

Protecting Your Practice From Sexual Harassment Troubles

In the era of #MeToo, it is more important than ever for ophthalmic practices to do everything possible to prevent sexual harassment in their offices. Clear antiharassment policies and procedures—consistently applied—not only will minimize the risks of costly litigation but also will help create a workplace culture in which respect and tolerance for everyone are the norm.

“In the current landscape, sexual harassment has been pushed to the forefront. As that happens, more victims are coming forward. So it’s important for medical practices to have it on their radar,” said Julia S.H. Prospero, Esq., a specialist in health care law who will present on this topic at the Academy’s annual meeting (see “More at AAO 2019,” page 55).

Why you need formal policies on harassment. “Especially with smaller practices, a lot of times you have these very comfortable relationships in the office, and some things that should be more formalized just aren’t. But sexual harassment policies are very important and should not be overlooked,” Ms. Prospero said.

Robert E. Wiggins Jr., MD, MHA, physician administrator of a multispecialty ophthalmic practice in Asheville, North Carolina, and Academy senior secretary for ophthalmic practice, urges smaller groups to take the matter seriously. “Every practice should have a policy manual that addresses this issue

—customized for that practice—and it has to be actually used,” Dr. Wiggins said. “You want to catch things early, before they blow up into a big problem for the practice.”

Defining Sexual Harassment

Federal statutes and case law, as well as guidelines of the U.S. Equal Employment Opportunity Commission (EEOC), together provide a definition of sexual harassment, said Ms. Prospero.

The EEOC defines it as follows: “Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 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.”

According to the EEOC, harassment claims can be grouped into two types, which also can overlap. Claims can involve 1) a “quid pro quo” and/or 2) a “hostile work environment.”

Quid pro quo-based harassment. This type of harassment consists of actions in which employment decisions or performance expectations are based on an employee’s submission to or rejection of the unwelcome sexual conduct. Harassment can involve outright

demands for sexual favors and/or inappropriate touching, such as pats on the arm or back, “friendly” shoulder massages, or repeated “accidental” touching of buttocks or a woman’s breasts.

The quid pro quo cases are particularly important in academia, where a subsequent negative evaluation by an adviser or supervisor could greatly impact the trainee’s future, an expert panel

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convened by the National Academy of Sciences, Engineering, and Medicine noted in a 2018 report.¹

A hostile work environment can constitute harassment. EEOC states that sexual harassment is illegal when it is “so frequent or severe that it creates a hostile or offensive work environment.” Behaviors that can contribute to such an environment include the following: Displaying sexually related posters, cartoons, or drawings; commenting about physical attributes or appearance; leering or using sexual gestures; and making sexual comments or jokes within the harassed person’s earshot. EEOC states that the harasser can be the victim’s supervisor, a supervisor in another area, a coworker, or even a patient.

Large versus small practices. The federal law applies to workplaces with 15 or more employees. For ophthalmic practices with fewer employees, state

and local laws—some of which are stricter than federal law—would apply, said Ms. Prospero.

Ways to Limit Legal Liability

Antiharassment policies can help to protect practices from being held legally liable for harassment, Ms. Prospero said.

When are you liable? If the harasser is a supervisor, then the practice is liable for such behavior. When other staff or patients are the harassers, the practice is liable if it has control over such individuals, if it knew or should have known about the harassment, and if it failed to take prompt and appropriate corrective action, she said.

Good protocols matter. Having clear policies, communicating them to everyone in the practice (including physicians), and applying them consistently can limit the exposure, Ms. Prospero said. A good antiharassment policy should include the following:

- Written policies and training for all staff, including physicians new to the practice, about what constitutes harassment. “Our comprehensive physician

policy on harassment is reviewed with every new associate physician. They have to sign it as part of their contract,” Dr. Wiggins said.

- A handbook that clearly states the procedures for making complaints. More than one supervisor should be designated to receive complaints.
- A commitment to take every complaint seriously. There should be clear procedures for investigating complaints and delineation of the steps that will be taken for those that are substantiated. Careful documentation is essential.
- Assurance that there will be no retaliation against any employee who reports harassment.

Insurance for further protection. An employee practice liability insurance (EPLI) policy to protect against damages from sexual harassment, discrimination, and wrongful termination claims can be purchased as an endorsement to the practice’s general liability policy, Ms. Prospero said. Such a policy also can be obtained separately, she added.

Consider “love contracts.” Another important area of policy to consider is romantic relationships in the office,

particularly if they involve a supervisor and a subordinate, Dr. Wiggins noted. They are fraught with potential for sexual harassment claims, from other staff members complaining of favoritism to claims of sexually motivated retaliation if the relationship falls apart, he said.

In hopes of limiting this potential, some practices require that romantic partners sign a consensual relationship agreement, often referred to colloquially as a “love contract.” These prohibit favoritism and displays of affection in the office and ask signatories to pledge not to seek retaliation after a breakup.

Limitations of “love contracts.” Ms. Prospero said this option might help protect a practice against the potential fallout from failed office romances. “I do not know how legally binding something like this would be, but it is still worth having,” she said. “The only concern that could arise out of such a contract is that the couple breaks up and one person starts harassing the other. The person being harassed may feel like they cannot report the harassment because they have signed such a document. I would recommend a provision be added to the contract that states that if an issue does arise at some point then either party should report it to human resources.”

This Fall, Vote on the Harassment Rule

The Academy has proposed a new ethics rule. Increased awareness about sexual harassment in medical settings^{1,2} led the Academy’s Ethics Committee to develop, and the Board of Trustees to approve, a proposal to add a rule about harassment to the Academy Code of Ethics.

The proposed rule will be presented to the membership for voting in the fall of 2019. You will be able to vote by mail or online during a 30-day voting period that will start on Monday, Oct. 14 (aao.org/about/governance/elections). If approved by the membership, the new rule will become effective on Jan. 1.

The proposed new ethics rule—Rule 18: Harassment and Discrimination—reads as follows: Harassment and discrimination in the practice of ophthalmology are unethical. The ethical practice of ophthalmology creates and fosters an environment in which patients and all members of the health care team, including those in training, are treated with respect and tolerance. Harassment and discrimination of all types are likely to jeopardize patient care, exploit inequalities in status or power, and abuse the trust placed in us as ophthalmologists. Therefore, discrimination, harassment, or creation of a hostile working environment on the basis of personal attributes, including but not limited to sex, gender identity, sexual preference, race, disease, disability, age, or religion, is inconsistent with the ideals and principles of ethics in ophthalmology.

1 Cabrera MT et al. *Ophthalmology*. 2019;126(1):172-174.

2 Jagsi R et al. *JAMA*. 2016;315(19):2120-2121.

Tips for Cultural Change

Beware of old ideas about what’s OK.

In the past, it might have been common for a male physician in a medical practice to talk about “the girls” in the office, but today’s staff members are more likely than their predecessors to chafe at not being called what they are—women—Ms. Prospero said. “That perhaps doesn’t cross the line into harassment, but it’s certainly not appropriate,” she said.

Alleged compliments also can be problematic. “I have had younger physicians report being told by senior colleagues, ‘You look good in dresses. You should wear them more often.’ Comments like that probably cross the line,” she said.

See something, say something. The 2018 report by the National Academy of Sciences, Engineering, and Medicine suggested that, instead of conventional

antiharassment training, it might be more effective to train bystanders to speak up against sexual harassment when it happens.¹ “Skills-based training that centers on bystander intervention promotes a culture of support, not one of silence,” the panel wrote. “By calling out negative behaviors on the spot, all members of an academic community are helping to create a culture where abusive behavior is seen as an aberration, not as the norm.”

1 Johnson PA et al., eds. *Sexual Harassment of Women*. National Academies Press: 2018. <https://doi.org/10.17226/24994>. Accessed June 14, 2019.

Ms. Prospero is an associate attorney at Wade, Goldstein, Landau & Abruzzo. *Financial disclosures: None*.

Dr. Wiggins is the senior secretary for Ophthalmic Practice at the Academy and a pediatric ophthalmologist and physician administrator at Asheville Eye Associates in Asheville, N.C. *Financial disclosures: None*.

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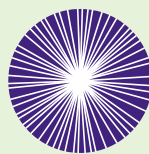
Is It Harassment? Bullying and Sexual Harassment in the Workplace (257). Senior instructor: Julia S.H. Prospero, Esq. **When:** Sunday, Oct. 13, 3:15-4:15 p.m. **Where:** South 213. **Access:** Academy Plus course pass.

Sexual Harassment in Ophthalmology: How Do I Protect Myself, My Practice, and My Trainees in the #MeToo Era? (515). Senior instructor: Michelle T. Cabrera, MD. **When:** Monday, Oct. 14, 4:30-5:30 p.m. **Where:** West 2005. **Access:** Academy Plus course pass.

Risky Business: The Aging, Impaired, or Disruptive Physician (633). Senior instructor: Debra L. Phairas. **When:** Tuesday, Oct. 15, 10:15-11:15 a.m. **Where:** South 207. **Access:** Academy Plus course pass.

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