Dr. Frances Conley, a neurosurgeon at Stanford University's Medical School for 25 years, cited sexual harassment and demeaning attitudes by male colleagues as the reasons for her resignation. She commented that “[t]he only reason I put up with it as long as I did is I really wanted to advance. You put up with a lot to try and be one of the crowd. I feel very guilty for having put up with it” (Petrocelli and Repa 1995, 30). Sexual harassment is a major problem in healthcare (Fiedler and Hamby 2000) and particularly pervasive in nursing.

In Farpella-Crosby v. Horizon Health Care (97 F.3d 803 [5th Cir. 1996]), the United States Circuit Court of Appeals upheld a nurse's sexual harassment claim against the employer, a nursing home, for sexual harassment by the male director of nursing. The director of nursing made several inappropriate sexual comments to the nurse, including questions about her sexual habits. Furthermore, he made her the target of sexual jokes in front of her colleagues, all the while insisting that she perform the menial tasks of washing dishes and refilling his coffee cup. The nurse complained to the human resources director, only to be told to “hang in there.” Because the nursing home's administrators failed to investigate and take prompt remedial action, and because the supervisor's “egregious comments” to the nurse, “some in front of co-workers, in combination with his frequent inquisition about her sexual activity, were sufficiently severe and pervasive to create a hostile work environment,” the court found the healthcare facility liable for sexual harassment.

The healthcare workforce includes a large number of employees who are “better-educated, more highly-trained professional people” than the average worker (Sclafane 1998b, 27). These demographics make the industry particularly susceptible to large damage claims for sexual harassment. An attorney for Littler Mendelson in San Francisco commented, “[A]ecdotal, judgments tend to be higher against health care facilities,” probably because juries expect more from healthcare providers and physicians (Sclafane 1998b, 28). Furthermore, these educated healthcare professionals are willing to demand from employers a workplace free of harassment and, if it is not forthcoming, to enforce it in court.

Several surveys confirm the need for healthcare employers to pay significant attention to sexual harassment. Because of the intimate nature of their jobs, nurses are likely targets for abuse (Collins 1996). In a survey by Memphis State University of its nursing program, 60 percent of respondents reported harassment during the previous year, with 25 percent of those harassed indicating that it affected their ability to work. The Equal Employment Opportunity Commission (EEOC) reports that claims tripled between 1990 and 1997. In fact, 6.7 percent of the 114,800 claims made between

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1992 and 1999 came from the healthcare industry (defined as hospitals, physicians' offices, healthcare facilities, and nursing care facilities) (Fiedler and Hamby 2000).

In this article, we discuss the legal perspectives of sexual harassment, with particular attention to three 1998 U.S. Supreme Court decisions that changed the standards of employer liability. We define sexual harassment, describe the different types of harassment, address sexual harassment in healthcare, and outline its cost to employers. Finally, we suggest what employers can do to avoid sexual harassment complaints and thus reduce the potential liability of their healthcare organizations.

The Legal Perspective

Sexual harassment is a form of sex discrimination. Federal and state laws form the basis for protecting individuals from sexual harassment. Title VII of the 1964 Civil Rights Act (42 USC Sec. 2000e-2[a]) is the applicable federal statute, along with the 1991 amendments (42 USC Sec. 1981 [a][1]), which authorized compensatory and punitive damages as well as jury trials. Generally, federal law applies only to organizations with 15 or more employees. Many state laws, however, apply to organizations with fewer employees. For example, in California, the Fair Employment and Housing Act (Sec. 12940b[3][A]) prohibits unlawful harassment by any person or business that regularly employs one or more persons.

The Definition

Surveys indicate that many employees do not know what constitutes sexual harassment (Laabs 1995). The EEOC defines it in the following way:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment. (EEOC 1990, paragraph 3114)

To reflect current judicial interpretation, the EEOC proposed modifications to the above definition that would add the words, “or otherwise adversely affects an individual’s employment opportunities” to (3), above. Furthermore, the modifications make clear that Title VII prohibits any gender-based harassment, even though such harassment may not be sexual in nature (Levy and Paludi 2002). Although the EEOC guidelines are not law, they guide judicial interpretation of what constitutes sexual harassment.

Types of Sexual Harassment

The EEOC describes two types of sexual harassment—quid pro quo and hostile work environment (EEOC 1989). Neither term appears in the statutory text of Title VII; judicial decisions and government agency guidelines imported these terms into the law. Although the U.S. Supreme Court blurred this demarcation in its 1998 decisions of Faragher v. City of Boca Raton (524 U.S. 745 [1998]) and Burlington Industries v. Ellerth (524 U.S. 742 [1998]), most courts continue the distinction.

Each situation identifies different behaviors and liabilities. Behaviors in both situations must be unwelcome by the employee. The characterization of a claim as either quid pro quo or hostile environment materially affects employer responsibility and liability. Courts, however, often confuse the type of harassment with the type of resulting injury (Petrocelli and Repa 1995).

Quid Pro Quo

Quid pro quo—“something in exchange for something else” (Garner 1999, 178)—describes behavior in which a supervisor or other person of authority demands sexual favors from an employee in return for his or her job. Courts closely scrutinize such behavior because of the strong possibility of abuse of status and power if submission to this conduct becomes a condition for employment, promotion, or pay increase.

The term supervisor is broadly interpreted in healthcare. For example, head nurses, assistant head nurses, nurse supervisors, shift supervisors, vice presidents of nursing, and chief executive officers may all be considered supervisors. A chief radiology technician or a physician who gives directions to a nurse could also be considered a supervisor. Sexual harassment claims are now heard by juries, who might understand how a patient would view a physician’s giving instructions to a nurse as, in fact, “supervising” that nurse. Courts generally have little problem recognizing and ruling on this type of case.

The 1998 U.S. Supreme Court decision of
Burlington Industries v. Ellerth established the parameters of quid pro quo sexual harassment. In Burlington, Ellerth's supervisor subjected her to both repeated offensive remarks and threats to deny her tangible job benefits. The Court held that quid pro quo harassment by supervisors creates absolute or strict liability for employers. Therefore, when a supervisor predicates a job benefit or detriment on whether an employee submits to sexual advances, the employer is automatically liable, regardless of whether the employer knew about the behavior. In other words, there is no defense.

The Burlington court continued that an employer is also vicariously liable for a supervisor's quid pro quo threats. Vicarious liability means that an employer is liable even though it does not condone or in any way participate in the unlawful behavior. Thus, employers are vicariously liable when supervisors threaten employees with tangible economic losses. And the employer remains liable even if the supervisor never carries through with the threatened action.

Hostile Work Environment

Sexual harassment claims of hostile environment involve such things as inappropriate posters and sexual innuendoes and jokes by supervisors, coworkers, and third parties (customers, patients, vendors, etc.). Many physicians who work in hospitals are not employees of the hospital but are independent contractors. Hospitals generally cannot avoid liability, however, simply because they have less control over nonemployee physicians. Although some courts may define independent contractors differently, the purpose of the law is to eliminate harassment from the workplace (Scafane 1998b, 27).

Employees have the right to be free from behavior that either unreasonably interferes with their work performance or creates a hostile, intimidating, or offensive work environment. Harassment is prohibited even if it leads solely to noneconomic injuries (Simmons 1999). Many times supervisors engage in this type of behavior as a thinly disguised effort to force women employees from the workforce. Employers, perpetrators, and courts suffer the most confusion, however, when they try to discern the types of behavior that amount to a hostile environment (Levy and Paludi 2002). Courts routinely consider cases involving behavior once considered benign that is now considered hostile.

The landmark 1986 case of Meritor Savings Bank v. Vinson (477 U.S. 57) involved outrageous behavior by a bank supervisor who sexually assualted the plaintiff-employee and exposed himself to other workers. The supervisor never threatened implicitly or explicitly to deny or grant any tangible economic benefits. Nevertheless, the U.S. Supreme Court found that this behavior created a hostile work environment for women and thus violated the Civil Rights Act. Since Meritor, the courts have struggled with the parameters of what constitutes an appropriate versus an inappropriate, or hostile, work environment. Courts have clearly determined that the behavior in question must be "sufficiently severe and pervasive" as to alter the conditions of the plaintiff's employment. Thus, an employer's liability for behavior by supervisors, coworkers, and third parties is vicarious. Subsequent cases clarified the standard of reasonableness, viewed from the perspective of a reasonable woman (Ellison v. Brady, 924 F.2d 892 [1991]); the degree of severity needed to create a hostile environment, as sufficiently severe to affect psychological well-being but not to cause a nervous breakdown (Harris v. Forklift System, Inc., 510 U.S. 17 [1993]); and liability for same-sex harassment (Oncale v. Sundowner Offshore Services, 523 U.S. 75 [1998]). Oncale also addressed the degree of severity needed to create a hostile environment, concluding that employers should not mistake "ordinary socializing in the workplace—such as male on male horseplay or inter-sexual flirtation—for discriminatory 'conditions of employment.'"

In 1998, the U.S. Supreme Court ruled that in cases where a supervisor takes no tangible job action, a defending employer may raise an affirmative defense (Faragher). The employer must prove two key elements to raise the defense: (1) an employer must exercise reasonable care both to prevent and to correct promptly any sexually harassing behavior and (2) the plaintiff-employee must fail to take advantage of any preventive or corrective opportunities provided by the employer (e.g., filing a grievance). If the employer does not meet these two conditions, it cannot raise an affirmative defense.

Harassment in Healthcare

Some attorneys believe that the 1998 Supreme Court decisions in the Burlington, Faragher, and Oncale cases will "hit hospitals hard" (Scafane 1998b). For example, nurses may file class action suits against hospital chains, similar to the $44 million EEOC suit filed on behalf of 300 prospective, current, and former women employees.
against Mitsubishi Motors Manufacturing. After experiencing months of negative publicity, Mitsubishi settled that case in 1998 for $34 million (Levi and Paludi 2002). Juries are now able to render verdicts on sexual harassment complaints, and courts are sustaining these ever-increasing jury awards. For example, in Steele v. Superior Home Health Care of Chattanooga, Inc., a jury awarded a psychiatric nurse $1.2 million (later reduced to $850,000) for sexual harassment (Phillips 2000).

The American Medical Women’s Association’s Position Statement on Gender Discrimination and Sexual Harassment (1990) argues that sexual harassment substantially interferes with the education, training, and practice of women physicians. The statement further provides examples of harassing behavior, including but not limited to the following:

- Any verbal sexual advance deemed by the recipient as unwelcome
- Sexually oriented comments about body, appearance, and lifestyle
- Offensive nonverbal behavior such as leering and staring
- Sexually explicit graphics, cartoons, pictures, etc., in the workplace

The association supports healthcare institutions that establish a sexual harassment policy and complaint procedure.

The American Nurses Association (ANA) issued a similar position statement on sexual harassment, which calls for the “elimination of sexual harassment for nurses in all work settings” (ANA 1993). The ANA urged healthcare institutions to educate their workers in ways to prevent sexual harassment and called on hospitals to suspend medical staff membership and practice privileges for nonemployee physicians who sexually harass hospital employees. In 1998 nurses from Walls Regional Hospital in Texas sued the hospital, claiming sexual harassment by a physician to whom the hospital had granted staff privileges (Tammelleo 1999).

As in other industries, sexual harassment in healthcare ranges from unconscious patronization and subtle innuendo to blatant sexual threats (Carr et al. 2000). A 1994 Newsweek article reported findings of a survey in which 73 percent of female resident physicians questioned said they had been sexually harassed, most by physicians (Begley, Biddle, and Gordon 1994). In a more recent study, researchers (including two physicians) surveyed 2,500 women from each medical school graduating class between 1950 and 1989. They found that 37 percent of responding women physicians perceived that they had been sexually harassed. Younger women physicians reported the highest number of incidents. The respondents believed that harassment has substantial professional and personal consequences. Many also said that they believed that the problem of harassment is mostly caused by older, sexist physicians and should decline over time. Sexual harassment is, however, primarily a manifestation of power, not age (Frank, Brogan, and Schiffman 1998).

The problem of sexual harassment is not unique to women physicians. Fiedler and Hamby (2000) measured the perceptions of sexual harassment among nurse administrators and registered nurses. One-half of the women respondents and one-third of the men believed they had experienced sexual harassment. In an earlier study, 30 percent of women registered nurses surveyed in a California county reported sexual propositions, insults, and suggestive touching by a physician at least once every two to three months (Diaz 1991). Stereotypically, men sexually harass women; however, the law says that victims of harassment may be either men or women. According to the EEOC, in 1997 the percentage of harassment complaints from men had risen from 7.5 percent to 11.6 percent (Binius 1998).

A 1994 survey of hospital human resources directors found that women employees alleging hostile work environments filed the most complaints; these charges are primarily against coworkers, with 10 percent against physicians (Kinard, McLaurin, and Little 1995). Employees lodge a significant number of complaints against individuals who are not employed by the hospital. The EEOC takes the position that employers are accountable for harassment of their employees by nonemployees if they knew (or should have known) of the harassing behavior but failed to take immediate corrective action. The courts base liability not on employers having endorsed the conduct but rather on their failure to correct the behavior.

**Costs to Organizations**

Maintaining humane relations in the workplace has become a matter of simple economics. Sexual harassment not only inflicts emotional scars on its victims, but it also costs companies millions of dollars in lost productivity and employee turnover (Gyynn and Neuman 1998). Other costs that
American companies incur include the following:

- **Lawsuits and claims.** Several reports cite increased harassment or wrongful termination claims because of inappropriate communications or perceived hostile environments. Those sexual harassment claims that go to trial net, on average, awards of $150,000 each (Quinley 2000).
- **Turnover.** Studies show that many people who quit jobs cite poor communication from managers or coworkers as problems.
- **Productivity.** Recent studies emphasize a high percentage of workdays lost because of personality squabbles. Also, studies show that employees are absent more and spend more time in the workplace worrying or talking with other workers about perceived incivility (What Does Workplace 1999).

Research conducted in 1993 by a workplace diversity consultant firm determined that, in addition to legal expenses, sexual harassment complaints can cost a typical Fortune 500 company $6.7 million in increased absenteeism and turnover and decreased productivity and morale. In fact, 90 percent of Fortune 500 companies have received sexual harassment complaints, and more than one-third have been sued (Fisher 1993).

Those legal costs include lost wages, attorney fees, reinstatement, compensatory damages for emotional pain and suffering, and punitive damages if the employer acted with malice. The Labor Department reports that American organizations lose approximately $1 billion annually for absenteeism, lower morale, and new employee training and replacement costs because of sexual harassment (Moore, Cangelosi, and Gatlin-Watts 1998). And, because of the very public nature of healthcare organizations, their reputations are compromised with every sexual harassment charge.

**What Can an Employer Do?**

Prevention is the first, last, and primary line of defense against sexual harassment; in fact, prevention is the cure. Simply for the sake of human dignity, employees in healthcare settings are entitled to safe, harassment-free workplaces. EEOC guidelines encourage employers to take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned. (EEOC 1989)

A recent survey of high-level training and human resources managers in small, medium, and large healthcare organizations highlighted how employers can establish harassment-free workplaces, thereby effectively reducing sexual harassment incidents and combating claims. Zero-tolerance is the watchword for employers. During a period in which there was a 150 percent increase nationwide in sexual harassment claims reported to the EEOC, 78 percent of surveyed organizations with tough, zero-tolerance sexual harassment policies reported reduced numbers of sexual harassment incidents. Managers agree that preventive sexual harassment policies coupled with good faith procedures help employers avoid the negative impact of harassing behavior at work. Such complaints harm the quality of care, culture, and employee morale of an organization (Moore, Cangelosi, and Gatlin-Watts 1998).

**Establish Policies**

EEOC guidelines stress the need for employers to establish, disseminate, and enforce anti-harassment policies and complaint procedures. As noted in Burlington, “Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.”

Employers should give each employee a copy of an easily understandable policy and complaint procedure and redistribute it periodically (Gardner and Lewis 2000). They also need to place the policy in their employee handbooks. Employees should sign a statement acknowledging that they have read and understood the policy, and employers should review the policy annually with them to ensure their continued understanding. Signed by the chief executive officer, the policy should contain the following key elements:

- A clearly written, comprehensive statement of the employer’s zero tolerance of sexual harassment by anyone in the workplace. It should clearly define sexual harassment, describing examples of acceptable and unacceptable behavior.
- Assurances that employees who make harassment complaints and witnesses who provide information receive protection from retaliation. For example, on February 12, 1998, a jury awarded $80.7 million to a former UPS employee who said she was punished for accusing a coworker of poking her in the breast (Ahmad 1998). Sometimes a “conspiracy of silence” protects a harasser. Organizations must eliminate such codes of silence so that employees and witness-
es will not fear reporting harassment. If the target remains silent, the harasser remains free to continue the harassing behavior toward the target and others (Davidhizar, Erdel, and Dowd 1998).

- **An easy-to-use, neutral process that encourages aggrieved employees to complain and provides several avenues to do so.** For example, employers need to identify at least two neutral individuals to whom employees may complain. Employees should be assured that employers will investigate all complaints promptly.

- **Assurances that the employer protects confidentiality to the extent possible, sharing information only with those who need to know.** The greater the degree of confidentiality, the more likely targets will feel protected and comfortable about filing complaints and witnesses will be forthcoming with relevant information.

- **A complaint procedure that provides for prompt, thorough, and impartial investigations by disinterested parties.** (Current interpretation of the Fair Credit Reporting Act conflicts with some recommendations by the EEOC; see Gardner and Lewis 2000 for in-depth information.) The procedure should not be complicated and should protect employee privacy as much as practicable. Furthermore, given the recent decision in *Oncale*, the healthcare organization needs to provide a means for handling same-sex harassment complaints.

- **Assurances that if harassment is found, the employer will take immediate and appropriate corrective action, up to and including termination.** To prevent a recurrence, employers should review periodically the behavior of harassers once corrective actions have been taken to be sure those actions are working.

The importance of issuing written policies cannot be overemphasized. In *Kimsey v. Wal-Mart Stores, Inc.* (907 F.Supp. 1306 [1995]), a jury awarded $50 million in punitive damages to female employees who had been harassed by supervisors and managers. However, because Wal-Mart had issued a written policy stating that sexual harassment violations would not be tolerated, the judge reduced the award to $5 million.

**Offer Training**

Employers also need to train employees continually on their rights and responsibilities. In a recent study of healthcare trainers and human resources directors, 86 percent of respondents agreed that education and training had to be combined with appropriate policies as part of organizational efforts to eliminate sexual harassment. Training should be interactive to sensitize all staff; trainers should assess the effectiveness of the training effort to ensure that trainees understand the material; and organizations should mandate at least one antiharassment training session per year for every employee, regardless of job level (Moore, Cangelosi, and Gatlin-Watts 1998). Whatever the nature of the training effort, organizations should impress on all employees the economic consequences of sexual harassment—the adverse effects on productivity, corporate reputation, and job turnover, as well as the possibility of individual liability (Palow 2000).

Employers must demonstrate a good faith effort at training all staff, both employed and contracted. Employee hiring procedures and contracts ought to mandate attendance at these training sessions. Furthermore, management needs to be trained on how to recognize signs of harassment and how to respond to them.

**Set an Example**

Managers, supervisors, and physicians need to set the example of behavior for everyone else. Those individuals occupy positions of power, and many studies show that harassers are usually in powerful positions (Moore, Cangelosi, and Gatlin-Watts 1998). Furthermore, careful attention should be paid to choosing an appropriate person to put in charge of eliminating sexual harassment. In *Smith v. St. Louis University Hospital and Medical Center* (109 F.3d 1261 [8th Cir. 1997]), the court found that the person in charge of curbing hospital harassment was the very head of anesthesiology who sexually harassed female residents. Before finding the hospital liable, the appellate court commented on the supervisor's "frequently and regularly" made, gender-related comments on sex.

**Purchase Employment Practices Liability Insurance**

Lawsuits are expensive, so expensive in fact that they have given rise to a new form of business insurance called employment practices liability (EPL) coverage. It is designed to protect a company against charges of sexual harassment, wrongful termination, discrimination, or similar allegations (Myers 1994). Professional liability insurance does not cover sexual harassment litigation costs or settlements (Preston 1999). Just five years ago, EPL insurance (EPLI) was an obscure policy available
through only a handful of insurers. Today it is one of the hottest products offered by the insurance industry. This growth market increased from about $100 million to over $200 million in premiums between 1996 and 1997 (Ahmad 1998). The fastest-growing sales category is sexual harassment insurance. Employers who have EPL insurance can protect themselves against claims as high as $10 million, as long as they have in place proper work practices and procedures (Odd Jobs 1998).

Because small physician associations may not have good antiharassment policies and procedures in place, EPL insurers tend to view large hospitals and health maintenance organizations as more attractive risks. Some institutions have a choice of whether to purchase directors' and officers' (D&O) coverage, malpractice policies that include EPL insurance coverage, or a stand-alone EPLI policy. With the increasing frequency of EPLI claims, many insurers advocate purchasing the stand-alone EPL insurance so as not to imperil D&O or malpractice limits (Scalafane 1998a).

**Conclusion**

Sexual harassment is an increasing source of workplace lawsuits that often result in large judgments against the employer. Nurses can now file class action suits against hospitals, and juries may now render verdicts on sexual harassment complaints to the tune of millions of dollars. Yet, health-care employers can do a lot to protect themselves. Establishing strong, zero-tolerance policies on sexual harassment, setting good examples, providing training, and purchasing employment practices liability insurance can not only protect an organization from legal liability but, more important, can help eliminate sexual harassment in the workplace.

**REFERENCES**


