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The Legal Treatment

Medical Practices in the New Age of Sexual Harassment and #MeToo

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Over the past several months, the news headlines have been dominated by stories relating claims of sexual harassment and assault allegedly perpetrated by high-profile celebrities, including media and business executives, politicians, and Hollywood elite. The phenomenon started with the Harvey Weinstein exposés published by the New York Times and the New Yorker, and, as these claims became more prevalent, more and more victims of sexual harassment have spoken out. A social movement took root known as “#MeToo,” resulting in some telling their stories after even decades of silence. The businesses that either affiliated with or employed the alleged perpetrators have been forced into a state of “damage control.” From a legal standpoint, businesses confronted with such allegations would best be served to a) diligently investigate claims; b) determine what corporate policies may have been violated; c) act swiftly

Note: The Legal Treatment is a new regular feature in the Onondaga County Medical Society Bulletin courtesy of OCMS general counsel Norris McLaughlin & Marcus. If you have a legal question or an issue that you would like NM&M to address in the next issue, please email your suggestion to semmi@oncms.org for consideration.

to address policy violations; d) prepare new policies where appropriate; and e) educate and train its employees (including principals) to prevent further issues.

We would be foolish to believe that sexual harassment is limited to prominent individuals and “big business.” Small businesses, including medical practices, may be subject to substantial liability for the actions of their principals and employees. Accordingly, medical practices in New York State are strongly encouraged to implement policies intended to protect both themselves and their employees. In order to implement these policies, it is essential that practitioners become knowledgeable about the applicable law concerning sexual harassment and the prevention of a hostile work environment.

Applicable Laws

Both the New York Human Rights Law and the federal Civil Rights Act of 1964, Title VII, prohibit sex discrimination. Sexual harassment is a specific form of sex discrimination. Amended in 2015, the New York Human Rights law prohibits New York employers, regardless of the number of employees, from subjecting employees to sexual harassment.

Medical practices in New York City should also be aware that the New York City Human Rights Law provides additional protections to employees, including protection against sexual harassment. Generally, the New York City Human Rights Law is even more favorable to employees than the New York State Human Rights Law. To be covered by the New York City Human Rights Law, the alleged act of discrimination must have taken place within, or have sufficient connection to, the five boroughs of New York City.

Sexual Harassment

Sexual harassment is divided into two varieties: 1) “quid pro quo” harassment; and 2) a “hostile work environment.” The former occurs when a person of authority tries to trade job benefits; i.e., hiring, promotion, continued employment, etc., for sexual favors. Quid pro quo harassment was thought to be mostly dormant in the modern workplace, but the flood of recent allegations spawned by #MeToo revealed that this form of harassment is, unfortunately, still prevalent.

The other form of sexual harassment, a “hostile work environment,” is one of the most frequently misused terms in employment law. A “hostile work environment” consists of words, signs, jokes, pranks, intimidation or acts of physical violence that are of a sexual nature, or are directed at an employee

because of that employee's sex. It also consists of any unwanted verbal or physical advances, sexually explicit derogatory statements or sexually discriminatory remarks made by someone in the workplace, which are offensive or objectionable to the employee, cause the employee discomfort or humiliation, or interfere with the employee's job performance. A hostile work environment does not arise when a supervisor is "mean" or uses foul language, if there is no connection to an employee's sex or other protected classification.

To create a "hostile work environment," the offensive conduct must be either severe or pervasive, so that one offhand joke or comment may not be enough to constitute sexual harassment. But if the conduct is severe enough, even one incident could create a "hostile work environment." Moreover, a "hostile work environment" can arise even if the offensive conduct is not directed to a specific employee, but is merely overheard by the employee. Intent is irrelevant – even if the offender did not mean to offend, harassment will have occurred if the conduct meets the other legal requirements discussed above.

Employer Liability

Employers in New York are strictly liable for sexual harassment by an owner or high-level manager, regardless of whether other owners or managers had knowledge. Employers may also be strictly liable for harassment by a lower level manager or supervisor, if the offender had control over the working conditions of the victim. If the offending party is a co-worker, employers may be liable if the employer knew about the offending conduct, but was negligent in failing to stop or prevent it.

Once an employee complains about sexual harassment to a supervisor or manager, knowledge of the offending conduct will be imputed to the employer. The employer, therefore, should have policies in place to ensure that all supervisors or managers know to report such complaints up the chain of command.

Retaliation

Both federal and New York law prohibit an employer from retaliating against an employee who complains of sexual harassment in the workplace. Retaliation can take the form of any adverse employment action, more than trivial, taken against an employee because the employee engaged in protected activity. Protected activity includes verbally complaining about harassment to management, filing a formal complaint of harassment, testifying in court regarding harassment, or assisting others in advancing their harassment claims.

Simply making a complaint, however, does not insulate an employee from legitimate counseling or discipline – the employee must show that the adverse employment action is causally linked to his or her protected activity.

Best Practices – Policies and Training

Having an effective policy against sexual harassment is critical in limiting an employer's liability. Employers who maintain such a policy and distribute it to their employees are afforded an affirmative defense in a sexual harassment lawsuit, but only if the policy contains the right components. An effective policy, at a minimum, must 1) advise employees that sexual harassment is against the employer's workplace policy and will not be tolerated; 2) inform employees to whom they can complain if they are a victim, or if they see harassment of others; 3) assure employees that they will not be retaliated against for complaining; and 4) provide that all complaints will be investigated and dealt with appropriately. Anti-harassment policies should be provided to all employees on a regular basis (annually is typical), and employers should make sure they obtain written acknowledgements from each employee that receives a copy of the policy.

Offering training to employees and supervisors is also a key component to preventing workplace harassment. Training should be performed at least annually, and attendance should be recorded and documented.

The Labor & Employment Group at Norris McLaughlin & Marcus offers comprehensive and affordable training to businesses. This harassment training covers the following topics:

- Prejudice, stereotypes, discrimination
- History of harassment in the workplace
- Types of unlawful harassment
- Quid Pro Quo harassment
- Hostile work environment harassment
- The elements of a hostile work environment
- Technology issues and harassment
- Personal liability issues
- Policy review
- What to do if you believe you are being harassed
- What to do if a co-worker is being harassed

- Gray areas (compliments, social invitations, consensual relationships; third party harassment)
- Supervisors only – duty to protect employees from harassment
- Supervisors only – duty to eliminate and promptly correct harassment
- Supervisors only – what to do when an employee complains
- Supervisors only – what to do when they have knowledge of inappropriate conduct but no one has complained
- Supervisors only – legal framework for liability for company and supervisor
- Supervisor only – retaliation issues

The format of our training program is a lecture-based presentation involving a significant amount of attendee participation. We recommend separate training sessions for supervisors and non-supervisors. Our training is tailored to each specific group. Our goal is to take a very serious topic and make it both interesting and easy to understand. As all of our trainers are attorneys, our training incorporates many real-life examples, situations, and lawsuits that we have handled over the years.

The “#MeToo” movement is here to stay. It has already been a game changer in the field of sexual harassment that has not been seen since the likes of Anita Hill and Justice Clarence Thomas. It is only a matter of time before this powerful social movement takes a firm root in American workplaces, both small and large. Medical practices are no exception. Working with an experienced attorney to ensure compliance can be the difference in avoiding a lawsuit, and paying a costly price.

If you have any questions, we invite you to contact David N. Vozza at dnvozza@nmmlaw.com or Keya Denner at kcdenner@nmmlaw.com. You can also contact Norris McLaughlin & Marcus, P.A., by calling our Healthcare Hotline at (888) 861-1141 or visiting our website at www.nmmlaw.com.

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