



Harassment Is Not Part Of A Caregiver's Job Description

By Richele K. Taylor (Columbia)

Nowhere is sexual harassment more of a “touchy” issue than in the patient care arena. Nurses, nurse aids, therapists, and other attendants are in constant contact with non-employees...the patients who are paying for services, visitors of these patients, vendors, and even doctors with admitting rights. Title VII protects caregivers from sexual harassment in the workplace perpetrated by any of these individuals.

Hospitals, doctors' offices, assisted living facilities, home health agencies, and other patient-care entities are responsible for providing a safe environment for staff, regardless if the person acting inappropriately is another employee or a *paying customer*. The difficulty patient care facilities face is balancing the protection of employees with the treatment of paying customers.

Paying Customers Do Not Pay For The Right to Harass

In 2009, the Equal Employment Opportunity Commission (EEOC) sued Nurse One/Team One, LLC, a home health agency, alleging that the company condoned a sexually-hostile work environment and retaliated against an employee for complaining. The agency received 25 written reports from female certified nursing assistants (CNAs) complaining of sexual harassment by the same client. The agency continued to place female CNAs in the home, instead of taking steps to stop the behavior. When one CNA warned a new CNA about the client and the client found out, the client demanded an apology. The CNA refused, and Nurse One/Team One fired her.

The CNA filed a charge with the EEOC alleging she was terminated in retaliation for complaining of harassment. The EEOC agreed and sued Nurse One/Team One, arguing that the company was aware of the client's behavior yet continued to mistreat the female CNAs by sending them to the client's house and not dealing with the client's behavior. The EEOC summed up the crux of the case, releasing the following statement: “There is no excuse for knowingly and repeatedly subjecting female employees to a sexually hostile and abusive work environment.” The case ultimately settled, but serves as a reminder that a patient care entity cannot ignore sexual harassment by paying customers.

Harassment By Patients Is Not Just A Clinical Issue

Patients are a unique group as they may be in pain, under medication, or have illnesses such as dementia that make them unable to understand that their actions are inappropriate. While there is no way to prevent all inappropriate conduct, as no one knows what a particular patient is capable of doing, the duty to protect employees still exists. Arguments that employees understand the types of risks involved in the job have no merit unless the patient care entity has proper procedures in place.

In an older case, *Turnbull v. Topeka State Hospital*, a female staff psychologist who worked at a state hospital serving mentally ill adolescents was assaulted by a male patient. The doctor sued claiming that she was subject to a sexually-hostile work environment at the hospital. In fact, a majority of adolescent patients acted out in sexually inappropriate manners, yet the hospital offered no training for the female staff on how to

handle such incidents. The hospital also had no policy addressing how to report harassment by patients and the hospital's culture left employees believing they would be considered a trouble-maker for reporting concerns.

These factors were some of the myriad considerations leading the court to uphold a jury decision that a sexually hostile work environment existed. The court noted that the hospital condoned sexual harassment by treating it merely as a clinical issue for patient treatment, and not protecting its employees.

Steps A Patient Care Entity Should Take

It's impossible to force patients or other non-employee third parties to treat employees in a harassment-free manner at all times. But as both cases above illustrate, once aware of the harassment, a patient care entity is liable if the conduct continues and no action is taken. With this in mind, the following steps should be put in place:

1. Have a policy and procedure specifically addressing sexual harassment by third parties and patients. The policy should address how employees can complain, and employees should understand that they will not lose their jobs if they complain about a paying customer.
2. Provide training on how an employee should react if sexually harassed. Some situations come with the caregiver territory, as caregivers routinely see patients without clothes on and in a medicated state. Provide staff with the tools to properly handle uncomfortable situations. Training caregivers on how to properly handle harassing comments or situations may stop further harassment by a patient or third party, and may limit harassment complaints by caregivers.
3. If an employee alleges harassment by a patient, investigate and take affirmative steps to end the harassment. Make sure that such complaints are treated seriously and that employees feel supported. Affirmative steps may include removing a caregiver from treating a patient, or requiring two caregivers to handle a patient so that no one caregiver is alone with the offending patient. While these steps may sound difficult to execute, they are easier and cheaper than the alternative, a lawsuit.

Remember, the fact that the harassment occurs at the hand of a patient or other third party does not absolve an employer from protecting its employees. The best defense for these situations is having a good offense.

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Unions Continue Healthcare Organizing Efforts With Wins In Texas

By A. Kevin Troutman (Houston)

Despite losing some steam in its push for the Employee Free Choice Act (EFCA), Big Labor continues intensive efforts to flex its muscles in the healthcare industry. During recent weeks unions organized some 3,000 workers in a series of elections at five hospitals in Texas. Already entrenched in Minnesota, nurses unions also staged a massive but short-lived walkout at 14 hospitals, while another 12,000 nurses in California threatened similar action. With a decidedly union-friendly National Labor Relations Board (NLRB) also in place, unions remain intent on advancing their agenda, especially in healthcare. Thus, hospital and other industry employers must remain vigilant and prepared.

A Change Of Heart?

In Texas, independent-minded healthcare workers historically rejected union organization. This makes the union's recent success more noteworthy. For many years, Texas hospitals were almost entirely union-free. When the California Nurses Association (CNA) organized a single Texas facility in 2008, it narrowly survived a decertification effort by the nurses it represented; it took two years to negotiate and obtain a 2% pay raise.

Changing tactics, however, the CNA and Service Employees International Union (SEIU) put aside their acrimonious past and won a string of elections at five South Texas Hospitals in May and June. Nurses at hospitals in El Paso, Corpus Christi, Brownsville and McAllen voted for representation by CNA. Skilled maintenance workers and "non-professional" employees in El Paso voted for representation by the SEIU. Though workers rejected the SEIU at other hospitals, these unions obviously feel emboldened. CNA's website is touting a so-called "Lone Star Rebellion."

Insisting that cookie-cutter mandatory staffing ratios are a panacea, the CNA and its affiliates try to portray themselves as patient and nurse advocates. This is a cornerstone of its organizing efforts and an issue they continually pressure state and national legislators to address. The union's huge one-day nurse walk-out in Minnesota tied directly to staffing ratios.

And the unions have not given up entirely on EFCA, the proposed law that would allow them to demand recognition as employees' collective bargaining representatives without employees ever having a chance to vote on the question, let alone hear both sides of the story. If its efforts cannot succeed through Congress, unions hope to gain this and other advantages through a now left-leaning Board.

New member Craig Becker, a former union lawyer, has long said that employers should have no input when a union is attempting to organize workers. Never mind that experience shows most employees are eager to hear their employer's perspective when faced with such critical choices. Mark Pearce, another former union lawyer, is also part of the Board's new pro-labor majority. Through its decisions and rule-making authority, the Board can and likely will tilt the playing field further in the unions' favor.

Among other things, it could shorten election periods; give third-party union representative on-premises access to employees; allow workers to use their employer's email system for organizing purposes; and limit employers' rights to communicate with them.

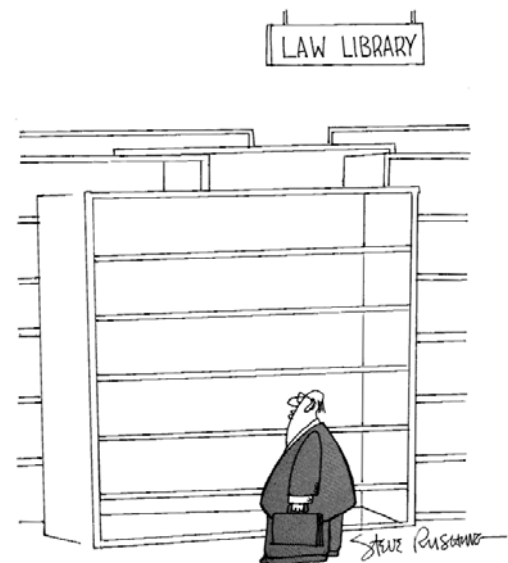
If there were any doubt, recent events make clear that unions continue to covet healthcare workers. Further, they are working on various levels to attract new members in traditionally union-free environments. To preserve their union-free status, hospitals must watch developments closely and pro-actively keep their workers informed about important workplace issues. This not only promotes a healthy working environment, but it makes workers less vulnerable to misleading communications from other sources.

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