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Sex in the Workplace – Is Your Practice a Target?

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Mr. Goldman is an attorney in San Francisco specializing in medical malpractice and employment-related litigation. This article is adapted from an OMIC sponsored seminar he presented at the annual meeting of the American Society of Ophthalmic Administrators in April, "Employee-Related Lawsuits: What They Are and How To Prevent Them."

An ophthalmologist 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 drug company representative comes into an ophthalmology practice with samples of a new glaucoma medication. While checking in at the front desk, the representative makes a sexually suggestive comment to the receptionist. The receptionist is offended and complains. Is the practice liable for the offensive comments of the drug company representative?

A patient comes in for a vision field test. While the office assistant is instructing the patient on how to take the test, the patient places his hand on the assistant's leg. Is the ophthalmologist required to discharge the patient from further care?

Sexual harassment is currently one of the hottest areas of litigation involving physicians. Plaintiff attorneys realize that it is more difficult and expensive to sue doctors for medical malpractice than for sexual harassment. In states with tort reform limits on damages, it is no longer as lucrative for attorneys to take on malpractice cases. In the post-Anita Hill/Clarence Thomas/Monica Lewinsky/Bill Clinton era, sexual harassment is in the spotlight. Physicians make good targets for attorneys who specialize in employment-related litigation because they are usually insured or have sufficient assets to sustain a large judgment or settlement. Sexual harassment is less costly to litigate and easier to prove than medical malpractice. Expensive expert witnesses are usually not necessary, and often there are other disgruntled former employees who are more than willing to support the plaintiff's claims. Furthermore, and most attractive to plaintiff attorneys, is that there are

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no caps or limitations on pain and suffering damages. Some state statutes allow for an award of attorney's fees if the employee wins and most significantly, punitive damages may be awarded by the jury based on the defendant's net worth. In many states, punitive damages are not covered by insurance.

What Constitutes Sexual Harassment?

Although it wasn't until the 1990s that sexual harassment litigation came of age, it was Title VII of the Civil Rights Act of 1964 that made gender-based discrimination and harassment in the workplace illegal. 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'll 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's where we see more litigation. 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 ophthalmologist who told the off-color joke, the law says that if you're creating a sexually hostile work environment that offends *even one person,* you can be held liable if that person ultimately leaves because of the offensive conduct he or she was subjected to.

Sexual Harassment or Not?

Unwelcome advances or other verbal or physical conduct of a sexual nature is considered to be sexual harassment if:

- Submission is a condition of employment.
- Submission affects employment decisions.
- The conduct unreasonably interferes with job performance.
- The conduct creates an intimidating, hostile or offensive environment.

Although the majority of 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 Supreme Court has determined that the same laws apply to same sex harassment as to opposite sex harassment; therefore, same sex harassment claims must be addressed in the workplace as well.

Strict Liability for Employers

One of the unique qualities of sexual harassment and discrimination laws is that strict liability applies to the employer. If the accused is an owner of the practice, a manager, supervisor, shareholder, officer or director, the corporation is strictly liable for all damages assessed against the individual who did the bad act even if the corporation was unaware of what was going on. Strict liability means that the plaintiff does not have to prove that the corporation knew about it or that the corporation participated in it. Strict liability sends a very strong message to employers that this type of conduct has to be prevented.

If you're in a partnership and one of the partners does the bad act, the entire partnership is liable for all damages even if the other partners didn't know about it; in other words, all pain and suffering damages, all punitive damages and all loss of earnings that are assessed against the individual bad actor 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 isn't sexual harassment between employees, or by vendors, patients or other third parties. Remember the drug company representative? If there's a complaint from the front office staff, the employer has a duty to warn the representative that if he doesn't stop making offensive comments to the staff, he won't be welcome in the office anymore.

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 take steps to terminate the physician-patient relationship by sending a letter to the patient explaining that because he did not stop certain improper behavior that he was warned about he is being discharged from the practice. Sometimes there are alternatives to discharging a patient. If it is a particular employee that the patient has been harassing, schedule the patient's appointments at times when the employee isn't around the office. But once again, the physician must be prepared to discharge the patient if the situation cannot be rectified in a reasonable manner. The employer's duty goes that far.

Supreme Court Case Shields Employers

In the last two 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 should one occur. In *Burlington Industries vs. Ellworth* [141 L. Ed 2d 633 (1998)], the Supreme Court stated that an employer could do two things to prevent liability in these kinds of lawsuits.

First, provide all employees with a simple, clearly written policy that says, "We have an office policy against sexual harassment." Then define what sexual harassment is. A model policy is available from OMIC's Risk Management Department that talks about what type of things should not be going on in the workplace. Generic model policies also 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, etc.) and to every employee in the practice. Make it clear that any form of sexual harassment will not be tolerated in your office.

Risk Management Tips

It is important for every physician-employer to recognize the strong public sentiment against sexual harassment and to take tangible steps in the workplace to:

- ➤ Advise employees of their right to a harassment-free workplace.
- ➤ Provide employees with a specific procedure for filing complaints.
- ➤ Take complaints seriously. Investigate and take action whether the complaint is against another employee, patient or vendor of the practice.

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 comes by and engages in conduct they find offensive, or a patient who says something or touches them in an inappropriate manner. The written policy should basically say that if any 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 investigation findings and resulting action.

If an employer follows these two steps and an employee sues without first going through the internal complaint process, the Supreme Court has said that the case will be thrown out. But the employer must show that it had a specific step-by-step procedure in place for filing complaints. Doing so provides a tremendous shield for the employer.

No ophthalmic practice is immune to charges of sexual harassment. OMIC offers an Employment Practices Liability Insurance (EPLI) policy for ophthalmologists that covers wrongful employment practices arising from alleged discrimination, harassment and wrongful termination. For information on OMIC's EPLI policy, please contact Kim Wittchow at (800) 562-6642, ext. 51 or kwittchow@omic.com.

How to Handle a Complaint

An employer should take immediate and appropriate action when he or she knows, or should have known, that sexual harassment has occurred. An employer must take effective action to stop any further harassment and to ameliorate any effects of the harassment.

To those ends, the employer's policy should include provisions to:

1. Handle the investigation in a confidential manner, respecting the right to confidentiality of all involved.
2. Interview everyone with information on the matter.
3. Make a determination and communicate the results to the complaining party, the alleged harasser and, as appropriate, to all others directly concerned.
4. If sexual harassment is proven, appropriate disciplinary action must be taken against the harasser and communicated to the complainant.
5. Take steps to prevent any further harassment.
6. Maintain a confidential written record describing how the complaint was investigated and resolved.

Resource: State of California Department of Fair Employment and Housing.