited conduct and assurance of protection from retaliation. Compliance training is essential, but focusing on steps to avoid legal liability may fall short of preventing a hostile work environment and a culture of harassment. The EEOC recommends creating a culture of civility by training with specific goals in mind as a "holistic effort" to prevent harassment, which should also include accountability and leading by example.

The goals of training should be to educate employees and supervisors, to ensure that employees understand what is considered harassment in the workplace and empower supervisors by creating procedures for complaint follow-up. Understanding what is not appropriate is the first step towards preventing a volatile work environment or changing an already toxic one. The EEOC also suggests that trainings educate employees about the external consequences (including reputational harm) of conduct that rises to the level of illegal harassment. A senior leader's attendance at the training is the strongest expression of support. As an alternative, a video of a senior leader introducing the training could be shown, or a memo from leadership sent prior to the training. Trainings should be interactive and take place at least every other year to demonstrate the employer's commitment to preventing harassment. Also, the trainings should evolve to ensure they are relevant and grab employees' attention with new content.

The EEOC Task force recommends "bystander intervention training" and "civility training" given that incivility is a harbinger of a hostile work environment.<sup>14</sup> This type of training focuses on what employees and

supervisors should do, rather than what they should not do. The training alone, however, is not enough. The employers who are most successful in preventing harassment have taken other steps to convince employees that they will not be tolerant of sexual harassment. The EEOC suggests that prior to training, employers should provide their employees with avenues for complaints (such as a hotline).

A proactive employer that is focused on creating an environment of civility through adequate training and leadership will reduce the likelihood of sexual harassment and sexual misconduct in the workplace. These strategies not only make the workplace safer, but lower the possibility of flagrant sexual misconduct as well as liability and the economic and intangible impact on an employer's business.

**REFERENCES ON PAGE 32**

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## Oceanus RRG was put into liquidation, what should we learn from this?

*By Phalanx Healthcare Solutions*

South Carolina Department of Insurance has formally executed the liquidation order effective September 21, 2017 after adverse development in the malpractice insurer's claims reserves. Simply put, Oceanus no longer has the assets to meet their claim obligations.

Oceanus, as recently as 2013, was the sixth largest writer of physician malpractice liability in New York but in 2016 their premium volume decreased by over 40%. This decrease coupled with an increase in claim reserves due to adverse loss development reduced their policyholders' surplus (net assets) to negative \$6M and placed the company in extreme financial distress (per the Oceanus June 30, 2017 statutory statement).

What is most unsettling about this is that providers who are currently insured with, or that have purchased "tail" coverage with Oceanus, may be personally responsible for existing or future claims made against them. Providers paid hard earned dollars to a company that may be unable to uphold their responsibility to their insureds.

***Frequently Asked Questions about the Oceanus Insurance RRG Liquidation (source: [oceanusinsurance.com](http://oceanusinsurance.com)):***

### **1. What is a liquidation proceeding?**

Liquidation is a type of receivership and is similar to bankruptcy. The South Carolina Insurance Code authorizes the Director of the South Carolina Department of Insurance, in his or her capacity as Liquidator, to liquidate the insurance company. The Liquidation Order directs the Liquidator, to (i) take possession of and safeguard the property of the insurer, (ii) conduct the insurer's business, and (iii) take such steps needed to liquidate (wind-up the affairs of) the business of the insurer under the supervision of the Court and as the Court may direct.

### **2. What happens to my coverage under my Oceanus policy?**

All policies in effect at the time of the issuance of the Liquidation Order continue only for the lesser of: 1) 30 days from the date of entry of the Liquidation Order (10/21/17 at 11:59 p.m. EDT) 2) the expiration of the policy coverage 3) the date the coverage has been replaced with equivalent insurance with another insurer or otherwise terminated the policy or 4) the Liquidator has effected a transfer of the policy obligation pursuant to Item (8) of subsection (a) of Section 38-27-400.

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- <sup>4</sup> *Sandra M. v. St. Luke's Roosevelt Hosp. Ctr.*, 823 N.Y.S.2d 463, 466–67 (N.Y. App. Div. 2d Dept. 2006).
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- <sup>7</sup> 867 F. Supp. 2d 344, 364–65 (W.D.N.Y. 2012).
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- <sup>9</sup> *Id.*; see also *Heskin v. Insite Advertising, Inc.*, No. 03–cv–2598, 2005 WL 407646, at \*20–21 (S.D.N.Y. Feb. 22, 2005) (holding that an employer can be held liable for the harassing acts of non-employees if a plaintiff “adduce[s] evidence tending to show that [the employer] either failed to provide a reasonable complaint procedure or that it knew of [the] harassment by [a non-employee] and failed to take any action”).
- <sup>10</sup> *Haight v. NYU Langone Medical Center, Inc.*, No. 13 Civ. 04993, 2014 WL 2933190 (S.D.N.Y. June 27, 2014).
- <sup>11</sup> This particular allegation involved plaintiff’s medical records being improperly accessed by another NYU employee raises HIPAA violations that are beyond the scope of this article, but are very important issues to address given the advent of electronic medical records.
- <sup>12</sup> Because it is common for healthcare professionals to receive treatment where they work, employers in this setting must impose a higher than normal standard of respect between employees.
- <sup>13</sup> These solutions summarize the solutions suggested by the EEOC in its Task Force Report, [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_Toc453686305](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686305).
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