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“Discrimination and Harrassment”
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DISCLAIMER

As hospital administrators it will likely be your job to protect the practice from harassment and/or discrimination claims. I feel fairly secure in saying that Federal, state, and local governments take a rather dim view of employers who allow discrimination or harassment in their workplaces. Because of basic human nature (we live in an “us and them” world) you can be assured that somewhere, sometime, and somehow, your hospital be be affected by a claim of discrimination or harassment. Lack of communication is also a root cause of these claims and most often occur because employers and employees alike do not have a clear understanding of just what behaviors are prohibited in the workplace.

Discrimination and harassment are really two distinct legal issues that are often part and parcel of the same illegal behaviors. For the purpose of clarifying the differences, I will discuss them separately but then will discuss the employers liability and prevention techniques as a single issue.

DISCRIMINATION

Discrimination is by definition an act or failure to act toward or against a person or group when the act or failure to act is based on class or category rather than individual merit. Discrimination is almost often associated with prejudice, whether recognized or not. Feelings of prejudice and discrimination are part of human nature and are, at least to some degree permitted in our private lives. Discrimination is not, however, permitted in the workplace, a place where we are forced by circumstances to interact with each other regardless of our prejudices.

Discrimination in the workplace can come in many forms, for example:

- Disability
- Age
- National Origin
- Pregnancy
- Race
- Religion
- Gender
- Sexual Orientation
- Physical characteristics
Since the Civil Rights Movement of the 1960s, federal, state and local governments have enacted a number of laws that bar an employer from discriminating against employees on almost any grounds, aside from the quality of the employee's work or the nature of his or her personality. This presentation is not intended to cover all of them. I will, however, give a brief sampling of the major federal laws governing these matters. It is incumbent on the hospital administer to be aware of and to implement these laws.

The major players in the discrimination battlefield are Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Laws with more limited application include The Immigration Reform and Control Act (IRCA) of 1986, the Family and Medical Leave Act (FMLA), The Fair Labor Standards Act, The Rehabilitation Act, and the Equal Pay Act (EPA).

For example, the best known of employment anti-discrimination laws, Title VII of the Civil Rights Act of 1964, prohibits an employer with fifteen or more employees from discriminating on the basis of race, national origin, gender, or religion. Under Title VII, it is illegal for an employer to take any of the following actions against an employee based upon his or her race, national origin, gender, or religion:

- Refuse to hire;
- Discipline;
- Fire;
- Deny training;
- Fail to promote;
- Pay less or demote; or
- Harass.

In addition, it is illegal for an employer to adopt a policy or practice that has a "disparate impact" on a protected class, such as by adopting hiring criteria that tend to screen out by gender or by membership in a minority group, or by instituting a required test for hiring or promotion on which a particular class tends to score badly. Such a policy or test, like a specific policy that only men or women can have certain jobs, is legal only if it can be deemed a "bona fide occupational qualification."
The Americans With Disabilities Act (ADA) and the Rehabilitation Act bar discrimination against those who are disabled. The ADA bars discrimination by private employers with more than fifteen employees, and the Rehabilitation Act applies to all government entities and federal contractors. Unlike other civil rights laws which protect easily-identifiable classes such as race or gender, in order to be protected by the ADA or the Rehabilitation Act, an employee or applicant must show that he or she is, in fact, disabled, has a history of being disabled, or was regarded by the employer as being disabled. Once the employee or applicant makes this showing, however, he or she is not only protected from discrimination, but is also entitled to "reasonable accommodation" for the disability if necessary. Reasonable accommodation may include a modified work schedule or work duties, unpaid time off, or special devices that will help the employee in the performance of his or her job duties.

The Immigration Reform and Control Act (IRCA) of 1986 provides that it is illegal for an employer to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group. It also requires employers to assure that employees hired are legally authorized to work in the U.S. However, an employer who requests employment verification only for individuals of a particular national origin, or individuals who appear to be or to sound foreign, may violate both Title VII and IRCA; verification must be obtained from all applicants and employees. Employers who impose citizenship requirements or give preferences to U.S. citizens in hiring or employment opportunities also may violate IRCA.

The Age Discrimination in Employment Act (ADEA) broad ban against age discrimination against those over forty years of age specifically prohibits:

- statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in the rare circumstance where age has been proven to be a bona fide occupational qualification (BFOQ);
- discrimination on the basis of age by apprenticeship programs,
- denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Title VII's broad prohibitions against sex discrimination specifically cover:

- Sexual Harassment - Including practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment. (The "hostile environment" standard also applies to harassment on the bases of race, color, national origin, religion, age, and disability.)
- Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.
The Equal Pay Act (EPA) prohibits discrimination on the basis of gender in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions. Additionally, Employers may not reduce wages of either sex to equalize pay between men and women.

Titles I and V of the Americans with Disabilities Act prohibit discrimination on the basis of disability in all employment practices. These are very complicated rules that are beyond the limits of this discussion except to say that one must understand several important ADA definitions to know who is protected by the law and what constitutes illegal discrimination.

The Immigration Reform and Control Act bars any employer with more than three employees from discriminating against a U.S. citizen, or an "intended citizen" (such as one who may work legally but is not yet a citizen) on the basis of his or her national origin. The law was enacted at the same time that the government strengthened its penalties against employers who hire illegal aliens, and was intended to prevent employers from overreacting to the new laws by refusing to hire anyone who appears foreign.

Each of these rules are distinct as to the type of discrimination they prohibit but also as to the type of business they apply to and the minimum number of employees the rules apply to. They also have vastly different time limits for the filing of complaints. Most veterinary hospitals with a need for a hospital administrator will qualify for most of them.

Most states have enacted laws that reduce the minimum employee requirement in these matters to a single employee. This means that while your hospital may not be governed by the applicable federal law they are, in all likelihood governed by a similar state law.

With the exception of the Equal Pay Act and the Immigration Reform and Control Act, each of the anti-discrimination laws discussed above requires anyone (whether employee or applicant) who believes that he or she has been discriminated against to exhaust "administrative remedies" prior to bringing a lawsuit. This means that, with some exceptions, anyone who wants to file suit under Title VII, the ADEA, the ADA, or the Rehabilitation Act must first satisfy any procedures the employer has in place to address these issues before they can file suit.

In applying each of these laws a hospital administrator must guard against overly ambitious affirmative action programs that could result in "reverse discrimination."

**HARASSMENT**

Non-sexual harassment is unwelcome conduct that is based on race, color, religion, national origin, disability, and/or age. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. The anti-harassment/discrimination statutes are not politeness or civility codes. Petty slights, simple teasing, offhand comments, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.
Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA). Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying.

Offensive conduct may include, but is certainly not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

Examples of actions which may result in hostile environment harassment, but are non-sexual in nature, include:

- Use of racially derogatory words, phrases, epithets
- Demonstrations of a racial or ethnic nature such as a use of gestures, pictures or drawings which would offend a particular racial or ethnic group
- Comments about an individual’s skin color or other racial/ethnic characteristics
- Making disparaging remarks about an individual’s gender that are not sexual in nature
- Negative comments about an individual’s religious beliefs (or lack of religious beliefs)
- Expressing negative stereotypes regarding an employee’s birthplace or ancestry
- Negative comments regarding an employee’s age when referring to employees 40 and over
- Derogatory or intimidating references to an employee’s mental or physical impairment

The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee. The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct. And, Unlawful harassment may occur without economic injury to, or discharge of, the victim.

**SEXUAL HARRASSMENT**

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964.

Sexual harassment can consist of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

Examples of actions that may create sexual hostile environment harassment include:

- Leering, i.e., staring in a sexually suggestive manner
- Making offensive remarks about looks, clothing, body parts
- Touching in a way that may make an employee feel uncomfortable, such as patting, pinching or intentional brushing against another’s body
- Telling sexual or lewd jokes, hanging sexual posters, making sexual gestures, etc.
• Sending, forwarding or soliciting sexually suggestive letters, notes, emails, or images

The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.

Unlawful sexual harassment may occur without economic injury to or discharge of the victim.

A claim of discrimination/harassment generally requires that 1) The complaining party is be a member of a statutorily protected class; 2) He or she was subjected to unwelcome verbal or physical conduct related to his or her membership in that protected class; 3) The unwelcome conduct complained of was based on his or her membership in that protected class; and 4) The unwelcome conduct affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with him or her work performance and/or creating an intimidating, hostile or offensive work environment.

When investigating allegations of sexual harassment, agencies look at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

PSYCHOLOGICAL HARRASSMENT

Employers and their hospital administrators should be aware of an increasingly common form of harassment known as psychological harassment. This kind of harassment comes in many forms: the most common being verbal abuse. Some tactics aim at trying to humiliate or weaken the morale of individuals or groups.

Psychological Harassment can be viewed as direct or indirect tactics used to get rid of someone or to break them down psychologically and should not be confused with stress related to work performance.

Mobbing (also referred to as bullying, psychological terrorism, and organizational violence) is described as a collective form of psychological violence in which many individuals unite to persecute an individual by making constant negative remarks, repeated criticism or sarcasm, intimidation, threats, and insinuations. They may try to humiliate and to socially isolate the individual. Mobbing is a way of destroying a person without using any physical means, a sort of psychological war of nerves. The group attacks an individual's dignity, integrity, self-image, self-confidence, and self-esteem.

Many victims of psychological harassment suffer from physical ailments, irritability, anxiety, nervousness, insomnia, stress, fatigue, depressive states, burn outs, and in some cases suicide. Many are unable to continue working and suffer financial loss.
**Employer Liability for Harassment**

The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Harassment that results in a tangible employment action occurs when a management official’s harassing conduct results in some significant change in an employee’s employment status (e.g., hiring, firing, promotion, failure to promote, demotion, formal discipline, such as suspension, undesirable reassignment, or a significant change in benefits, a compensation decision, or a work assignment). Only individuals with supervisory or managerial responsibility can commit this type of harassment.

The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

If found guilty, an employer could be liable to the victim for:

- **Lost wages**: Payments to cover wages and benefits a victim would have earned from the date of the harassment to the date of the trial or settlement.
- **Future lost wages**: Payments to cover wages and benefits a victim would have earned if there had never been a sexual harassment charge.
- **Compensatory damages**: Payments for emotional pain and anguish.
- **Punitive damages**: Payments to punish the employer.
- **Attorney costs and court fees**
- **Reinstatement or promotion for victim**

An employee engaging in illegal conduct under these rules can be legally penalized by:

- Warning or reprimand
- Transfer or demotion
- Salary reduction
- Suspension or termination
- Training or counseling
- Monitoring
CRIMINAL PENALTIES

Harassment can also be a crime. If proven, depending on the severity and frequency of the conduct and the harasser's prior criminal record, harassment can be punishable as either a gross misdemeanor or a felony. Criminal harassment can mean many things. It can refer to the actions of a person (or group) who is repeatedly sending threatening letters, calling on the phone, or repeatedly sending unwanted gifts. It can also involve behavior such as "stalking" as following you, watching you, and coming to your place of work or home. Criminal harassment can also include intentionally exposing you to materials which the harasser knows, or has reason to know, are culturally offensive or intimidating to you.

It is not necessary that the harasser intend for the conduct to produce feelings of fear or intimidation in the victim, only that the harasser has reason to know that the conduct would cause such feelings. In some instances, harassment results from infatuation or romantic obsession (one of the more common veterinary occurrences). The harasser does not intend for the behavior to make the victim fearful; the harasser is simply trying to prove "love" for the victim. The law now reflects the understanding that, regardless of the motivation for the conduct, it disrupts the victim's life and may threaten the victim's safety.

Employers can be held criminally liable for discrimination/harassment if they allow the illegal activity to continue even after appropriate notice that the behavior is illegal.

PREVENTION

Prevention is the best tool to eliminate discrimination/harassment in the workplace. Employers are encouraged to take early and appropriate steps to prevent and correct unlawful harassment. They should clearly and strongly communicate to employees that unwelcome harassing conduct will not be tolerated.

Employers should:

- Have a clear and strong anti-sexual harassment/discrimination policy. The policy should communicate that the hospital is taking a "zero tolerance" approach toward sexual harassment. Have a qualified local attorney review it, and make sure it gets out to all your employees either through the employee handbook or in a receipted memo form. Have the employees sign to acknowledge that they received and read the policy. The policy should be verbally communicated to all new employees, and should be posted in the workplace.
- Make sure your anti-discrimination/harassment policy spells out clearly that retaliation against an employee filing a discrimination/harassment complaint is illegal and will not be tolerated.
- If you have employees whose primary language is not English, have your discrimination/harassment policies translated or communicate to them in their primary language.
- Establish a clear, accessible, and effective complaint or grievance process. The employer should provide several different and easily accessible routes that
employees can take to file complaints; i.e., calling a hotline, contacting the human resource department, or by contacting their supervisor. Also the employee should have the option of talking with a male or female company representative.

- Provide anti-harassment/discrimination training to their managers and employees on a regular basis, even if it is only composed of reading material or watching a video. For defense purposes, something is better than nothing.
- Encourage employees to inform the harasser directly that the conduct is unwelcome and must stop. Employees should be instructed to report harassment to management at an early stage to prevent its escalation.
- Take immediate and appropriate action when an employee complains. Conduct investigations promptly and thoroughly. After the dispute is resolved, a follow up should be done with the employee to ensure that no one has suffered retaliation.
- Conduct and record yearly meetings with your supervisors to review the anti-discrimination/harassment policy, and to make sure that they understand that an employee does not need to suffer negative consequences in order to make a claim of sexual harassment. Inform the supervisors that even mild to moderate sexual jokes or statements can create an atmosphere of hostility that will make some employees uncomfortable, and could lead to the creation of an environment where sexual discrimination could develop. The supervisors should also be directed to always inform the hospital administrator of any discrimination/harassment complaints they receive from employees. Supervisors should never promise confidentiality with an employee when the information relates to sexual harassment.
- Conduct and record a yearly discrimination/harassment survey among your employees. The survey can be done anonymously and should be distributed with a copy of the company’s sexual harassment policy. The survey can simply ask the employees (male and female) if they have experienced any form of sexual harassment during the past year. Why do a survey? The results of the survey will tell a court that your company is actively engaged in preventing and correcting sexual harassment. Remember, that the Supreme Court has just determined that an employer can be held liable for incidents of sexual harassment that they are unaware of occurring. So, one method of defense will be to demonstrate to the court or a jury that your company conducts yearly meetings with supervisors and also conducts a yearly sexual harassment survey to attempt to uncover sexual harassment violations before they cause problems for your employees.
- Always document the results of any discrimination/harassment complaint or investigation. Also document any corrective action that you asked the employee or supervisor to take. Follow up on any corrective action so you can document if the employee fails to take advantage of your hospital polices/procedures or any corrective action that your hospital takes to prevent the sexual harassment from occurring again in the future.
- Post in a conspicuous place all legally required notices and posters relating to employee rights and privileges.