

Addressing and Preventing Sexual Harassment in Medicine  
Approved December 2004

Report of the Board of Trustees 25-I-04

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1 Council on Medical Education Report 3-A-03, "Prevention of Harassment and Discrimination of  
2 Women in Medicine" was adopted as amended in lieu of Resolution 301-I-01. It presented a status  
3 report on sexual harassment and gender discrimination in the medical profession and offered guidance  
4 on developing policies to address harassment related issues.

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6 The adopted recommendations called on the AMA to reaffirm policy and to support and monitor  
7 programs and procedures that address sexual harassment, exploitation, and gender discrimination in  
8 the profession. The recommendations also included the following directive:

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10 "That the American Medical Association Guidelines for Establishing Sexual Harassment  
11 Prevention and Grievance Procedures be updated by the AMA Women Physicians Congress, and  
12 forwarded to the House of Delegates for approval, and include not only resources for training  
13 programs but also private practice settings. To facilitate wide distribution and easy access, the  
14 Guidelines will be placed on the AMA web site."

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15 This Board of Trustees report responds to that charge and presents for approval to the House of  
16 Delegates a resource document on addressing harassment. This includes a review of federal law and  
17 guidelines for preventing and dealing with sexual harassment in the physician workplace and medical  
18 training environment. The document also incorporates the AMA Model Harassment and Discrimination  
19 Grievance Policy and Procedure, as approved in the CME Report 3-A-03 recommendations. It is  
20 understood that the information included herein is relevant and applicable to addressing sexual  
21 harassment and discrimination regardless of the sex of the individuals involved. This report, however,  
22 refers most often to such issues for women in medicine as the group most likely to experience sexual  
23 harassment and gender discrimination.

24

## 25 **Introduction**

26

27 More women are in medical training and practice than ever before. According to the Association of  
28 American Medical Colleges (AAMC), 2003 marked the first year in which the number of medical school  
29 applications received from women exceeded those from men. Yet there continues to be a lack of a  
30 "critical mass" of women leaders throughout medical education, medical practice, and medical  
31 associations and societies. Women remain underrepresented in top faculty and administrative  
32 positions in medical schools, leading to a lack of role models for women students and the loss of that  
33 their perspective in medical leadership. Gender inequities in compensation and benefits also remain a  
34 problem, exacerbated by the fact that women physicians are more likely to work in specialties with  
35 less earning potential than in the more specialized disciplines such as surgery.

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36 As this increase in the number of women in medical school continues and permeates into medical  
37 practice, the profession must continue to examine gender-based training and practice issues, including  
38 sexual harassment and discrimination in all its forms. When women are not given equal opportunities  
39 nor viewed as equal partners in the medical community, this disrespectful behavior may result in

1 discrimination or sexual harassment. Sexual harassment is most often linked to offenders who are in  
2 positions of power or perceived power.

3  
4 Sexual harassment can cause intense psychological and physical distress, low self-esteem, economic  
5 hardships, and decreased work productivity or potential in individuals. In addition to the toll this  
6 takes on the harassed individual, harassment in the work place has an adverse affect on the institution  
7 or medical practice as a whole. The negative affects of sexual harassment reverberate throughout the  
8 profession - compromising patient care; professional collegiality and interaction; medical ethics;  
9 career satisfaction and professional advancement; and physician well-being and safety. As one  
10 woman physician explained, “If sexual harassment is not addressed, the next generation of physicians  
11 will learn that harassment is acceptable”. The elimination of gender-based harassment and  
12 discrimination is essential to maintaining high standards of professionalism in medicine.

### 13 14 **Addressing Sexual Harassment in Medicine**

15  
16 Sexual harassment education, support, prevention, and grievance procedures continue to be necessary  
17 as more women pursue careers in medicine. It is true that the number of instances of overt sexism in  
18 medical education has decreased in recent years. Institutional initiatives addressing sexual harassment  
19 have improved overall as a result of the widespread inclusion of specific language in medical school  
20 and residency program accreditation standards addressing harassment and its consequences.

21  
22 Despite such progress, however, there is a growing body of literature that documents the continued  
23 existence of discrimination and harassment. Harassment is reported and experienced by women  
24 medical students, resident physicians, medical school faculty, and practicing physicians. Many  
25 believe that instances of sexual harassment, discrimination, and sexism are often more difficult to  
26 address today because the issues are more subtle than before the laws were on the books and “political  
27 correctness” arrived. This may be especially true in the private practice environment where policies  
28 and grievance procedures may be nonexistent or less formalized than in education and training  
29 institutions.

30  
31 In a 1998 study published in *Internal Medicine*, the authors revealed that 36.9% of their women  
32 physician survey respondents reported having experienced sexual harassment. Authors of a study  
33 published in a 2002 *Academic Medicine* reported on survey results from senior medical students  
34 suggesting a belief that gender discrimination and sexual harassment is prevalent in medical  
35 education, particularly in some core clerkships. A later AAMC graduation questionnaire produced  
36 data, published in *Academic Medicine* in 2004, that showed 15% of medical student respondents  
37 reporting experiences of mistreatment during medical school, including sexual harassment and/or  
38 gender bias.

39  
40 Of note, the latter study also looked at institutional liability regarding sexual harassment, examining  
41 two cases (1998 and 1999) in which the US Supreme Court clarified that schools may be held liable  
42 for the sexual harassment of their students.

1 **Developing Harassment Policies and Procedures**

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3 Institutions, medical practices/organizations should develop clear statements of policy and procedures  
4 concerning sexual harassment/discrimination. To be effective, these policies and grievance  
5 procedures must be communicated effectively, and in writing, by employers and institutional  
6 governing bodies.

7  
8 A grievance procedure should be established including a grievance hearing/decision-making  
9 committee. The committee should be gender-balanced with members who represent a balanced view  
10 of the organization and with advisors or members trained in investigating sexual harassment  
11 complaints.

12  
13 The organization's or institution's commitment to prevent and address sexual harassment when it is  
14 reported or observed should be consistent and timely. Retaliation towards the complainant(s) or any  
15 party involved should not be tolerated. Organizations and employers should deploy the necessary  
16 resources, including appropriate legal review, in order to establish the most appropriate and efficient  
17 methods to fully address sexual harassment in their workplace.

18  
19 The AMA recommends that organizational policies on sexual harassment include the following:

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- 22 • The organization's formal position on sexual harassment, e.g. a statement of zero  
23 tolerance for sexual harassment.
  - 24 • The legal definition of sexual harassment and the protections for and rights and  
25 obligations of all parties.
  - 26 • Examples of sexual harassment in the workplace/training setting, including verbal,  
27 physical, and workplace violations.
  - 28 • An assurance of confidentiality and discretion in dealing with matters of harassment and  
29 discrimination, and of the organization's commitment to a timely, confidential  
30 investigation of any alleged instance.
  - 31 • A statement addressing the obligations of the harassed individual or observers of  
32 harassment to initiate the grievance process and/or notify the institution or employer so  
33 that corrective action can be taken immediately.
  - 34 • A chronological timeline for the filing of a complaint, initiation of an investigation, and  
35 resulting corrective or disciplinary action.
  - 36 • A description of disciplinary actions possible in response to a finding of harassment or  
37 discrimination or to instances of retaliation to individuals or groups involved.
  - 38 • An explanation of the peer review immunity protections afforded under state and federal  
39 law to all sexual harassment committee members.
  - 40 • A provision for and an explanation of an appeals process.

41 The AMA recommends that organizations, institutions, and medical practices demonstrate their  
42 commitment to the adherence to and enforcement of their sexual harassment policies through the  
43 following actions:

- 44
- 45 • Distribution of the sexual harassment policy and grievance procedures in written form to  
46 all employees/employers, physicians-in-training, etc.
  - 47 • Asking all employers, management, employees, residents, and students sign the policy as  
48 declaration of commitment to the policy.

- 1 • Including the policy in employee orientation/human resources materials and resident  
2 physician contracts and posting the policy in a visible area(s).
- 3 • Providing information on sexual harassment in training sessions and through other  
4 educational resources and forums.
- 5 • Establishing and supporting a fair and confidential grievance process for addressing  
6 instances of perceived sexual harassment.
- 7 • Demonstrating a zero tolerance for retaliation against those reporting or witnessing  
8 grievances.
- 9 • Taking appropriate and immediate corrective or disciplinary action, as prescribed by the  
10 grievance body, to address instances of harassment.

## 11 **Conclusion**

12 The Board of Trustees commends the AMA Women Physicians Congress for its efforts in addressing  
13 this important subject. The medical profession must work to prevent and address sexual harassment  
14 in all environments - medical schools, clerkships, residency programs, private and group practices,  
15 and academic faculties – in order to ensure career satisfaction for all physicians and create an  
16 environment that is based on mutual respect and trust. These qualities translate directly into quality  
17 patient care, excellence in medical education, and high professional standards.

18 The attached document (Appendix) provides additional guidelines on addressing sexual harassment,  
19 including:

- 20 • An overview of the law concerning harassment;
- 21 • The critical elements of an effective sexual harassment policy and grievance procedure;
- 22 • Accreditation policies addressing harassment in medical education and training.
- 23 • Guidelines for addressing harassment in medical practice.

24 The Board of Trustees recommends that the following be adopted and the remainder of this report be  
25 filed:

- 26 • That our American Medical Association approve the Guidelines for Preventing and Addressing  
27 Harassment in the Medical Profession for posting on the AMA web site, and other distribution  
28 where appropriate.

29 Fiscal Note: Staff cost estimated at less than \$500 to implement.

## 30 **AMA Policy:**

31 H- 65.987 Gender Exploitation in the Workplace  
32 H-295.955 Teacher-Learner Relationship In Medical Education  
33 H-295.964 Enforcement of AMA Policy on Sexual Exploitation and Harassment  
H-295.970 Sexual Harassment and Exploitation between Medical Supervisors and Trainees  
H-525.998 Women in Organized Medicine  
E-3.08 Sexual Harassment and Exploitation Between Medical Supervisors and Trainees  
D-295.962 Prevention of Harassment and Discrimination of Women in Medicine  
D-525.996 Prevention of Harassment and Discrimination of Women in Medicine

**APPENDIX**

**American Medical Association  
Guidelines for Preventing and Addressing Harassment  
in the Medical Profession**

Medical organizations and training institutions must have in place sound policies and procedures for addressing harassment and discrimination in medicine. There have been encouraging data showing that organizational/institutional interventions, including education and training in preventing sexual harassment and raising gender sensitivity, can both prevent and remedy sexual harassment.

Most medical schools and residency programs have institutionalized policies and grievance procedures to address and prevent sexual harassment. There is less evidence that comprehensive policies and procedures exist for physicians in hospitals, managed care companies, and in private and group practices.

Through this document, the American Medical Association (AMA) provides guidance to assist physicians and physician employers in preventing and addressing sexual harassment in their organizations and institutions. However, it is strongly suggested that all parties involved consult with their own legal counsel, local EEOC officers, and other advisors to create, implement, and interpret such sexual harassment policies and grievance procedures.

## **ACCREDITATION STANDARDS FOR MEDICAL SCHOOL AND RESIDENCY TRAINING PROGRAMS**

Medical schools and residency training programs are required to have discrimination and harassment grievance policies and procedures in order to maintain their accreditation. Nearly all medical schools or parent institutions have their own unique policy statements and procedures for handling informal and formal complaints of harassment and discrimination specific to the school's mission. Some schools have established Affirmative Action Offices, Ombuds Offices, or EEOC Liaison Offices. Some schools have established "sexual harassment officer" positions while others have established special committees (ie, Standing Committee on Rights and Responsibilities) or special boards (ie, Board on Sexual Harassment).

### **I. Liaison Committee on Medical Education (LCME)**

The standards of the LCME for accreditation of medical education programs leading to the MD degree require that each medical school or its parent university define the standards of conduct in the teacher-learner relationship. Schools should develop and widely promulgate written procedures that allow medical students to report violations of these standards, such as incidents of harassment or discrimination, without fear of retaliation. The procedures also should specify mechanisms for the prompt handling of such complaints, and for the educational methods aimed at preventing unlawful conduct. Copies of these procedures must be made available to the LCME site visit team in order to n medical school accreditation.

### **II. Accreditation Council on Graduate Medical Education (ACGME)**

The Institutional Requirements of the ACGME clearly state that sponsoring institutions and programs must provide resident physicians with a written agreement or contract outlining the terms and conditions of their appointment. The contract must include the institutional policies and procedures covering sexual and other forms of harassment. Institutions must have a Graduate Medical Education Committee (GMEC) with responsibility for monitoring and advising on all aspects of residency education, including the quality of education and the work environment. A process must be in place by which an individual resident physician can address concerns in a confidential and protected manner. There needs to be establishment and implementation of fair institutional policies and procedures for resolution of resident complaints and grievances.

If a sponsoring institution is non-compliant with ACGME Institutional Requirements, a resident may submit a complaint to the ACGME. The Executive Director of the ACGME will process the complaint according to established procedures.

## **GUIDELINES FOR DEVELOPING AND ESTABLISHING SEXUAL HARASSMENT PREVENTION AND GRIEVANCE PROCEDURES**

*The AMA acknowledges with thanks the contributions of the firm of Vedder, Price, Kaufman & Kammholz, P.C. in the development of the following section. (<http://www.vedderprice.com>)*

Legal considerations require the elimination of harassment based on sex, race, national origin, disability, age, and other protected classifications in workplaces, large and small. These guidelines focus on preventing sexual harassment.

### **I. The Law – A General Overview of Sexual Harassment**

#### **A. Definition of Sexual Harassment**

Sexual harassment is a violation of federal, state, and many local laws. Sexual harassment is a form of sex discrimination. The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing and interpreting federal discrimination laws, issued sexual harassment guidelines in 1980.<sup>1</sup> The EEOC defines sexual harassment as:

1. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, where,
  - a. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; or
  - b. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual.
2. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, where such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment.

In essence, the EEOC and the courts have recognized that sexual harassment comes in two forms: quid pro quo and hostile work environment. The first occurs when a manager or supervisor makes submission to sexual advances or other sexual conduct a condition of remaining employed, advancing, or receiving other benefits. A hostile environment exists where the workplace is rife with sexual conduct, comments, or other behavior.

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<sup>1</sup> EEOC's guidelines on sexual harassment are available in the Code of Federal Regulations, at 29 C.F.R Part 1604.11 (<http://frwebgate.access.gpo.gov/cgi-bin/getcfr.cgi?TITLE=29&PART=1604&SECTION=11&YEAR=2001&TYPE=TEXT>). For additional sexual harassment on-line resources click here (hyperlink).

In examining sexual harassment, the courts have made clear that a complaining employee must show that the conduct was unwelcome and that the employee did not consensually participate.<sup>2</sup> And in determining whether a sexually hostile work environment exists, the courts will examine:

1. frequency of the conduct;
2. severity of conduct;
3. whether conduct is physically threatening or humiliating, or a mere offensive utterance; and
4. whether the conduct unreasonably interferes with an employee's work performance.<sup>3</sup>

In further developing the law of sexual harassment, the Supreme Court has held that same-sex sexual harassment is also prohibited.<sup>4</sup> In this same case, the Supreme Court also pointed out that harassment law is not a "general civility code." The hostile environment still must be so objectively offensive as to alter the conditions of the victim's employment. The use of words or deeds having a sexual connotation is not enough automatically to constitute sexual harassment.

#### B. Employer Liability for Supervisor/Manager Harassment

Employers are subject to vicarious liability for unlawful harassment by a "supervisor with immediate (or successively higher) authority over the employee."<sup>5</sup> An employer will be automatically liable (and have no defense) for a supervisor's harassment if it involves a "tangible employment action."

Although any employment action qualifies as "tangible" if it results in a significant change in employment status, examples of such actions include:

1. hiring;
2. promotion, demotion, or failure to promote;
3. undesirable reassignment;
4. actions resulting in a significant change in benefits;
5. compensation decisions; or
6. undesirable work assignments.

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<sup>2</sup> Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

<sup>3</sup> Harris v. Forklift Systems, 510 U.S. 17 (1993).

<sup>4</sup> Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998).

<sup>5</sup> Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998); Farragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).

On the other hand, if the harassment solely involves “hostile environment” harassment by a supervisor, an “affirmative defense” may exist which enables an employer to limit or avoid damages altogether. The employer will not be liable if it can prove:

1. That it exercised “reasonable care” to prevent and correct promptly any sexually harassing behavior, generally by proving the existence of an anti-harassment policy with an adequate complaint procedure; and
2. That the alleged victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to otherwise avoid harm.

C. Harassment by Coworkers and Third Parties

Employers generally are liable for coworker harassment where the employer (or its agents or supervisors) knew or should have known of the harassment and failed to take “immediate and appropriate corrective action.”<sup>6</sup> An employer may also be liable for harassing conduct of its customers or patients and other third parties in the workplace where it knew or should have known about the harassment and failed to take “immediate and appropriate corrective action.”<sup>7</sup>

In determining an employer’s liability, the EEOC looks to the extent of the employer’s control over the harassing third party. In addition, the EEOC has taken the position that an employer cannot claim lack of knowledge as a defense to such harassment, if it failed to communicate to employees that such claims should be brought to the attention of management and that the complaints would promptly be addressed.<sup>8</sup>

## II. Preventing Sexual Harassment

There are actions all employers, large or small, should take to prevent sexual harassment. The key action is the implementation and dissemination of an effective, comprehensive anti-harassment policy, coupled with a user-friendly complaint procedure. Supporting acts such as training and effective enforcement are also important, in part because the courts recognize them as a part of a valid employer defense. Underscoring that no retaliation will occur in response to complaining about harassment is also critical because a retaliation charge is a possible separate claim of liability against the employer.

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<sup>6</sup> 29 C.F.R. § 1604.11(d).

<sup>7</sup> 29 C.F.R. § 1604.11(e). In determining an employer’s liability the EEOC looks to the extent of the employer’s control over the harassing third party. In addition, the EEOC has taken the position that an employer cannot claim lack of knowledge as a defense to such harassment, if it failed to communicate to employees that such claims should be brought to the attention of management and that the complaints would promptly be addressed.

<sup>8</sup> EEOC Enforcement Guidance No. 915.002 n.58.

Employees bear some responsibility to prevent workplace harassment as well. Employees need to take advantage of available complaint procedures in a timely manner, provide truthful information regarding the harassment, and cooperate in the employer's investigation.

A. Critical Elements of an Effective Anti-Harassment Policy

An anti-harassment policy should prohibit all types of harassment. Although the existence of a policy will not guarantee that no harassment occurs, the absence of a policy will make it very difficult for an employer to be viewed as having exercised reasonable care to prevent it. The policy gives employees an understanding of how the employer will treat and respond to allegations of harassment. As such, it is as much a benefit to the employee as it is to the employer.

Anti-harassment policies and complaint procedures should contain, at a minimum, the following elements: (1) a description of prohibited behavior; (2) a statement that such behavior will not be tolerated and that those who engage in it will be disciplined; (3) a no retaliation provision; (4) a complaint procedure; (5) a description of the investigative process that ensures prompt and effective action; and (6) an assurance of confidentiality to the extent feasible and an assurance that prompt and appropriate corrective action will be taken.

B. Types of Conduct Prohibited

All sexual advances, request for sexual favors, and words or conduct of a sexual nature having the purpose or effect of creating a hostile, intimidating or offensive working environment should be prohibited. Many employers go one step further by prohibiting all demeaning, offensive, and inappropriate language, innuendo, and jokes, sexual or otherwise. Examples of prohibited behavior should be included. Apart from helping assure a productive, respectful workplace, broad policies that prohibit all offensive conduct serve another useful purpose: the employer can conclude that its policy was violated by an employee and take appropriate remedial or disciplinary action without necessarily making an admission that the conduct violated the law. Be aware, however, that a "zero tolerance" policy is effective only if enforced consistently, and inconsistent enforcement may be used against an employer in litigation.

C. Protection Against Retaliation

An essential element of an anti-harassment policy is a clear statement that an employer will not tolerate adverse treatment of an employee because he/she reported harassment or provided information related to a complaint. Any such retaliation can be a separate source of liability against the employer.

D. Confidentiality of Complaints and Investigations

The policy should explain that, to the extent possible, complaints will be dealt with in a confidential manner. Complete confidentiality cannot be granted since such a promise would impede an effective investigation. Information relating to an investigation should be revealed on a need-to-know basis.

E. Accessible and Effective Complaint Procedures

The policy should clearly define the complaint procedures and ensure that the procedures do not present unreasonable obstacles so that all employees may readily take advantage of the procedures. If called to determine the effectiveness of a policy, courts will likely look at the accessibility of the procedure to employees and the authority of those charged with investigating and remedying complaints.

It is important that responsibility for administration of the complaint procedure be assigned to a high-level manager, or to someone with the authority to enforce remediation recommended by others. There should be a choice of individuals who can receive complaints, and it is advisable to include the CEO, the COO, or a senior human resources official to show that the policy is taken seriously by the company. However, it is not recommended that the policy provide that complaints may be taken to all supervisors and managers. This increases the possibility that the complaint might be mishandled.

F. Training and Acknowledgement

The policy is useless to prevent sexual harassment unless its existence is known to employees. Therefore, the policy should be: included in all handbooks and personnel policy manuals, posted on bulletin boards, distributed to all new hires, and periodically redistributed, with re-training, to existing employees. Employees should acknowledge receipt of the policy in writing.

Training sessions should be conducted for employees and acknowledgments of the training should be in writing. All supervisors and managers should be trained to recognize and report harassment they observe or hear about, even if the policy does not provide that complaints may be made to any supervisor or manager. All employees should be trained in the policy's prohibitions and encouraged to use the complaint procedure when appropriate. Re-training and dissemination of the policy should occur on a periodic basis.

G. Investigations

An employer's first response to a harassment allegation should be to separate the parties, or otherwise minimize contact between the parties to the extent reasonably possible, in order to stop the alleged harassment.

The following addresses discrimination and harassment investigations specifically, but generally apply to investigations of other misconduct as well. All claims of sexual harassment should be investigated, even if the accuser requests that the employer not do so. Investigations should be commenced and completed as quickly as practicable. A negative inference may be drawn where an employer delays its response to a complaint or has encouraged an employee to delay his or her complaint.

An immediate supervisor should not be designated as the investigator, as the supervisor may be implicated or not as objective as preferable. Thus, the employer should designate someone outside the line of supervision, experienced in human resources matters or who has received advice or training in handling such matters.<sup>9</sup>

The investigation should be thorough and provide procedural fairness to both the accuser and the accused. At least one other unbiased person should be present at all interviews. Both the accuser and the accused should be questioned in order to get their respective sides of the story, as well as to identify other employees (and perhaps other individuals) who might have knowledge of the situation. Other employees with relevant information, such as those who are identified as witnesses to the harassment or who should have knowledge of other incidents of harassment by the accused, should likewise be interviewed.

When investigating a claim of harassment, the following steps should be followed:

1. Identify type of complaint, quid pro quo (this for that), or hostile environment;
2. Review personnel files of accused and accuser (other complaints, disciplinary records) and any documents, journals, recordings, photographs, voice mails, e-mails, telephone records, or other items that may be relevant to the allegations of harassment; and
3. Keep accused and accuser separate (temporary reassignment or reporting relationships, transfer of accused – or accuser if he or she requests, temporary paid leave).

The investigator should take notes during interviews, or soon thereafter, for the purpose of maintaining accurate records. The investigator should also create and maintain a confidential investigative file separate from personnel files.

#### H. Reaching a Determination

After the employer's investigation is complete, the investigator should prepare a final written report, documenting his or her findings. Generally, the investigator's report should detail the steps the investigator took in examining the complainant's allegations and should explain any conclusions the investigator has made. The employer should inform the complainant and the alleged harasser of its findings in the matter.

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<sup>9</sup> An outside investigator, possibly an attorney, may be an appropriate investigator, especially when the accused holds a high-level position, or when the complained-of conduct is severe and the exposure to liability is high, or when attorney-client privilege is a concern. One important caveat in designating an attorney as an investigator is that privileges may be waived if litigation ensues and the employer raises the defense of adequate investigation. There is also the possibility that if the attorney is called as a witness, he or his firm may be disqualified from representing the employer.

If the investigation is inconclusive or concludes that no policy violation occurred, the complainant should be informed, thanked for using the process and reminded that retaliation is prohibited.

If it is determined that the sexual harassment policy has been violated, prompt and appropriate remedial action designed to end the offending conduct and prevent future conduct must also be taken.

Regardless of the investigator's findings, follow-up inquiries should be made to ensure that the conduct has not resumed and that no person has suffered any retaliation.

I. Appropriate Remedial Action

When it is determined that sexual harassment has occurred, prompt remedial action must be taken to end the harassment and prevent future harassment. What constitutes appropriate remedial action depends upon the circumstances. Appropriate remedial action should be commensurate with the nature and severity of the harassment, the existence of any prior incidents, and the effectiveness or lack thereof of any prior remedial steps.

Remedial action may include: halting any ongoing harassment; taking prompt disciplinary action, including the possible termination of the harasser; taking effective actions to prevent the recurrence of harassment; and making the complainant whole by restoring any lost employment benefits or opportunities. Educational training in gender sensitivity and behavior modification, and/or mounting penalties for the harasser may be used as to the harasser. In some circumstances, an outside consultant or mediator may be brought in to repair work relationships.

**III. Hospital and Health Care Practice Issues**

Health care facilities<sup>10</sup> have an obligation to protect employees from sexual harassment, whether the alleged perpetrator is another employee, independent contractor, or physician. Unpaid volunteers and interns, however, do not have a cause of action pursuant to federal law (Title VII) and thus, do not legally trigger a health care facility's duty to investigate.<sup>11</sup> That is not to say, however, that hospitals and health care facilities should not make it a practice of investigating intern and unpaid volunteer complaints. While not required by law, these voluntary investigations may prevent harassment in the future before a pattern is established. Indeed, although not required under Title VII, many institutions have adopted bylaws or other rules which prohibit such behavior and establish investigation procedures for all complaints, no matter the complainant's employment status.

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<sup>10</sup> For purposes of this section, the term "health care facility" refers to hospitals, clinics, teaching universities and similar medical institutions.

<sup>11</sup> See *O'Connor v. Davis*, 126 F.3d 112, 119 (2d Cir. 1997) (denying recovery to a college medical intern for alleged sexual harassment by a physician at the hospital); Eric Matusewitch, Courts Ruling That Title VII Does Not Protect Unpaid Workers, 5(2) Sexual Harassment Litig. Rep., April 1999, at 4.

Patients can also qualify as harassers. However, a hospital’s liability for patient -physician harassment is limited to a key inquiry: Did the hospital have reason to believe that the patient was behaving improperly? If so, the hospital may be held vicariously liable for harassment under federal law. As one court has said, an employer may be liable for a non-employee’s harassing conduct if it “ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”<sup>12</sup>

A. Physicians

There is a fundamental distinction between physicians and others in the health care setting. Doctors often are not employees of the hospital; they are said to enjoy “privileges” to practice at the hospital but, unlike the average employee, they are generally not expected to comply with every rule, policy or practice of the hospital or facility. On the other hand, non-physicians, such as nurses, medical technicians, administrators, and orderlies are usually direct employees of the Health Care Facility.

a. Physicians as Harassers

Health care facility employees subjected to severe or pervasive sexual harassment by a non-employed physician with staff privileges may seek to have the hospital held vicariously liable for the physician’s alleged harassment.<sup>13</sup> The health care facility has a duty to remedy an alleged abusive condition created by a physician even though he or she is not an employee. The same duty to investigate and discipline arises as in co-worker or third-party harassment. Keep in mind, however, that health care facilities may be limited in how they can discipline a physician based on medical staff bylaws and other rules.

b. Physician-Patient Harassment

Physicians who are found to have harassed patients may be held liable under a state’s malpractice laws. Health care facilities may also find liability under state tort law.

c. Physician-Physician Harassment

All too often it is physicians themselves who experience harassment, whether it be racial, sexual or otherwise, stemming from their colleagues.

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<sup>12</sup> *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 756 (9th Cir. 1997) (citing 29 C.F.R. § 1604.11(e)).

<sup>13</sup> 29 C.F.R. §1604.11(e) (employers may be liable for sexual harassment perpetrated by non employees in the workplace, where the employer knows or should have known of the conduct, and fails to take immediate and appropriate corrective action).

Because of their often unique employment or other relationships with the hospital or health care facility, physicians are limited in what type of remedy they may seek from a health care facility. Although the duty to investigate is triggered, corrective action is often defined by the health care facility's medical staff bylaws and limited by the physician-harasser's due process rights.

Experience has shown that where possible, internal health care facility alternative dispute resolution is an effective mechanism to end harassing behavior. For example, a health care facility's internal grievance procedure may be adapted to adequately address a physician's concerns of harassment. Different than a means to discipline, the grievance process can serve as an opportunity to involve an independent third party into the situation to mediate and address concerns of harassment.

d. Physicians' Rights

Absent a contract or other circumstances establishing specific restrictions, a health care facility may suspend or discharge an employee without notice at any time. However, even if a physician is an at-will employee of the health care facility, suspending or terminating him or her or her may not be so simple. Courts have repeatedly found that a physician's right to practice in a state or local government health care facility is a property right that cannot be suspended or taken away without certain due process considerations. Most private institutions also afford certain due process rights to their physicians through the medical staff bylaws and grievance procedures. Therefore, there are protections unique to a physician with hospital privileges that must be considered in determining the appropriate and allowable action to be taken where sexual harassment or other misconduct is alleged. These due process protections include notices, fair hearings, statutory and regulatory licensure proceedings, and those rooted in a hospital's internal bylaws.

If a health care facility is a state entity, a physician has a right to due process before a hospital may terminate his or her privileges. Some courts have held that due process rights are implicated in revocation of hospital privileges where the revocation occurs for disciplinary reasons. Further, physicians are generally safeguarded against a hospital or health care facility suspending them pending an investigation. Summary suspension of a physician's privileges for sexual harassment is only justifiable when there is a reasonable basis to conclude that there is a danger that the physician's misconduct will have an immediate adverse impact on patient care.

e. Hospital Grievance Procedures

Depending on the facility, a health care facility may employ its own internal grievance process for handling complaints of harassment.

Regardless of employee status, the grievance process serves as an excellent mechanism for resolving disputes. Employees and doctors alike should be cognizant of the internal grieving mechanics unique to their facility.

#### **IV. Additional Sexual Harassment Prevention Resources**

- EEOC Policy Guidance on Current Issues of Sexual Harassment-  
<http://www.eeoc.gov/policy/docs/currentissues.html>
- Policy Guidance on Employer Liability under Title VII for Sexual Favoritism -  
<http://www.eeoc.gov/policy/docs/sexualfavor.html>
- Sexual Harassment Training and Outreach  
<http://www.eeoc.gov/outreach/index.html>
- Information on Sexual Harassment for Small Employers  
<http://www.eeoc.gov/employers/smallbusinesses.html>
- Civil Rights and Criminal Justice: Primer on Sexual Harassment  
<http://www.ncjrs.org/txtfiles/harass.txt>

This information is from The National Criminal Justice Reference Service (NCJRS) which is one of the most extensive sources of information on criminal and juvenile justice. This article from "Research in Action" examines civil rights laws as they affect the criminal justice community, takes a close look at sexual harassment--a form of sexual discrimination that is in the forefront of the American consciousness.

- Sexual Harassment FAQ. From CourtTV  
[http://www.court tv.com/archive/legalcafe/work/sex\\_harass/sexual\\_background.html](http://www.court tv.com/archive/legalcafe/work/sex_harass/sexual_background.html)
- Sexual Harassment Hotline Resource List. Organized by state; from Feminist Majority Foundation Online  
<http://www.feminist.org/911/harass.html>
- Sexual Harassment Links. compiled by the HRM Mega Law Site  
<http://www.hrmgt.com/hrlaw/sexhar.htm>

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## MODEL GRIEVANCE POLICIES AND PROCEDURES

### I. Model Language for Medical Staff Bylaws

1 *According to the AMA Physician's Guide to Medical Staff Bylaws the following is recommended for*  
2 *inclusion in development of medical staff bylaws. ([http://www.ama-assn.org/ama1/x-](http://www.ama-assn.org/ama1/x-ama/upload/mm/395/bylaws090602.pdf)*  
3 *[ama/upload/mm/395/bylaws090602.pdf](http://www.ama-assn.org/ama1/x-ama/upload/mm/395/bylaws090602.pdf))*

#### Sample Bylaw: Harassment

6 Harassment by a medical staff member against any individual (e.g, against another medical  
7 staff member, house staff, hospital employee, or patient) on the basis of race, religion, color,  
8 national origin, ancestry, physical disability, mental disability, medical disability, marital  
9 status, sex, or sexual orientation shall not be tolerated.

11 [“Sexual harassment” is unwelcome verbal or physical conduct of a sexual nature which may  
12 include verbal harassment (such as epithets, derogatory comments, or slurs), physical  
13 harassment (such as unwelcome touching, assault, or interference with movement or work),  
14 and visual harassment (such as the display of derogatory cartoons,  
15 drawings, or posters).

17 Sexual harassment includes unwelcome advances, requests for sexual  
18 favors, and any other verbal, visual, or physical conduct of a sexual nature when (1)  
19 submission to or rejection of this conduct by an individual is used as a factor in decisions  
20 affecting hiring, evaluation, retention, promotion, or other aspects of employment; or (2) this  
21 conduct substantially interferes with the individual’s employment or creates an intimidating,  
22 hostile, or offensive work environment. Sexual harassment also includes conduct which  
23 indicates that employment and/or employment benefits are conditioned upon acquiescence in  
24 sexual activities.

26 All allegations of sexual harassment shall be immediately investigated by  
27 the medical staff and, if confirmed, will result in appropriate corrective  
28 action, from reprimands up to and including termination of medical staff  
29 privileges or membership, if warranted by the facts.]

30 California Medical Association Model Medical Staff Bylaws Section 2.6.

32 See also:

#### Nondiscrimination

34 JCAHO MS.5.9 requires that: “Gender, race, creed or national origin are not used in making  
35 decisions regarding the granting or denying of medical staff membership or  
36 privileges.” State, federal, or municipal laws and regulations applicable to the hospital or  
37 healthcare entity may expand this elementary nondiscriminatory requirement.

## **II. AMA Model Harassment and Discrimination Grievance Policy and Procedure**

*(The following section is excerpted from Report 3 of the AMA Council on Medical Education, in recommendations adopted by the AMA House of Delegates, June 2003, as follows: “That the AMA Model Harassment and Discrimination Grievance Policy and Procedure be widely distributed throughout the medical education community and placed on the AMA Web site.”)*

The following model language is offered as an example of written grievance and fair hearing policy and procedure for issues of harassment and discrimination. It is not intended to replace an existing grievance procedure or fair hearing process nor is it intended to abrogate any rights protected by law.

### **Statement of Policy**

It is the policy of \_\_\_\_\_ to provide an environment that is free from harassment and discrimination; therefore harassment and discrimination is prohibited and will not be tolerated. Persons found to be in violation of this policy shall be subject to disciplinary action which may include, but is not limited to, written warning, demotion, transfer, suspension, expulsion, dismissal or termination.

### **Definition**

Harassment consists of unwelcome conduct whether verbal, physical or visual that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, sex, sexual orientation, national origin, age, veteran status, disability, marital status, citizenship or other projected group status, and that: 1) has the purpose or effect of creating an intimidating, hostile or offensive work or educational environment; 2) has the purpose or effect of unreasonably interfering with an individual’s work or school performance; or 3) otherwise adversely affects an individual’s academic status, employment opportunities or tangible job benefits.

Sexual harassment includes making unwelcome sexual advances or requests for favors or other verbal, physical or visual conduct of a sexual nature where: 1) submission to such conduct is made either explicitly or implicitly a term or condition of academic performance or employment; or 2) submission to, or rejection of, such conduct is used as a basis for making employment or educational decisions; or 3) such conduct unreasonably interferes with work or academic performance or creates an intimidating, hostile or offensive work or learning environment.

In addition, consensual sexual relationships between individuals in a supervisory relationship (eg, supervisor or faculty members) and their subordinates (eg, trainees or students) represent inappropriate conduct to the extent that, even though characterized by mutual consent, may tend to raise ethical concerns because of the potential for exploitation by or favoritism towards one of the parties or, because of the possibility that the faculty member’s or the supervisor’s objectivity may be compromised.

### **Procedure for Reporting Harassment and Discrimination**

1. **Grounds for a Hearing.** The following actions shall entitle the medical student, resident physician, faculty member, administrator, medical staff member, or practicing physician to a hearing upon a timely and proper request:
  1. Unlawful discrimination on the basis of age, color, sex, disability, marital status, national origin, race, religion, citizenship, or sexual orientation.
  2. Retaliatory conduct, which includes any action against an individual because he/she has opposed any unlawful, discriminatory practice, made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing involving unlawful discrimination.
  
2. **Requirements for Filing a Grievance.** A medical student, resident physician, faculty member, administrator, medical staff member, or practicing physician shall file a written discrimination complaint:
  1. With \_\_\_\_\_ (ie, the Affirmative Action Office, Ombuds Office, EEOC Liaison Office, Human Resources Department).
  2. Stating the grounds upon which the grievance is based.
  3. Within \_\_\_\_\_ (ie, 90-120 days) following the alleged discriminatory act or the date on which the complainant knew or reasonably should have known the act took place.
  
3. **Informal Hearing**
  1. The \_\_\_\_\_ (ie, Affirmative Action Office, Ombuds Office, EEOC Liaison Office, Human Resources Department) shall receive the complaint, assist the complainant in defining the charge and preparing the complaint.
  2. The \_\_\_\_\_ (ie, Affirmative Action Office, Ombuds Office, EEOC Liaison Office, Human Resources Department) shall apprise the respondent and his/her administrative officer of the charge and its supporting documents, assist them in interpreting the complaint, and suggest a format for responding to the complaint.
  3. The \_\_\_\_\_ (ie, Affirmative Action Office, Ombuds Office, EEOC Liaison Office, Human Resources Department) shall have \_\_\_\_\_ (ie, 30-45 working days) to resolve the complaint informally.
  4. If a mutually acceptable resolution is achieved, the case shall be closed. A written notice shall list findings and indicate the agreement reached, and shall be signed and dated by the complainant, the respondent, and the staff member of the \_\_\_\_\_ (ie, Affirmative Action Office, Ombuds Office, EEOC Office, Human Resources Department), and copies provided to both the complainant and respondent.
  5. If conciliation is not possible, the \_\_\_\_\_ (ie, Affirmative Action Office, Ombuds Office, EEOC Liaison Office, Human Resources Department) shall so notify both complainant and respondent in writing, and shall advise complainant of his/her right to proceed to a formal hearing. The complainant shall have \_\_\_\_\_ (ie, 10-15 working days) to advise the \_\_\_\_\_ (ie, Affirmative Action Office, Ombuds Office, EEOC Liaison Office, Human Resources Department) of his/her desire to have a formal hearing.

4. **Formal Hearing.** A hearing panel shall be appointed which:
  1. Is comprised of not more than \_\_\_\_\_ (ie, 5-7) or less than \_\_\_\_\_ (ie, 3) members of \_\_\_\_\_ (ie, the medical staff, administration, faculty), \_\_\_\_\_ (ie, 1-2) of whom are \_\_\_\_\_ (ie, medical students, resident physicians, practice staff). Does not include members who have been involved in the action/decision giving rise to the hearing; and
  2. Includes members who are mutually agreeable to both parties.
  
5. **Hearing Procedure.** A hearing shall entitle the complainant and respondent to:
  1. Representation by an attorney ;
  2. Call witnesses;
  3. Introduce evidence;
  4. Cross examine witnesses; and
  5. Rebut evidence.
  
6. **Final Decision of the Panel.** Upon conclusion of the formal hearing, the complainant and respondent shall receive a written recommendation/finding from the panel not more than \_\_\_\_\_ (ie, 10-20 days) after the conclusion of the hearing. The \_\_\_\_\_ (ie, Affirmative Action Office, Ombuds Office, EEOC Liaison Office, Human Resources Department) shall ensure that the panel's recommendations are timely implemented and that no retaliatory actions are taken against the complainant or those who were called as witnesses at the hearing.