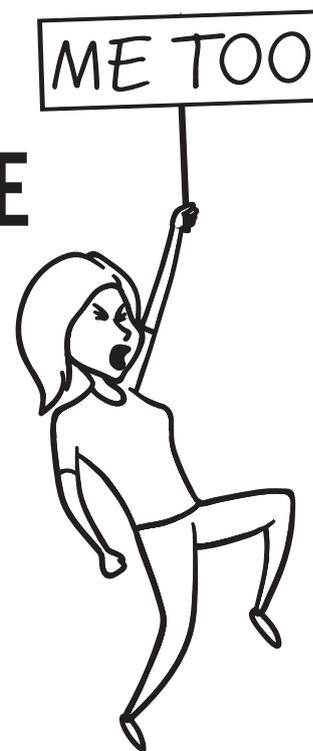


SEXUAL HARASSMENT IN THE

#ME TOO ERA



How can ophthalmic practices prevent workplace harassment?



BY JOSHUA F. ALLOY, JD

As the #MeToo movement continues to shed light on sexual harassment across a wide variety of industries, it has become clear that the health care profession, including ophthalmology, is not immune. Victims no longer remain silent about the abuses they suffer at the hands of doctors, supervisors, coworkers, patients, and others. In addition to increasing numbers of internal complaints and lawsuits, stories and settlements of sexual harassment claims—even old claims—are publicized in the press, social media, and other online sites:

- In October 2017, the dean of The University of Southern California's school of medicine was forced to step down immediately after his appointment when news reports surfaced of 15-year-old allegations that he had sexually harassed a young researcher at an out-of-town conference, resulting in a six-figure settlement. Although the incident was apparently "well known in the upper echelons of the university," it was not generally known to students and staff and did not become public until the *Los Angeles Times* broke the story in connection with a separate investigation into the previous dean of medicine.¹
- In November 2017, a prominent eye doctor in Charlotte, North Carolina,

relinquished his medical license and closed his practice after he settled a lawsuit for sexual harassment brought by two former employees.²

- In a recent survey of ophthalmologists and ophthalmologists-in-training conducted by four physicians and presented at the American Academy of Ophthalmology Annual Meeting in October 2018, 59% of all respondents reported having experienced sexual harassment during their ophthalmology career, and 47% reported at least one incident in the past 5 years. Although many of these incidents involved patients, approximately 36% of respondents reported being sexually harassed by someone other than a patient. This is consistent with other studies and estimates, including within the health care profession. Notably, the vast majority of sexual harassment is experienced by women, particularly in fields in which there are significant gender gaps or disparities.³

As victims of sexual harassment begin to speak up both privately and publicly, hospitals, academic institutions, private practices, patients, and the public at large should take notice. More important, employers should take concrete steps to try to prevent harassment, educate their employees, put in place

robust policies and practices, set up expansive reporting systems, promptly investigate claims, and change internal cultures from the top down.

WHAT IS SEXUAL HARASSMENT?

Unlike other forms of harassment, such as racially charged epithets or jokes, sexual harassment is not always obvious. Sometimes it is more ambiguous and harder to pinpoint. In part, this is because certain behavior that may be socially acceptable—or at least not unlawful—outside of the workplace environment, such as telling a sexual joke, asking someone out for a date, engaging in flirtatious behavior, or hugging someone, can have very different implications and consequences when that conduct is connected to the workplace. When does conduct rise to the level of sexual harassment under the law? Consider the following hypothetical situations:

- ▶ **Situation No. 1:** A female doctor who is a shareholder in the practice tells a sexually explicit joke during a staff meeting. At the time, most of the employees at the meeting laugh, and nobody complains. A few weeks later, however, an employee who has been having performance problems complains

to the human resources (HR) department about the joke.

- ▶ **Situation No. 2:** A patient places his hand on a technician's leg during an appointment. The technician is too embarrassed to say anything at the time, but she tells a coworker about the incident the next day.
- ▶ **Situation No. 3:** After not receiving any response to his first two emails asking a colleague on a date, an employee sends a third email asking her out to dinner.

Could any of these situations constitute sexual harassment or create legal liability for the employer? Are there additional facts or circumstances that might change your mind or that we need to know before reaching any conclusions? What can be done to prevent or correct these situations in the future?

QUID PRO QUO AND HOSTILE WORK ENVIRONMENT HARASSMENT

Broadly speaking, there are two forms of sexual harassment under US law. The first type is called *quid pro quo* harassment. Literally translated, it means "this for that," and it occurs when an employee experiences, is threatened with, or is offered a tangible employment benefit or loss, such as getting a promotion (or losing a job) in exchange for submitting (or refusing to submit) to a supervisor's sexual advances. *Quid pro quo* harassment can also occur when a relationship between a supervisor and subordinate ends, if the supervisor begins to take action against the subordinate because he or she broke off the relationship or refuses to continue with the relationship. Employers are *strictly liable* when there is *quid pro quo* harassment; in other words, there is no legal defense available.

The second form of sexual harassment is when the harassment interferes with an employee's job performance or creates an intimidating, hostile, or offensive work environment for the

victim. A hostile work environment claim generally requires the following:

- The conduct must be *unwelcome*;
- The conduct (which can be physical, verbal, or visual) is either sexual in nature or targets the employee based on his or her sex;
- The conduct must be both subjectively and objectively offensive. In other words, it must be offensive both to the victim and to a reasonable person in the victim's circumstances; and
- The conduct must be severe or pervasive enough that it affects the employee's work environment, or enduring the conduct has become a condition of continued employment.

Sexual harassment can be verbal, such as comments, jokes, stories, inappropriate sounds, or questions. It can also be nonverbal, such as suggestive or explicit posters, cartoons, emails, photographs, gestures, touching, or facial expressions. Not only can sexual harassment occur in the workplace and at work-related events, but it can also happen through email, social media, or on the internet if it is related to or has an impact on work. A harasser can be a manager, supervisor, coworker, or even a nonemployee such as a patient, customer, salesperson, delivery person, contractor, or vendor. Although women are overwhelmingly the targets of harassment, anyone can be harassed, including by members of the same sex.

If the harassment is by a supervisor and results in a negative employment action such as termination, failure to promote, or loss of wages, the employer is automatically liable. However, if a supervisor's harassment results in a hostile work environment, the employer can avoid liability under federal law if the employer proves that it reasonably tried to prevent and promptly correct the harassing behavior and the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer. Some US states, such as New York and California, go even

further and impose strict liability any time a supervisor engages in unlawful harassment. When the harassment is perpetrated by a coworker or nonemployee, the employer is liable only if it knew or should have known about the harassment and failed to take prompt and appropriate corrective action. In some states, individuals can be held personally liable for harassment or for aiding and abetting unlawful conduct.

WHAT CAN EMPLOYEES AND EMPLOYERS DO TO PREVENT SEXUAL HARASSMENT?

There is no magic spell, or, perhaps more appropriately, no vaccine that can eradicate sexual harassment from the workplace. But employers can take a number of important steps and actions to reduce incidents of sexual harassment.

Set the Tone at the Top. Employers should take a careful look at their own policies and cultures. This should start with a top-down approach with the goal of creating a meaningful workplace culture and ethos that employees can truly embrace and appreciate. Employers should pay attention to leadership positions and management teams to ensure that they are not homogeneous. Management must demonstrate that it takes sexual harassment prevention seriously, for example by participating in training sessions, asking for periodic reports on harassment complaints and investigations, engaging outside counsel to conduct an audit or review of the workplace environment, and putting in place a strong HR function.

Educate Employees. Employers should try to educate employees on what is and is not appropriate workplace behavior. This should be done through policies and through training. Policies should be reviewed and updated, easy to find, and actually enforced. There should be multiple avenues of complaint (some employers use hotlines). Ideally, in-person interactive training is conducted on a semiannual basis by a skilled attorney or

HR professional. When done properly, training can help eliminate some of the less extreme and more ambiguous forms of harassment and push employees to think more carefully about how their words and actions are interpreted by others in the workplace, particularly those with different backgrounds, experiences, and sensitivities. Policies and training only go so far, however; there will always be bad actors.

Empower Victims. Victims must be given both the opportunity and encouragement to report incidents of harassment. They should feel that their complaints are heard and responded to in a meaningful fashion, and they should be able to trust that they will not be retaliated against for reporting harassment. Too often, employees do not speak up or complain because

they are afraid of what will happen to them, afraid that they will not be taken seriously, afraid that they will alienate their colleagues and supervisors, afraid of harming the career of the harasser, or unsure of the proper complaint procedures or policies. Complaints should be taken seriously and should be promptly and impartially investigated. Appropriate corrective or preventive action should be taken, and employers should make sure to follow up with complainants at the conclusion of any investigation.

Don't Overlook Bystanders. Finally, employers must not overlook the rest of its workforce—what some call *bystanders*. This silent majority may witness or hear about inappropriate behavior directed at others, and they must be encouraged to stand up for victims in

the moment and to report workplace misconduct without fear of retaliation.

Although no one action will solve the problem, it is incumbent upon employers to demonstrate to their employees and to the public that they are making every possible effort to confront and eliminate sexual harassment in the workplace. ■

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3. Cabrera MT, Enyedi LB, Ding L, MacDonald SM. Sexual harassment in ophthalmology: a survey study. *Ophthalmology*. 126(1):172-174.

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■ Financial disclosure: None