Employer Liability for Sexual Harassment by a Patient

Healthcare employers are well aware of their responsibility to maintain a workplace free of unlawful harassment and that conduct of a sexual nature that has the effect of “unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment” can result in liability. Employment policies routinely prohibit such conduct and spell out sanctions, including termination, for employees engaging in sexual harassment.

But what if the alleged offender is not an employee, but the patient? Do the same rules apply? Are there additional rules to consider? Are the expectations of governmental agencies with jurisdiction consistent or realistic?

It is clear that an employer may be responsible for sexual harassment resulting from the acts of patients or their family members if the employer knows or should have known of the conduct and fails to take immediate and appropriate action to address the situation. It is not sufficient for an employer to simply “warn” its healthcare provider employees of the propensities of a patient and expect the employees to assume the risk of harassment.

Unfortunately, in the eyes of those federal and state agencies having authority to enforce employment laws, the analysis often ends there, placing healthcare employers in a difficult if not sometimes impossible dilemma. Unlike employees allegedly engaging in harassment, patients are not under the same control of healthcare employers, and the handling of patient issues is governed by a myriad of regulations.

Generally, an offending patient cannot simply be discharged. While a patient relationship may be severed for abusive conduct toward employees, healthcare employers may be bound by contractual obligations to provide certain care and, of course, the patient also has the right not to be discharged for discriminatory reasons. Certain types of care also have their own standards. For example, End Stage Renal Disease care centers treating Medicare patients have special regulations governing the involuntary patient discharge procedure. These patients may only be discharged under certain circumstances, including patient behavior that is “disruptive and abusive to the extent that the delivery of care to the patient or the ability of the facility to operate effectively is seriously impaired.” Even then, the discharge must follow certain documentation procedures, providing 30 days notice and making attempts to find alternative care for the patient.

In those situations where patient discharge is regulated, for sexual harassment to be the basis of a transfer or discharge, the conduct alleged would generally have to rise to the level of endangering the safety of caregivers or other patients. These discharges usually result from actual physical behavior. Discharging a patient for merely offensive language is even more difficult.

To further complicate the situation, patients may behave in an inappropriate manner due to the very mental or physical conditions which necessitate their care, possibly resulting in the existence of a “disability” under the Americans with Disabilities Act.

Fortunately, some courts have recognized the dilemma faced by healthcare employers. One such case, Hylton v. Norrell Health Care of New York, 53 F. Supp. 2d 613, 619 (S.D.N.Y. 1999), involved a Home Health Aid claiming to have been sexually harassed by the son of a patient. The employer, a temporary staffing agency, immediately reported the incident to the home health service after learning of the incident, found another employee to send in her place and sent a nurse to the home to investigate. The court found the employer not liable for sexual harassment, as the employer's response was “prompt, reasonable and effective.” Other courts, though, have not been so understanding. Some have gone so far as to state that an employer may not “shield itself from liability under Title VII” by relying on the federal and state regulations governing long term care facilities. Ligenza v. Genesis Health Ventures of Mass., Inc., 995 F. Supp. 226, 230 (D. Mass. 1998).

Faced with conflicts in regulation and with the often unrealistic expectations of the Equal Employment Opportunity Commission (EEOC), Tennessee Human Rights Commission (THRC), and the courts, healthcare employers must take proactive measures to limit their exposure to hostile environment claims involving patients.

As with most employment issues, it is critical that employers have clear, written policies addressing this issue. A standard harassment policy that is applicable only to harassment by co-workers is not sufficient. The policy must not only address when inappropriate patient behavior creates a hostile environment, but must also remind caregivers of the responsibility to determine whether such conduct is knowing and intentional, or when it may be a symptom or consequence of the patient’s condition. The policy must give specific direction on how to report inappropriate patient conduct and how the employer will respond.

The next consideration is documentation of the events. As discussed above, a provider generally cannot discharge a patient without documentation of the patient’s inappropriate conduct. It is critical that the employer’s policy make it clear that documentation in a patient’s medical record is NOT the same as complaining of a hostile environment. Employees must be given specific direction on how to document inappropriate patient conduct for employment purposes, and that documentation must be maintained in a manner that is HIPAA-compliant. During the time a patient's conduct is being documented to justify discharge, it is important to balance the rights and needs of the patient with the rights of the caregiver.

As regulation of healthcare and litigation of employment claims increase on a parallel course, healthcare providers will continue to find themselves standing in the breach to balance the rights of patients and employees. Absent legislation, which is highly unlikely on the federal level, there is no clear resolution in sight. Employers must, then, be aware of the risks, prepare for the worst, and respond as promptly and appropriately as reasonably possible.

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