Sexual Harassment in Healthcare

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Reviewed September 2026, Expires September 2028
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Purpose

The purpose of this course is to define sexual harassment, describe court cases, describe prohibited behavior and types of harassment, and steps required to file a complaint.

Goals

Upon completion of this course, the healthcare provider should be able to:

- Discuss Title VII of the Civil Rights Act.
- Explain the role of the US Equal Employment Opportunity Commission (EEOC).
- Differentiate between *quid pro quo* and a hostile work environment.
- Describe at least 3 sexual harassment cases.
- Describe at least 4 prohibited behavior according to the EEOC.
- List and describe 5 types of sexual harassment.
- Discuss those at risk for sexual harassment.
- Describe 5 elements of the complaint process.

Introduction

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The healthcare industry is not exempt from sexual harassment; in fact, over 50% of female nurses, physicians, and students report experiencing sexual harassment. Sexual harassment is unwelcome conduct, on the basis of gender, that affects a person's ability to do his or her job (or complete studies), including unwelcome sexual advances, verbal or physical conduct of a sexual nature, and requests for sexual favors. Although most claims of sexual harassment are made by females, there have been increasing charges of sexual harassment of males.

The original Civil Rights Act of 1964 prohibited discrimination based on race, sex color, national origin, or religion and protected females against sexual harassment. Through revision (1991) and court decisions, the law has expanded to cover gender bias and harassment against both males and females, including same-sex harassment. Individual states have laws regarding sexual harassment, sometimes with broader application than Federal laws.

The US Equal Employment Opportunity Commission (EEOC) is responsible for implementation of the laws. The Age Discrimination in Employment Act (ADEA) of 1967 prevents discrimination based on age and protects those ≥40 years and is often a co-factor in sexual harassment issues. Preventing sexual harassment and taking proactive steps to deal with harassment that does occur is especially important, as the Supreme Court has ruled that employers are responsible for eliminating sexual harassment from the workplace. In a 2004 decision, the Supreme Court ruled that an employer is strictly liable for harassment that results from a supervisor's official act, but is subject to liability for other types of supervisor harassment only if employer

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negligence is established, such as may occur if the employer fails to take appropriate action resulting from the claim.

How is sexual harassment defined?

The Supreme Court has outlined two different types of sexual harassment covered by Title VII of the Civil Rights Act:

- *Quid pro quo*: Job security, advancement, or benefits are tied to sexual favors. This type includes unwelcome sexual advances, requests for sexual favors, or physical or verbal conduct of a sexual nature that are tied directly or implicitly to employment.

- Hostile work environment: Inappropriate behavior is so pervasive and severe that it permeates the workplace and interferes with the individual's ability to carry out the duties of the job.

Quid pro quo is somewhat easier to understand because it's more straight-forward: "Sleep with me if you want to keep your job" doesn't leave a lot of room for interpretation; but, in fact, the pressure to provide sexual favors may be more subtle and may be implied rather than directly stated. "Let's go out for a drink and talk about that promotion" may be a *quid pro quo* violation. Or not. Additionally, if the work environment becomes so intolerable due to sexual harassment that the person being harassed feels compelled to resign, this person can bring a charge of **constructive discharge**, which establishes a claim of *quid pro quo* because the employee was forced to lose employment because of sexual harassment.

If a person is fired, demoted, or refused promotion, receives a poor evaluation, or is reassigned to a lesser position because of rejecting a sexual advance, this constitutes sexual harassment. If the same thing happens simply because the person is a female or a male, this also constitutes sexual harassment because the action was based on the person's gender.

Hostile work environment violation is more subjective and covers a far wider range of behaviors, including unwelcome verbal, non-verbal, visual, psychological, and physical harassment of a sexual nature. More importantly, the harassment does not have to be directed at the individual making the complaint. If an individual observes sexual material or behavior or hears statements of a sexual nature that offends him or her and interferes with the ability of that person to do his or her job, then that person is the victim of sexual harassment. Most *quid pro quo* cases also include a hostile work environment.

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Court cases	
Female v Verizon Communications, Inc	A female employee charged she was constantly called a "bitch" and "stupid" and was denied equipment, access to public restrooms, denied overtime, subjected to discipline for acts common to men, and forced to use bathrooms without locks. The court agreed this constituted a hostile work environment.
Female v City of Beaumont	Female police officer charged she was denied advancement because of gender despite being better qualified. Court agreed this was sex-based discrimination, *quid pro quo*.
Female v Forklift Systems	A female worked as a manager and was repeatedly insulted by the company president, who disparaged her gender and made sexual innuendos and offensive statements about her to other employees. The woman complained to the president about his behavior and he promised to stop but resumed harassment again. She resigned and filed suit. The trial court ruled against her because she had not suffered injury (such as a nervous breakdown). However, the Supreme Court overturned this ruling, stating that a hostile environment need not be so severe as to cause severe psychological injury. This is an example of *quid pro quo* constructive discharge and a hostile work environment.
Male v Sundowner Offshore Services (1998)	A male oilrig worker was harassed by male co-workers, and was subjected to humiliating actions, including being held down and sodomized with a bar of soap. When he reported the harassment to the supervisor, he was called an insulting name and no action was taken. He resigned and filed suit. The lower court dismissed the suit because he was a male, but the Supreme Court overturned this ruling, stating that the sexual harassment laws apply to males and same-sex harassment. This is an example of *quid pro quo* constructive discharge and a hostile work environment.
Female v Burlington Industries	A female employee was subjected to continual harassment by a supervisor, who threatened her job if she didn't provide sexual favors. She

	refused all advancements, and did receive a promotion, so he did not carry out his threats, and she did not report the harassment. She resigned after 15 months and filed suit stating that the supervisor's treatment had essentially forced her to leave her job. The lower court found for her, a higher court ruled against her, but the Supreme Court overturned this ruling stating that employers are liable for the unwelcome and threatening sexual advances of a supervisor, even if the threats are not carried out and the harassed employee suffers no adverse, tangible effects. This is an example of *quid pro quo* constructive discharge and a hostile work environment.
15 Females v Del Laboratories.	Fifteen female employees filed suit against Del Laboratories because the CEO sought sexual favors in return for job benefits by making promises to women he harassed or threatening them with unfavorable working conditions if they refused his advancements. The court ruled this was both *quid pro quo* and a hostile work environment and awarded $1, 850,000.

The **U.S. Equal Employment Opportunity Commission (EEOC),** responsible for enforcing workplace laws, outlines prohibited behavior:

- It is unlawful to harass a person (an applicant, employee, or student) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.
- Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.
- Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

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- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer (including a patient).

Two important considerations when determining if a case of sexual harassment is valid are frequency and severity.

- A one-time episode, unless it is grievous (as in rape), is rarely grounds for a claim of sexual harassment because the courts require evidence the harassment was pervasive and/or ongoing. For example, if a supervisor asks an employee for date one time and is told "No," that generally ends the matter. It becomes harassment if the supervisor continues to ask the person for a date repeatedly.

- Sexual harassment must also meet the test for severity, and this is fairly subjective. Because the law is somewhat vague, there have been conflicting rulings in different courts. The Supreme Court has clarified some of these issues but not all.

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Types of sexual harassment	
Verbal (spoken or written)	Offensive teasing, joking, questioning. Suggestive remarks or sounds. Terms of endearment, such as "honey," "sweetie," or "hunk." Requests for sexual favors. Whistling, catcalls. Inappropriate emails, letters, memos, telephone calls. Comments about appearance, clothing. Threats. Spreading rumors about a person's personal or sexual life.
Non-verbal	Sexual gestures (licking, making hand signals, eating in provocative manner). Winking. Leering/Looking inappropriately at a person's body or body parts. Blocking a person's path, following the person. Giving personal gifts.
Visual	Sexual exposure, including "flashing" or "mooning." Offensive pictures, pornography, posters, pin-ups. Offensive screensavers.

	Email with offensive jokes, cartoons, and pictures.
Physical	Touching, raping, brushing against the body, patting, stroking, hugging, kissing, fondling. Massaging the neck or shoulders.
Psychological	Repeated undesired social invitations, proposals, or contact resulting in anxiety and stress

Who is at risk?

Sexual harassment is common in the healthcare industry. The power dynamics in some large institutions can be quite complex with multiple departments and multiple supervisors and levels of authority. The old-school idea that it was acceptable for doctors or those in authority to denigrate or abuse (verbally or otherwise) healthcare personnel, such as nurses, is simply no longer tenable; however, sexual harassment of healthcare workers by physicians remains a problem.

Nurses and other healthcare workers are frequently harassed by patients. It is common for nurses to be hit, spat on, and grabbed, especially for those working in the emergency department where people may be confused or high on drugs or alcohol. Patients sometimes expose themselves, make inappropriate comments, or engage in other forms of harassment that contribute to a hostile environment. This type of behavior is not acceptable, but the patient's condition must be considered when planning an intervention. For example, if a patient has dementia, he or she may not be responsible for the behavior. However, the employee and supervisor or other team members should work together to find a way to prevent or manage the offending behavior.

Healthcare facilities should have policies in place for dealing with outright sexual harassment from patients, and these policies should be followed. If no such policy exists, then healthcare workers should request a policy be written. Harassment should always be documented on the appropriate incident report and reported to a supervisor. In some cases, patients have been sexually harassed by staff. In this case, anyone who observes this or receives a report about it from a patient must document and report this harassment as well.

Interestingly, research studies of harassment show that females in supervisory positions are more likely to be harassed than females in subordinate positions. Over half of supervisors report harassment compared to about a third of those in lesser positions. Men who were judged as "more feminine" were much more likely to be harassed than

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those deemed "more masculine." Additionally, both males and females who were judged by others as being gay, lesbian, bisexual or transgendered or who self-reported these sexual orientations were twice as likely to experience sexual harassment as heterosexuals.

On study looked at 110 work groups and found that females were not more likely to experience sexual harassment if they were in the minority or the majority but were more likely to be harassed if the proportion of males and females in the workforce was generally equivalent in numbers, suggesting that this situation presented more opportunity for harassment. The study did not consider harassment directed at males.

What are the steps to reporting sexual harassment?

Employers are required to take reasonable care to prevent sexual harassment and take reasonable care to promptly correct sexual harassment once it occurs. Failure to carry out these responsibilities may carry significant financial implications if a court rules that sexual harassment has occurred. As well as any financial settlement to the plaintiff, employers may be required to pay court costs, which may cost as much or more than the settlement. These are solid practical reasons for protecting employees from sexual harassment and establishing a "zero-tolerance" policy. Managers should not be judgmental when employees file complaints and should set examples for other employees.

The "reasonable" care requirement of the law is not specific, so different employers may use various approaches. Most employers establish a policy regarding sexual harassment and a procedure for making a complaint. Some establish sexual harassment training courses and/or provide literature or posters regarding harassment. However, these measures alone are not adequate if the employer fails to enforce policies or to investigate complaints.

It's important to remember that the employer cannot be held responsible for behavior about which the employer is unaware. This means that the employee being harassed should always notify the employer (unless there is reason to fear for personal safety). If the employer takes appropriate action, such as warning the person doing the harassing, the employer has acted with reasonable care. If the person continues to harass, the victim MUST report every incident of additional harassment because if the victim fails to do this, the

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employer may not be held accountable. In some cases, the employer is also the harasser, but the employee should follow the same basic procedures.

If employees are being sexually harassed, a number of options are open to them. They may consider consulting with a union representative, a human resources person, an attorney, or a legal services representative before filing a complaint. Employees should know and understand their rights under the law because filing a complaint can be frightening and sometimes results in reprisals or acts of intimidation.

Additionally, employees should be very clear about the definition of sexual harassment. Employees may choose to go through the employer's complaint process or file a charge with a state fair employment agency or Federal EEOC. Employees may also file a civil suit to ask for damages. Under Federal and most state laws, employees must file a complaint within 180 days of an act of sexual harassment. This may vary somewhat by state laws; for example, California allows 300 days.

Employees have a right to review their personnel files and to see any written evaluations. Before filing a complaint, employees should ask to see their files and, if possible, make copies of the contents because some employers have retaliated against those complaining by filing negative evaluations or altering records.

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Elements of the complaint process	
Say "No"	Consensual behavior is not sexual harassment, so the employee must be very clear about saying "No." • If asked for a date, "I already have plans" or "I have a girlfriend" or "I don't like workplace romances" is not the same as "No, I don't want to date." • Laughing uncomfortably at a dirty joke is not the same as saying "I don't want to hear dirty jokes. They make me uncomfortable." • Ignoring pornographic pictures is not the same as saying, "I find those pictures offensive and would like them removed." • NOTE: If a patient sexually harasses a healthcare worker, the employee should deal with the matter directly: "Your behavior is inappropriate and not acceptable."

Document	The employee should document every incident of sexual harassment, including the date, time, description, and witnesses. • Note: Just because a fellow employee says, "You're on your own. I'm not going to say anything about this" does not alter the fact that the person was a witness and should be listed as such. Should the issue go to court, the person may not be willing to commit perjury. • This documentation should NOT be done on an employer-owned computer or through emails over an employer network because there is no presumption of privacy. • Documentation may contain photos of offensive material, such as offensive cartoons on a bulletin board, or copies of offensive letters or other forms of communication.
Report	Following employer procedures, the employee should make a formal complaint to the appropriate supervisor in writing, outlining exactly what has occurred and providing evidence or supporting statement of witnesses as appropriate. Subsequently, the employee should follow the same procedure if further harassment occurs.
Create written record	The employer should create a written record that contains copies of all documents. The employee should document the results of filing the complaint, including any actions the employer has taken to resolve the issue and the response of those who had engaged in harassment. All letters, emails, and summaries of telephone conversations or meetings should be included. Should legal action be necessary, a careful written record may be critically important.
Seek support	The employee should seek support through friends, family, and co-workers. In some cases, the employee may benefit from assertiveness training or counseling. Those who seek professional counseling to deal with harassment should not sign a release of medical records because, if the issue goes to court, attorneys may try to use the record of treatment as an indication the person bringing charges is mentally unstable.

Conclusion

While some behavior is so blatantly offensive that it is clearly sexual harassment, much behavior falls into a gray area. Behavior does not constitute sexual harassment if it is welcome. This is key. Supervisors can date employees, and co-workers can laugh at dirty jokes, hug each other, and slap each other on the butt, and these actions may violate company policy (or should); however, if none of them object, it's not sexual harassment. If however, someone DOES object or is subjected passively to this behavior, it is sexual harassment. The prudent employer establishes a policy that precludes behavior that could be considered sexual harassment, and the prudent employee avoids all such behavior.

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