

# Allegations of Sexual Misconduct: *An Old Problem with a New Reality*

By Madeleine M. Pfefferle

In 2018, Pew Research Center found that 59% of women and 27% of men indicate that they have experienced sexual harassment. From 2017 to 2018, EEOC Title VII lawsuits increased by 50% and courts are tending to view employer liability for employee acts more stringently based upon what the employer reasonably knew or should have known. Complaints of sexual harassment include verbal or physical conduct of a sexual nature that has the purpose or effect of adversely affecting an employee's job or creating a hostile or offensive work environment. In recent years, this old problem has gained increased publicity and is now subjected to heightened scrutiny, making it important that all businesses, including those in the healthcare industry be aware of disruptive behavior and be equipped to act if a complaint is lodged.

The Me Too Movement began in 2006 as a way to empower women who experienced sexual harassment or abuse through empathy and exploded in 2017 when Alyssa Milano encouraged women to hashtag the phrase on social media to show how many people have encountered similar experiences. The Me Too Movement is currently receiving national attention with the trial of Harvey Weinstein and conviction of Larry Nassar, M.D., the National Medical Coordinator for USA Gymnastics.

The prominence of the Me Too Movement is impacting sexual harassment and hostile workplace environment claims across business, including health care practices. The AMA Code of Medical Ethics defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." AMA Code of Medical Ethics Opinion 9.1.3. Such disruptive and unprofessional behavior distracts from patient care and creates anxiety, which can lead to medical errors or near misses. Such behavior leads to patient dissatisfaction, poor office morale, increased staff turnover, and potentially negative publicity. Additionally, disruptive behavior can have a negative economic impact, including investigative costs, potential litigation costs, settlement amounts (average settlement is \$125,000), and costs associated with placing employees on administrative leave and/or replacing staff.



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# TIPS FOR HEALTH CARE EMPLOYERS

## TRAIN ALL EMPLOYEES REGARDING HEALTHY, RESPECTFUL, AND INCLUSIVE BEHAVIOR IN THE WORKPLACE PER LEGAL AND REGULATORY STANDARDS

- ✓ [Title VII](#)
- ✓ [Title IX](#)
- ✓ [Joint Commission Standards](#)
- ✓ [AMA Code of Ethics](#)
- ✓ [Accreditation Council for Graduate Medical Education Standards](#)
- ✓ Medical Board Position Statements, e.g., [Avoiding Misunderstandings During Physical Examinations](#)
- ✓ Other policies in play, including Human Resources Policies, Institutional Policies, Medical Staff Bylaws, Departmental Policies

## CREATE AND ENFORCE A COMPREHENSIVE POLICY REGARDING HARASSMENT

- ✓ Ensure employees know who to contact with a complaint
- ✓ Maintain protection from retaliation
- ✓ Include all protected classes, not just sex-based harassment
- ✓ Include substantiated claims of sexually hostile work environment as “for cause” termination in employment agreements

## ESTABLISH CLEAR EXPECTATIONS FOR AN OBJECTIVE AND TIMELY INVESTIGATION

- ✓ Determine who will conduct and be involved in the investigation
    - Medical Director
    - Department Director
    - Quality Assurance Committee
    - Credentialing Committee
    - Human Resources
    - Compliance
    - Security
    - Counsel
- \*Consider an external investigator depending on the seriousness and sensitivity of the allegations*
- ✓ Interview all individuals with knowledge and assess credibility and motives
  - ✓ Review any and all documentation
  - ✓ Consider prior acts and/or discipline
  - ✓ Document all findings in an Investigative Report

## DETERMINE NEXT STEPS

- ✓ Mandatory training
- ✓ Letter of reprimand/warning
- ✓ Conditional letter of reappointment
- ✓ Last Chance Agreement
- ✓ Probation
- ✓ Suspension
- ✓ Termination
- ✓ Recommendation against reappointment
- ✓ Reporting

**DISCLAIMER:** This is distributed as guidance material only and is not to be relied upon without the advice of legal counsel with knowledge specific to the situation being assessed.

North Carolina health care providers discussed these issues with panelists Elizabeth McCullough, Dawn Raynor, and Barbara Thornton at seminar hosted by Young Moore on January 22, 2020.

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