Harassment issues should be dealt with before they become problems

Education

Éducation

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In brief

SEXUAL AND OTHER FORMS OF HARASSMENT are common in the medical work environment. Physicians who are employers and medical educators as well as clinicians should be aware they may be held responsible for the harassing conduct of colleagues, employees and others unless measures are in place in the workplace that show reasonable efforts have been made to prevent the behaviour and deal with it appropriately when it occurs. This article uses a US case to illustrate the evolution of a sexual-harassment complaint over several years.

En bref

LE HARCÈLEMENT SEXUEL ET LES AUTRES FORMES DE HARCÈLEMENT sont répandus dans le monde du travail en médecine. Les médecins, qui sont des employeurs et des éducateurs médicaux, ainsi que des cliniciens, devraient savoir qu'ils peuvent être tenus responsables du harcèlement pratiqué par des collègues, des employés et d'autres personnes, sauf si les intéressés ont pris, au travail, des mesures qui démontrent qu'ils ont fait des efforts raisonnables pour prévenir le comportement et pour y faire face comme il se doit le cas échéant. Cet article décrit un cas survenu aux É.-U. pour illustrer l'évolution, sur plusieurs années, d'une plainte pour harcèlement sexuel.

Research indicates that sexual harassment is prevalent in the medical workplace. A recent US case illustrates the problem of sexual harassment in a clinic setting and the manner in which a court will look at the facts. In Canada, such a case would appear before a human-rights tribunal as a possible violation of provincial/territorial legislation. Nevertheless, the situation and the issues raised in the American court's discussion of the motion illustrate how a problem arose and how the parties involved reacted to the situation.

Sue Otis' first contact with Dr. Gene Wyse occurred in the early 1980s while she worked at a Kansas nursing home. At the time she asked Wyse, who was an independent medical provider at a local clinic, to serve as her preceptor while she studied to become a nurse practitioner.

As the plaintiff in a hostile-work-environment claim against her former employer, she alleged that the harassment started while the physician served as her preceptor. Specifically, she alleged that Wyse placed sexually oriented ads on her desk, instructed her to take a sexual history of all patients and then discussed those sexual histories with her.

After she received her degree in 1986, she was employed at the same clinic but worked with another physician for the next 2 years. During that time, Wyse continued to leave sex-related articles on her desk and request sexual histories of patients. Once, he left a lotion-filled condom. Although Otis discussed the situation with her physician associate, there is no indication that any action was taken or that the conduct abated; her associate then stopped practising at the clinic.

In 1989, Otis took a job at another health services organization (HSO) in the same area, at which Wyse also saw patients. The offensive conduct continued in this workplace; at one point she received a bunch of condoms, arranged as a bou-

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quet. Between 1989 and 1990 she discussed her concern about the physician's behaviour with the clinic manager weekly. She also informed the HSO's area manager of the situation and her complaint was ultimately investigated by the company. In late 1990, a letter was finally sent to Wyse.

Although acknowledging that Wyse was not actually an employee of the organization, the letter directed that he should avoid all contact, including clinical supervision, involving the complainant and avoid any conduct that interfered with any clinic employee's work performance or created an offensive work environment. Any breach of the directive would result in corrective action and possibly a recommendation for termination of Wyse's practice agreement with the HSO. Otis was informed of this action and instructed to report any subsequent harassment immediately.

After the letter was issued, there was no communication between Wyse and the nurse practitioner for several months. When Wyse happened to be the only physician in the clinic, Otis communicated with him only through his nurse. During this period she had also begun to work a few days each week at a satellite office in another community.

Within the year, however, Otis believed she was being harassed again. She noticed that the physician "glared" at her when they were alone and she heard rumours that he was going through her charts and billings. She complained several times to a manager about Wyse's intimidating behaviour and tried unsuccessfully to reach the president of the organization. There was no record of any remedial action. When the plaintiff met with a new clinic manager to discuss her case load, it was suggested that she would have to work directly with Wyse in order to get a raise. When she explained the directive regarding the physician's harassing behaviour, she was told to "let the past go and get on with it."

A few months later, in March 1992, a number of local merchants received an anonymous "cut-and-paste" letter accusing Wyse of sexual harassment. Otis was asked by her manager if she knew anything about the letter; she denied having any knowledge of it and resigned shortly afterwards. She filed a complaint a year later.

The complaint

The basis for the complaint was that the HSO subjected her to a hostile work environment, which caused her to be "constructively discharged." This is a legal term that means the workplace conditions were such that her decision to resign could be deemed to be a dismissal, because any reasonable person under similarly hostile circumstances would also feel compelled to resign.

The case was heard by the US Equal Employment Opportunity Commission (EEOC) under legislation similar to Canadian human-rights laws that prohibit various forms of discrimination in the workplace. The memorandum and order following the motion referred to a "dogged pattern" of discrimination and stated that hostility is determined by looking at "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."

In analysing the physician's evidence, the court noted that there were mischaracterizations by the plaintiff, including no evidence that the question asked of her regarding the "did-you-know" letter was accusatory or that she was "directed" to work with Wyse as a condition of employment. It only indicated that it would be the only way for her to increase her patient load and thus qualify for a raise.

Nevertheless, the court also observed that "while glaring is obviously different from sending sex-related medical articles and is not particularly strong evidence of harassment, it is neither so dissimilar nor so benign that it could not compromise part of the totality of the circumstances which create a hostile work environment."

On the issue of the physician's relationship to the clinic — should the clinic be liable for the discriminatory acts of an independent contractor? — the court referred to EEOC guidelines and case law which indicated that the employer may be responsible for the acts of nonemployees if the employer knows or should have known of the conduct and failed to take appropriate corrective action. Canadian law is similar: the employer may be penalized if it cannot demonstrate that good-faith efforts have been made to prevent harassment, stop any harassment when it becomes known and correct any damage that might occur.

Because the American action involved a motion for summary judgement on a number of technical legal issues, this discussion is intended to illustrate the complexity and perceptions of the facts rather than to demonstrate the results of a legal analysis and judgement. Many Canadian physicians are already aware of the existence of sexual harassment in the medical/clinical workplace and of the potential personal toll the conduct takes on a person's health and livelihood.

Harassment in Canada

In Canada a workplace complaint of sexual harassment is governed by human-rights legislation, which prohibits discrimination on the basis of sex (and age, ethnic origin, race, disability, religion and sexual orientation, among other things.) At both the provincial/territorial and fed-

eral levels these laws have been widely interpreted to mean both *quid pro quo* harassment involving the exchange of sexual acts for job-related benefits, and a range of behaviours that create a hostile work environment for the person to whom the attention is directed.

Sexual harassment today is legally defined in Canada as unwelcome behaviour of a sexual nature in the workplace that detrimentally affects the work environment or leads to adverse job-related consequences for the employee. Such conduct is also seen to represent an abuse of power.[1] The Supreme Court of Canada considers sexual harassment a demeaning practice and an affront to the dignity of employees forced to endure it.

Physicians should recognize that sexual and other forms of discriminatory harassment are illegal, violating both federal and provincial/territorial human-rights legislation. Furthermore, since physicians are often employers and medical educators as well as clinicians, they need to be aware of their legal responsibilities. This means that sexual harassment in the workplace and classroom must be addressed by acknowledging it, by providing education about its causes and effects, and by taking steps to deal with it when it occurs.

In particular, physicians who are employers may be held responsible for the harassing conduct of colleagues, employees and even others who come in contact with their employees unless workplace measures are in place indicating that reasonable efforts have been made to prevent the behaviour and to deal with it appropriately when it occurs. In order to meet the requirements of human-rights legislation, physicians who are employers should address the issue by providing a clear policy statement to prevent such illegal conduct in the workplace, and by having procedures in place to deal with the problem should it arise.

Reference

1. *Janzen* v. *Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 at 1284.