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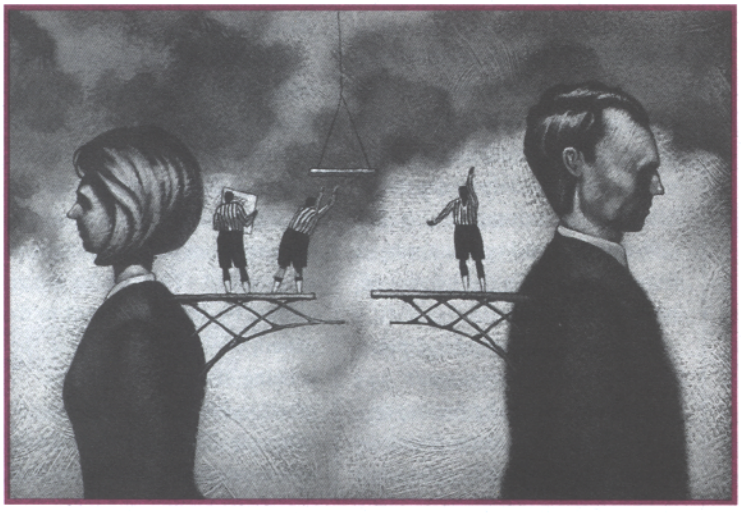

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Sexual harassment and what the law has to say

Is your practice a target?

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A dentist tells a sexually oriented joke during a staff meeting. Nine of the 10 employees present find the joke funny and are not offended by it. One employee is offended, however, and a few weeks later resigns. Does the offended employee have the right to sue for sexual harassment?

A dental lab courier frequently delivers orders to a dental office. While interacting with the front desk receptionist, the courier makes a sexually suggestive comment to the receptionist while apparently attempting to look down her blouse. The receptionist is offended and complains to one of the associate dentists. Is the dentist who owns the practice liable for the offensive comments and conduct of the lab courier?

A patient comes in for a prophylaxis. While the hygienist is cleaning the patient's teeth, the patient repeatedly places his hand on the hygienist's leg despite her requests that he stop. Is the dentist required to discharge the patient from further care?

Sexual harassment is currently one of the hottest areas of litigation involving dentists and all other types of health care practitioners. Plaintiff attorneys realize that it is more difficult and costly to sue dentists for malpractice than it is to sue them for sexual harassment. Expensive expert witnesses are usually not necessary, and often the plaintiff's attorney will dig up other disgruntled former employees who are more than willing to support the plaintiff's claims. Dentists are targets for sexual harassment claims especially if the dentist/owner is male and the staff is female, as is quite often the case.

In states with tort reform limits on pain and suffering damages in malpractice cases, it is no longer as lucrative for attorneys to take on a malpractice case as it would be to pursue a harassment case, which has no limit on pain and suffering damages.

Some state statutes, as in California, allow for the plaintiff to obtain an award of attorney's fees if the employee wins the case. Typically, the attorneys fees for a dental sexual harassment case that is taken to trial ranges from $50,000 to $100.000, so that the losing dentist not only has to pay his or her attorneys fees but those of the plaintiff as well. If that is not enough, punitive damages may be awarded by the jury against the dentist practice owner based on the dentist owner's net worth. In many states, punitive damages are not covered by insurance.

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What is sexual harassment?

Although it wasn't until the 1990s that sexual harassment litigation came of age, it was the passage of federal laws contained in Title VII of the Civil Rights Act of 1964 that made gender-based discrimination and harassment in the workplace illegal. Title VII, the federal law, applies to employers who employ 15 or more employees on each working day in 20 or more calendar weeks of the current or preceding year. For the most part, states have enacted laws that parallel the federal law and make it possible to file a sexual harassment claim in state court.

There are two categories of sexual harassment. The first, quid pro quo, is easy to recognize: "Sleep with me, and you'll get a raise." "Go out on a date with me, and you'll get that promotion or you will have continued employment here." Quid pro quo is direct. It says, "This is what I want, and if you give it to me, you will get an employment benefit. If you don't give me what I want, you're going to be terminated or discriminated against."

The second has to do with creating a sexually hostile work environment. This category is harder to define but it is more popular for attorneys to pursue on behalf of former employees. This is where the jokes, the sexually suggestive comments, the verbal expressions and the general office atmosphere come into play

In the case of the dentist who told the off-color joke, the law says that if you are creating a sexually hostile work environment that offends even one person, you can be held liable if that person ultimately leaves because the sexually hostile work environment interfered with the employee's ability to work.

Although most sexual harassment claims are brought by females offended by the conduct of males, there is some interesting case law that has come out of female to female and male to male harassment. The U. S. Supreme Court has determined that the same laws apply to same-gender sexual harassment as to opposite gender sexual harassment. Therefore, same-gender sexual harassment claims must be addressed in the workplace as well.

The law applies to patients as well. The patient with the wandering hands needs to be told that he will be discharged if he does it again.

Strict liability for employers

One of the unique qualities of sexual harassment and discrimination under federal law is that strict liability applies to the employer for any sexual harassment that takes place in the workplace, even if the employer did not know about it.

"Strict liability" amounts to a finding of guilt and responsibility without any defense. If the accused harasser is a person with an ownership interest in the practice or someone in the position of a manager, supervisor, officer or director, the practice ownership, whether a sole proprietor, partnership or corporation, is strictly liable for all damages assessed against the individual who did the offensive act, even if the practice ownership was unaware of what was going on.

Strict liability means that the plaintiff does not have to prove that the practice ownership knew about, participated in or approved of the harassment. Strict liability sends a very strong message to employers that this type of conduct has to be prevented at all levels of management in the practice.

Under common law, which is still followed by many states, the practice owner would not automatically be liable for sexual harassment by one employee of another employee as would be the case under Title VII. The employer would be "vicariously liable" for the sexual harassment of the employee only under the following circumstances:

- the wrongful conduct was designed to further the interest of the practice owner;
- the practice owner had prior knowledge of the employee's propensity to sexually harass; or
- the employer knew about, participated in or ratified the sexually harassing conduct.

In those practices of 15 or more employees or in states like California where the sexual harassment laws apply to smaller practices, if a partnership owns the practice and one of the partners engages in sexual harassment, the entire partnership is liable for all damages, even if the other partners were not aware that the illegal conduct was taking place. In other words, all pain and suffering damages, all punitive damages and all loss of earnings that are assessed against the offensive partner apply to the entire partnership.

Taken one step further, what this means is that not only do you have to be concerned about anyone who has a direct ownership or interest in the practice creating this liability for you, but the employer also has to be responsible for making sure there is no sexual harassment between employees, or by vendors, patients or other third parties.

Remember the lab courier? If there's a complaint from the front-office staff to an associate in the practice, the office policy should be for that associate to report the offensive conduct to the owner/employer dentist. The owner/employer can then comply with his or her duty to warn the lab courier that if he doesn't stop the offensive comments and conduct, he will be barred from the dental office.

The law applies to patients as well. The patient with the wandering hands needs to be told that he will be discharged if he does it again. If that occurs, the doctor should seriously consider withdrawing from the doctor/patient relationship. This can be accomplished by sending a letter to the patient explaining that he or she is being discharged from the practice due to unacceptable behavior. The letter should offer a resource for the patient to find a new dentist, such as a referral service, and indicate that the dentist will handle any emergency dental care for a 30- day period at which time the doctor/patient relationship will cease.

The letter also should give the patient reasonable notice that the dentist will be terminating the doctor/patient relationship, in order to ensure that the dentist does not violate any patient abandonment statutes in his or her state. Dentists should check with their personal attorneys regarding the requirements of any such statutes in their states

While the withdrawal letter will be maintained in the chart, the record should not contain any reference to the harassing behavior. Such documentation should be kept separate and apart from the chart to avoid any claim of defamation if a copy of the chart were to be viewed by a new dentist. For the same reason, the dentist also should be careful about what he or she says to other parties, such as staff, about the

patient's termination.

Although claims of abandonment related to the discharge of a patient are uncommon, there are alternatives to discharging a misbehaving patient. This can be accomplished while the dentist maintains his or her duty to prevent the sexual harassment of his or her employees

If it is a particular hygienist or chairside assistant that the patient has been harassing, schedule the patient's hygiene with a different hygienist or use a different chairside assistant when treating that patient. But once again, the dentist must be prepared to discharge the patient if the situation cannot be rectified in a reasonable manner. The employer's duty reaches that far.

Supreme Court case shields employers

Within the last several years, the Supreme Court has set down a new standard that can help employers prevent sexual harassment lawsuits from occurring in the first place and minimize their effects when they do.

In Burlington Industries vs. Ellworth, the Supreme Court stated that an employer could do two things to prevent liability in these kinds of lawsuits. Even though the ruling applied to Title VII, not to state laws, dentists should keep in mind that many state laws contain provisions similar to those in Title VII. Consequently, the Burlington case provides useful guidance for dental practices that would be subject to state sexual harassment laws.

If the investigation proves there is no merit to the complaint, no action will be taken. If the complaint does have merit, corrective action will be taken.

First, provide all employees with a simple, clearly written policy that says, "We have an office policy against sexual harassment." Then provide a written definition of sexual harassment in the workplace. Generic model policies are available from practice managers or state departments of fair housing and employment. Put one together for your practice, post it and give it to every member of the practice (shareholder, partner, everyone) and to every employee in the practice. Make it clear that any form of sexual harassment will not be tolerated in your office.

Second, have a procedure in place whereby employees can complain about violations of the sexual harassment policy, whether it's an offensive joke, a vendor who engages in sexually offensive conduct or a patient who says something or touches staff in an inappropriate manner.

The written policy should basically state that if an employee feels he or she is being harassed in a sexual fashion, he or she should file a confidential complaint with the office manager, office administrator or other designated person in the practice, and that person will conduct an investigation.

If the investigation proves there is no merit to the complaint, no action will be taken. If the complaint does have merit, corrective action will be taken. In either case, the employee who files the complaint will be informed of the findings from the investigation and resulting action, if any.

If an employer follows these two steps and an employee sues without first going through the internal complaint process, the U.S. Supreme Court has ruled that the case can be thrown out of court. But the employer must show that it has a specific step-by-step procedure in place for filing complaints and that a reasonable investigation will be made.

This process provides an important shield against sexual harassment claims for all dentist employers.