



Whiteford|Taylor|Preston<sup>LLP</sup>

# Legal Implications Regarding Harassment for the Modern Healthcare Organization

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# Harassment Still a Problem

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Employees should be expected to conduct themselves in a professional and business-like manner, but unfortunately workplace harassment continues to be a common occurrence and no organization is immune.

# In the News

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- NBC
- Amazon
- Nickelodeon
- National Public Radio
- U.S. Congress
- The New York Times
- D.C. Comics

# What is workplace harassment?

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Equal Employment Opportunity Commission defines harassment as unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. (Protected categories under the Civil Rights Act, Age Discrimination in Employment Act, Americans with Disabilities Act).

# Illegal Workplace Harassment

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Harassment where 1) enduring the unwelcome 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.

# Illegal Workplace Harassment

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Retaliation against individuals for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

# Usually Not Illegal Harassment

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Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people, be made a condition of employment or be in retaliation to employee's lawful actions.

# Common Types of Unwelcome Conduct

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- Offensive Jokes
- Slurs
- Epithets
- Name-calling
- Physical Assaults
- Sexual Advances
- Threats
- Intimidation
- Ridicule
- Mockery
- Insults
- Touching



# Conduct Alone May Not Be Illegal

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- Unsolicited conduct that was undesirable
- Made a condition of employment or basis for an employment decision or
- Creates a hostile environment that would be considered offensive to a reasonable person or
- In retaliation for employee's lawful complaints or conduct

# Employer Liability

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The EEOC says that an 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.

# Employer Liability Continued

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The employer may also 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.

# Healthcare Settings

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## HEALTHCARE CREATE SPECIAL ISSUES

- Interactions with:
  - Supervisors
  - Peers
  - Subordinates
  - Patients and their families
  - Physicians and other independently contracted providers
  - Other contracted staff

# Healthcare Settings

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Employer has duty to provide safe work environment for all its employees

\*Harassment can come from others who are not supervisors.

# Healthcare Settings

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Question is whether employer knows or should have known about the hostile work environment yet allowed it to persist.

Gardner v. CLC of Pascagoula, LLC

Fifth Cir., June 29, 2018

# Gardner v. CLC of Pascagoula, LLC

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Many cases of third-party harassment are from restaurants, bars, and casinos.

Gardner involved repetitive harassment of a nurse by a resident of an assisted living facility. The resident had diminished mental capacity from a variety of ailments, including dementia. The nurse complained several times to her supervisor, who brushed aside her complaints.

# Gardner v. CLC of Pascagoula, LLC

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The Gardner decision recognized that inappropriate comments and incidental contact are common amongst patients with reduced cognitive ability, and it is not objectively reasonable to expect that they will never happen. However, the Court found that the facility must take steps to protect its employee from significant physical contact or violence.



# Gardner v. CLC of Pascagoula, LLC

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The Court noted that the facility could have assigned a security escort or additional staff, reassigned the employee, moved the resident to an all-male facility, used medication to control the resident, or discharged the resident. It looked to prisons for guidance.

# Lessons from Gardner

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The employer must look at the work environment and listen to staff.

Staff must feel that it is safe to communicate their concerns.

Once a complaint is filed, it should be promptly addressed and, if necessary, the problem should be promptly corrected.

# Lessons from Gardner

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The employer should objectively document the information it learns and the steps to ameliorate it.

Part of our goal is to prevent litigation, not just win lawsuits. Litigation is expensive and disruptive.

# Hypothetical

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Dr. Gross hangs around the hospital lab. For years, the staff has known that he pinches the backsides of the female staff, but no one told a supervisor. Finally, he pinched the wrong person, and she complained to the lab supervisor.

What should the hospital do?

What could the hospital have done better?

# Hypothetical

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Would your answer vary if Dr. Gross were a big admitter? Or a contracted provider?

Physicians are not always employed by the same employer as the harassed staff. Consider whether to complain to medical staff or contracted providers.

# Online Harassment

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In general, most people would consider online harassment to be the use of email, instant messaging, SMS texting, and websites to bully or otherwise harass an individual or group through personal attacks. Basically the same type of harassment that may occur in face to face situations, but now is done remotely.

# Online Harassment

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The advancement of technology has not only increased the ease with which someone may conduct harassing behavior against a fellow employee, it has also introduced new methods of harassment such as revenge porn and catfishing.

# Catfishing

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## Urban Dictionary Definition of Catfishing:

The fabrication of online personas and entire social circles to trick people into emotional/romantic relationships (over a long period of time).



# Hypothetical

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Sam and Victoria are colleagues. They are generally friendly with each other and work well together. Sam likes Victoria, but is very shy and does not express his feelings in any way. Sam learns that Victoria likes to post on a particular online forum so he creates a fake account in order to interact with her and learn more about her. Victoria learns about this fake account and is upset by it. Should Sam's behavior be disciplined?

# Policy Approach Still Generally Similar

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While changes in technology have opened up new opportunities for harassing behavior, the general premise and approach to addressing harassment in the workplace has not really changed. Online harassment can be captured in the scope of an employer's general policies and procedures meant to address harassment.

# Key Components of a Policy

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- Firmly prohibits workplace harassment
- Encourages victims to come forward
- Promises and delivers prompt and effective response to employee complaints
- Ensures fair and professional treatment of all employees
- Promotes a respectful work environment

# Have a Workable Policy

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Having a policy that just sits on the shelf is not enough.

Sometimes, it is worse to have a policy than to not have one, because having a policy shows that the employer knows what should happen.

If you have a policy (and you should), it should be a workable policy.

# Have a Workable Policy

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When considering whether to take action against a harasser, some employers worry that they will be sued by the harasser.

Remember that doing nothing can also lead to litigation.

The employer must balance how best to prevent litigation by either party.

# Reporting Recommendations

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- Have a clear mechanism for reporting complaints
- Investigate all complaints
- Be discrete and maintain confidentiality
- If warranted, try to take prompt, corrective action
- Include the employee in any preventive or corrective opportunities
- Do not retaliate!

# Taking Corrective Action

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- You must make sure:
  - The victim is not adversely affected
  - The harassment stops immediately and does not occur again – The key is prompt, effective measures which are reasonably designed in order to stop the inappropriate conduct

# Taking Corrective Action

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- You must also be careful to:
  - Correct the effects of the harassment
  - Follow up to make sure the problem is solved

**NOT MEETING THESE BASIC REQUIREMENTS  
WILL LEAD TO CLAIMS AND POSSIBLE  
LIABILITY**



# Best Practices

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Discourage touching

Monitor interoffice relationships

Implement harassment training at all levels

Do not stereotype

# Best Practices

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Treat everyone with dignity and respect

Follow policies 24/7

Avoid comments about an individual with respect to physical appearance, race, age, gender or religion

Use common sense

# Sample Policy Language

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“Any discriminatory intimidation, ridicule or insult or other harassing behavior that is sufficiently severe or pervasive to alter the conditions of an individual’s employment and create an abusive working environment is prohibited.”

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QUESTIONS?

# Contact Information

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