Healthcare Professionals Don't Misbehave...Right?

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In a healthcare environment, one likely expects professionalism, great employee relations and few, if any, employment law issues. In many cases, those assumptions are correct. However, when a claim of harassment, discrimination or retaliation occurs in a healthcare environment, particularly when physicians are accused of misconduct, some employers can be woefully unprepared to manage the problem or to confront the alleged wrong-doer. Unfortunately, when a claim of harassment, discrimination and/or retaliation is not investigated, and worse, not resolved, serious legal liability may be looming.

For example, a federal jury recently awarded $350,000 in punitive and compensatory damages to three former employees of Endoscopic Microsurgery Associates, a Baltimore-area medical practice, who were subjected to unwanted sexual advances by Mark Noar, MD, the owner and CEO of the practice, and Martin Virga, the practice administrator.

The allegations were bad
The Equal Employment Opportunity Commission filed the lawsuit on behalf of the practice's employees. According to the complaint, Dr. Noar and Mr. Virga made frequent unwanted sexual comments to the female employees, as well as frequent sexually derogatory comments about women generally (including some directed at their weight) and physically touched and grabbed female employees in a sexual manner against their will. Despite repeated complaints to management, the harassment continued and intensified, evolving into a retaliatory hostile work environment.

And so was the verdict
The jury returned a verdict in favor of each of the three female employees, finding that the defendants had subjected them to a sexually hostile work environment. The jury further found that Mr. Virga's conduct contributed to the sexually hostile work environment, and that he was at least partially responsible for the retaliatory harassment.

In its press release following the verdict, EEOC Philadelphia regional attorney Debra Lawrence stated that the verdict "reminds high-level officials who function as the employer that their high level does not give them license to abuse women — they must treat employees as professionals."

Physician immunity?

The EEOC does not have a history of targeting physicians in Title VII sexual harassment litigation, although among the 7,500 or more sexual-harassment charges filed each year, many of the complainants are employees of medical facilities. So why does the EEOC choose to litigate the cases it does each year against physicians, and, more importantly, how can a medical facility avoid becoming a target?

The likely answer to the first question becomes apparent by comparing the above case to one of the few published opinions during the past several years in which the EEOC has litigated a sexual harassment claim against a medical clinic: EEOC v. Fairbrook Medical Clinic, P.A. In Fairbrook, EEOC filed suit on behalf of a female physician, Deborah Waechter, MD, against her former employer, alleging a sexually hostile work environment. The alleged harasser in the case was John Kessel, MD, the sole owner of the clinic and Dr. Waechter's direct supervisor.

A federal district court initially ruled against the EEOC and dismissed the case. On appeal, the U.S. Court of Appeals for the 4th Circuit reversed the district court's grant of summary judgment in the case, concluding that "what happened here . . . was . . . a series of graphic remarks of a highly personal nature directed at a female employee by the sole owner of an establishment."

The complaint alleged that Dr. Kessel showed Dr. Waechter and other employees an X-ray of his hip that included "a shadowy image of his penis," which Dr. Kessel referred to as "Mr. Happy" on multiple occasions and discussed intimate details of his sex life with Dr. Waechter, despite the fact that she told him that the comments made her uncomfortable. Perhaps the most egregious allegations took place after Dr. Waechter returned from maternity leave, when Dr. Kessel frequently commented on her breast size, often asking if he could see her breasts and help her pump her breast milk. Eventually, Dr. Waechter resigned from the clinic.

Significantly, in the Fairbrook case, the clinic had a policy prohibiting sexual harassment, but the reporting system was inadequate. Employees were directed to report complaints of sexual harassment to their "immediate supervisors." If that method was ineffective, employees were to report complaints to "the partners" of the clinic "and ultimately to 'a human resource representative or a representative of the EEOC.'"

Not only was Dr. Kessel the victim's immediate supervisor, but he also was the only "partner" at the clinic because he was the sole owner. Dr. Waechter still brought her complaints to Dr. Kessel, which he apparently ignored, referring to her as "one of the guys." When Dr. Kessel failed to change his behavior after repeated complaints, Dr. Waechter reported his actions to the office manager and possibly the personnel manager. She thus exhausted all of her internal resources, yet the clinic did not conduct an investigation or take any corrective action.

Why these cases?

Besides the fact that the allegations in both the Endoscopic and Fairbrook cases are egregious, the cases share another commonality: The medical facility learned about the harassing conduct and did

cases share another commonality: The medical facility learned about the harassing conduct and did nothing. In any workplace, tolerance of sexual harassment sends a clear message that the workplace considers itself above the law or considers some employees more important than others. But in the case of medical clinics, the message also is one of fear. Physicians often own or hold shares in the facilities where they work, and their titles alone carry an air of respect and even immunity from wrongdoing. Accordingly, when the physician is the harasser, he or she may seem untouchable, despite whatever harassment policies may be "on the books."

Lessons learned

First and foremost, assuming the allegations in these cases are true, the harassment should never have gone as far as it did. If these clinics had had effective policies prohibiting sexual harassment in the workplace, the victims of the harassment would have known exactly what to do after the first inappropriate comment. Policies prohibiting sexual harassment — or any form of harassment — are meaningless if they do not provide a clear chain of command for complainants.

In drafting a policy, HR professionals should put themselves in the shoes of each employee in the company and determine what that employee would need to do to effectively report a complaint. Each employee should always have an alternate route to take in the event that the employee's supervisor is the alleged harasser or a person with real or perceived power.

More importantly, each individual in the chain of command for reporting complaints must have the authority to take immediate action to resolve the issue. If, for example, the office manager cannot ask a physician to leave for the day while the clinic conducts an investigation into allegations against the physician, the office manager does not belong in the chain of command.

Beyond setting forth a clear route for reporting harassment complaints, HR professionals also need to have a plan in place in the event that one of the physicians is accused of harassment. Whereas in some work environments, the company could simply investigate and terminate the alleged harasser, termination is not always an option when a physician is a partner in the medical office or brings in a large number of patients.

Accordingly, if an investigation reveals that the physician sexually harassed an employee, the HR professional may need to consider other effective options for remedying the situation. Training sessions are always a good option. But in some situations, the solution may need to involve a more personal solution, such as requiring the physician to attend individual sensitivity counseling.

Finally, always remember the complainant. Ask the complainant what he or she thinks about the recommended plan of action. See if there is anything else that would make the complainant more comfortable in his or her workplace. Keep an open line of communication between complainants and management so that the complainants know that their comfort at work is a priority, and that even physicians are not above the law.

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