

Harassment—You Can't Be Too Careful

By Frank Hotchkiss and Tim Twigg

Claims, allegations, and lawsuits involving harassment continue to rise. In fact, harassment claims are one of the fastest growing areas of Employment Law Compliance violations. Judgments and settlements continue to reach all time highs.

One dentist was charged with sexual harassment and since the attorney fees would have been significantly greater if he had contested the charge, the doctor chose what he perceived to be the least expensive way out and settled out of court for \$40,000.

Why did this doctor settle? Simply put, because the necessary preventive steps to protect against the charge hadn't been taken, and the time, stress, and financial costs of fighting were going to be too great.

Remember that harassment can take many forms and is not limited to just two people of the opposite sex. The amount paid by employers as a result of harassment claims has reached all-time highs of nearly \$55 million. Cases of harassment against healthcare practitioners are becoming more and more common. Ironically, many of these stem from disgruntled employees who have received unfavorable performance reviews, did not get the raise they wanted, felt unfairly discharged, or were unhappy with a decision the doctor made.

Harassment generally takes one of two forms. Most allegations of harassment we encounter fall under the heading "conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." These are categorized as "hostile environment" claims and can include indecent propositions, discussion of sexual activities, obscene jokes, displaying sexually suggestive pictures, and crude and offensive language. Further definition is difficult since the "hostile" nature of the alleged acts is effectively defined by the victim. Based on such a personal and situational definition, prevention and corrective action is essential in such matters by making certain the work environment is free of any such potentially offensive conduct. Hostile environment harassment can also occur based on any of the "protected classes" covered under the law. While this normally includes race, color, national origin, sex (including pregnancy-related conditions), most state laws provide for additional protected classes. In California, this now includes gender identity which protects transgendered and transsexual individuals.

Although we find it much less frequent, another form of sexual harassment is referred to as "quid pro quo." This is harassment which occurs when an employee is asked to perform a sexual activity and perceives her/his job is conditioned on compliance. Harassment in employment on the basis of sex is a violation of Title VII.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by an employer or any "agent" of the employer, constitute sexual harassment when:

1. Submission to such conduct is made either explicitly 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 unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Clearly, harassment by an employer or supervisor carries with it serious liabilities for the employer. But harassment by a co-worker or third party (vendor, patient, etc.) also results in liabilities for the employer if the employer is negligent in following up or remedying the harassment once reported. If harassment is claimed or reported, the absolute worst course of action is to ignore the complaint and do nothing. Oftentimes, the problem for employers is not that harassment happened, but that the employer didn't follow the prescribed steps to address the situation. How can you keep this from happening to you? Prevention is the most effective tool for the elimination of harassment claims.

10 Keys to a Comprehensive Sexual Harassment Policy

1. Recognize that sexual harassment is a significant personnel-related issue.
2. Have a well-written sexual harassment policy such as the one provided in our Personnel Policy Manual.

A few years ago the U.S. Supreme Court held that an employer can avoid strict liability for sexual harassment under Title VII of the Civil Rights Act of 1964 if "the employee failed to make a complaint under the company's policy or otherwise failed to avoid harm."

A well-written sexual harassment policy should:

- Define what constitutes harassment.
- State that sexual harassment will not be tolerated.
- Encourage employees to report harassment concerns. Assure employees that a complaint will be treated as confidentially as possible.
- Insist that incidents be reported to the employer or a designated person immediately and outline reporting channels and methods.
- Inform staff that appropriate disciplinary action, which may include discharge, will be taken against any offenders.
- Assure employees that they will be protected from retaliation for filing a good-faith complaint or acting as a witness.
- Emphasize that a workplace free of harassment promotes good employee relations.
- Train supervisors and managers of their responsibilities in addressing such matters.

Note: Based on recent legislation, employers in California with 50 or more employees are now required to provide supervisors with two hours of sexual harassment training every two years.

3. Hold a staff meeting and distribute a copy of your policy. Discuss the written policy and have all employees sign an agreement that they have read and understand your policy prohibiting all forms of sexual harassment. Failure to train employees about sexual harassment is a violation of federal law. To maximize the effectiveness of the training make it interactive and use a knowledgeable individual to facilitate the training and discussion. You are legally required to make a good faith effort to ensure that employees know what they should do if they feel they are a victim of harassment.
4. As a practical matter, whenever possible, avoid being alone behind closed doors or in the practice with an employee, particularly of the opposite sex.
5. Do not condone risqué language or jokes within the office, post sexually oriented cartoons or calendars, or have unnecessary physical contact.

6. Post and/or make available EEOC suggested or state required “Harassment In Employment” posters or pamphlets in a conspicuous place within the premises. Also, discuss, distribute, and post your sexual harassment policy to reinforce its importance.
7. Investigate all claims of sexual harassment immediately. Take claims seriously and act promptly. Do not assume that a complaint is frivolous or the employee is “too sensitive” since sexual harassment is in the perception of the person experiencing it. If need be, separate the parties to ensure no exacerbation takes place.
8. Following a proper investigation, any sanctions imposed should fit the offense. Regardless of how unpleasant it may be, a lack of discipline on your part essentially sets a precedent of condoning harassment.
9. Keep accurate records and detailed notes of all pertinent details concerning the nature of any complaint, the name of the parties involved, the details of the investigation, and the final outcome. Keep the complainant informed during the investigation and what disciplinary action, if any, you have taken. Follow through after the investigation and periodically check in with the employee to make sure that all harassment has stopped and that no form of retaliation has taken place.
10. Designate another individual to intervene in case the allegations involve you.

NOTE: Sometimes employers have problem resolution processes in place that require or mandate that an employee participate in arbitration prior to taking any other course of action available (lawsuit or labor board complaint); thus effectively forcing an employee to waive their rights under the law. Know that there are legal precedents that undermine such an exclusive remedy, as well as prohibit a requirement that aggrieved employees must pay any related arbitration fees associating with initiating such action. Be sure to contact your legal counsel if you have questions relating to your arbitration policy.

In summary, remember that avoiding harassment charges is primarily addressed through a preventive approach. You need to be informed on all aspects of this topic and then you must take steps to ensure that employees are aware of your expectations of them, including the obligation to report any known incidents that could be construed as illegal harassment.

While courts may not consider effusive or excessively demonstrative behavior as illegal harassment, employees may do so. When reviewing concerns related to overly affectionate behavior, always take them seriously even if the behavior is not alleged to be sexually harassing. Avoid physical contact in the workplace that could be easily misconstrued. For example, focus your compliments on the work, not the person.

By insisting that all members of your work team, patients, and vendors, behave in the workplace in a respectful manner, you will significantly reduce the opportunity that objectionable behavior will occur. The benefits are a more harmonious work environment, with better job performance, and less turnover.