



Risky Business: A Three-Step Plan For Addressing Harassment By Nonemployees

Insights

8.03.15

Employers have long understood that they face potential liability when an employee is sexually harassed by another employee and they do nothing to prevent or fix the known problem. It is also true, but perhaps less well known, that similar liability can result when employees are harassed by customers, patients, or other nonemployees. Ignorance of this potential liability can be costly, but you can minimize your risks by following a simple three-step plan.

Ignoring Third-Party Harassment Can Be Costly

Two cases in recent years underscore this point. In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) filed suit against a private healthcare facility in Virginia after a female employee complained that she had been sexually harassed by a resident. The employee complained to her supervisor about the harassment, but the employer failed to take proper corrective action. The employer ultimately settled that case by agreeing to pay \$30,000 and agreeing to conduct regular training on sexual harassment prevention.

And in a 2014 case outside the healthcare industry, a Missouri court awarded \$2.5 million in punitive damages to a female employee of an auto parts store who had been sexually harassed by two customers. The employee complained to her managers, but to avoid losing the customers' business, they took no action.

Harassment Problems Specific To The Resident Care Arena

Sexual harassment is a difficult issue in any employment setting, but perhaps nowhere is it more problematic than in the resident care arena. Healthcare employees, including nurses and therapists, are in regular, physical contact with nonemployees – primarily the patients and residents for whom they care (and the family members of those individuals). Under Title VII, employees are protected from harassment by residents or patients just as they are from coworkers and supervisors.

Hospitals, nursing homes, assisted-living facilities, and other patient-care entities are responsible for providing a workplace free of sexual harassment, regardless of whether the harassment is perpetrated by a coworker or by a paying customer.

Many nursing home employers have experienced episodes where a resident acts out in an inappropriate manner. Often, the inappropriate behavior is due to the resident having a deteriorated mental condition, such as dementia or Alzheimer's. As a result of this condition, residents may not

understand that their actions are inappropriate, but this doesn't mean that nursing home employers are automatically shielded from liability.

A Three-Step Plan

Where sexual harassment has been alleged, a court will likely first look to whether the employer knew or should have known about the harassment, and then will look to whether the employer did anything to correct the offending conduct. While it may be difficult to completely prevent harassment in the healthcare setting due to the occasionally unpredictable conditions of patients and residents, employers can take three simple steps to address and minimize the risk.

First, you should maintain a written policy that explicitly addresses sexual harassment by patients or residents or other third parties. The policy should specifically address how employees can report the harassment when it occurs. Maintaining such a reporting policy is critical because it provides important legal defenses in situations involving alleged harassment by a supervisor.

Second, you should regularly train your employees on how to react when they are harassed by a patient or resident. Because the duties of a healthcare employee often require close, physical contact with patients and residents, some with diminished mental capacities, there is an increased potential for misunderstandings or unwelcome incidents. If employees are trained to react properly and promptly, the unwelcome conduct may be stopped before it becomes "severe or pervasive" – the standard used by courts in determining whether the conduct rises to actionable sexual harassment.

Third, you must investigate and respond to complaints appropriately. While the response will depend on the circumstances of the complaint, there are several "best practices" that you should consider. For instance, you could assign another employee to care for the resident or at least discuss with the employee whether he or she wants to transfer to another part of the facility. Other options include making staffing adjustments such that the employee never cares for the resident alone. You should also consider involving the resident's family in an effort to stop the inappropriate behavior.

Avoid The Appearance Of Retaliation

Regardless of how you respond to a complaint, it's critical to avoid any action that may constitute retaliation against the employee for making the complaint. Retaliation claims have increased within all industries in recent years and the healthcare industry is no exception.

Don't take any action that is "materially adverse" to the employee as a result of the complaint – including serious actions such as discipline, or even lesser actions such as a transfer to a position with more onerous job duties. If you have to take disciplinary action against an employee who has recently made such a complaint, make sure your reasons for doing so are well documented and consistent with past practice.

The most effective way to minimize the risk of harassment in your healthcare facility is to follow the three-step plan as soon as possible: implement policies now if you don't have them, schedule and

three-step plan as soon as possible. Implement policies now if you don't have them, schedule and conduct regular training for your managers, and immediately address any complaints that might arise.

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