Healthcare Employers Liable for Harassment by Patients, Not Just Employees

Publication
11.15.13

Today, most healthcare employers are sensitive to issues of workplace harassment, although the focus of that sensitivity is usually upon issues involving co-worker to co-worker and supervisor to subordinate misconduct. It is important to remember that the law's protection applies just as well to harassment from third persons who are not even employees. And, given the presence of so many non-employees in the typical healthcare setting, the opportunities for problems to arise are enormous.

The Equal Employment Opportunity Commission recently filed a lawsuit that reinforces the need to be vigilant concerning harassment by non-employees in a healthcare environment. In a lawsuit filed in federal district court on Sept. 6, the EEOC charged a health system in Virginia with violating federal law by subjecting a female employee to a sexually hostile work environment. According to the EEOC, a receptionist at the hospital was subjected to sexual harassment by the same male patient from April to December 2009, and again from June to September 2010.

As described in the lawsuit, the harassment included unwelcome sexual comments such as an invitation that she "run away" with the patient, statements that he was "visualizing her naked" and suggestions that she have sex with him. The commission alleges that these kind of comments were made both in person when the patient visited the facility and by telephone when he called in to the facility. Significantly, the lawsuit also alleges that the receptionist complained about these statements to her supervisor, who did nothing to stop them. On these facts, the EEOC seeks both compensatory and punitive damages, as well as injunctive relief, against the employer-health system.

Assuming that the EEOC is able to prove these allegations, when the receptionist complained to her supervisor about this patient's misconduct, the health system was legally put on notice of the alleged conduct. That is the case even if the supervisor said nothing to anyone else in authority. When the supervisor, as the health system's "agent," gained knowledge of the alleged misconduct, it was absolutely incumbent upon the employer to investigate and, if appropriate, take prompt remedial action, even though the offender was not an employee but a patient. Assuming the employee did complain to her supervisor, one can only speculate as to why nothing more was done, but it is quite possible and consistent with what has happened elsewhere, that the harasser's status either caused the supervisor to conclude that there was nothing that could be done, or chilled the

either caused the supervisor to conclude that there was nothing that could be done, or chilled the supervisor from further pursuing the matter. Either way, the health system was subjected to the time and expense of a lawsuit and inadvertently put at risk.

So, how should an employer sensitive to harassment in all its forms deal with complaints about the conduct of patients or other non-employees? The first, and most obvious, thing to do is to make absolutely sure that supervisors are aware that harassment by patients — indeed, by any non-employee — is every bit as serious as harassment by employees. Employers should review their anti-harassment policies on that point and should ensure that its application to the misconduct of both non-employees and employees is stressed in periodic training given to supervisors. By the same token, non-supervisory employees should be made aware that the employer expects them to raise complaints about misconduct from patients and other non-employees, just as they are expected to advise of misconduct by employees.

Second, in the event that harassing conduct is brought to the employer's attention, the employer must then conduct a serious and thorough investigation. Of course such investigations are often more difficult as the employer often may not compel cooperation from non-employees to the extent that it can from employees, but that does not mean that the employer cannot gather as much information as possible, and then reach a reasonable conclusion. Employers cannot simply shrug their shoulders and do nothing if they are unable to secure the cooperation of non-employees in their investigations; they then have to make a decision based on whatever information is available to them.

Third, the employer must promptly act on the results of the investigation in such a way as is reasonably calculated to resolve the complaint. In many cases, this may result in a consultation with the patient or other non-employee. In other cases, it could even result in advising a patient to seek care elsewhere or in restricting the patient's access to certain areas of the facility, or at least actively monitoring the patient's conduct while at the facility.

Fourth, in any case, the employer must not leave the complaining employee hanging. The employee raising the complainant should always be advised that the complaint has been or is being investigated, at least the general action taken, and enjoined to report any further misconduct. In addition, a wise employer also should periodically and on its own accord inquire of the complainant concerning any recurrence.

Training, vigilance and prompt corrective action are the keys to avoiding the often huge cost of harassment lawsuits. These are no less important in the case of harassing conduct from patients as from other employees.

This article originally appeared on *Becker's Hospital Review* on November 15, 2013.