

## Long-Term Care Survey Alert

### Address This Growing Risk Management Challenge: Residents Who Harass Staff

If your focus is solely on the resident's behaviors and well-being, watch out.

Talk about being caught between F tags and an emerging litigation trap: A nursing facility has to uphold resident rights, including strict transfer and discharge rules. But employment law protects staff from racial or sexual harassment by "third parties," which, in a nursing home, includes residents, even if their behavior stems from dementia or mental illness.

And facilities that don't honor staff's rights under the law may find themselves up the litigation creek without a paddle, should a staff person decide to claim harassment or discrimination. "It is a real balancing act," comments **Patrick Gavin**, an attorney who presented on the issue at the recent 2008 **American Health Lawyers'** Long-Term Care and the Law conference in New Orleans.

"You can't go too far one way or the other," says Gavin, with **Husch Blackwell Sanders LLP** in Kansas City, MO. For example, if the facility wrongfully discharges a resident who is aggressive with staff, it can end up in trouble under federal or state laws. But if a resident hurls racial slurs or sexual epithets at particular staff or gropes them, the facility may face civil actions brought by staff.

Years ago, litigation involving residents or families harassing staff was virtually unheard of, says Gavin. Today, however, such litigation is on the rise. And Gavin predicts the claims will continue to climb as the nursing home population increases due to the incoming baby boomers.

The claims are filed under the harassment provisions of Title VII of the Civil Rights Act of 1964, as well as Section 1981 of the Civil War Era Civil Rights Act. "The latter prohibits discrimination in contracts but has been extended to racial discrimination in employment, providing a vehicle for litigation of harassment claims," Gavin tells **Eli**. And each state has its own version of such laws, prohibiting harassment of and discrimination against workers.

"The cases started out related to residents suffering from dementia but we are seeing some develop where the residents have psychiatric diagnoses" -- bipolar disorder being one, in particular, Gavin says.

#### Cross This Option Off Your List

As a general rule, taking a "do nothing" approach by simply telling staff who complain about racial harassment, for example, "That's just Sally, who has dementia," paves the way for liability, Gavin warned.

Instead: Implement an incremental approach where you respond in different ways to an evolving scenario in which a resident or residents harass staff or create a hostile work environment.

In some of the civil cases where providers have prevailed, the facility continued to adjust the care plan, bringing in outside consultants and tapping state resources to deal with the issue, which some states have, Gavin said.

Try these specific strategies:

- **Craft the caregiver's job description** to say the person will be working with people who have dementia and mental illness and may not be able to control their behavior in some cases, suggested Gavin. That approach won't inoculate the facility against liability, but it's one more piece that shows the facility is working with employees to let them know what

they will face, he said.

- **Report staff's complaints about harassment up the chain immediately** for investigation and action, if needed.
- **Respond empathetically to staff's complaints and provide immediate follow-up.** In one case presented by Gavin, black employees overheard specific racial comments, which they reported to the administrator. But the administrator reportedly made a callous remark that showed a lack of sensitivity as to why the remarks were offensive.

Staff and administrators may need education on the issue, he said.

Get the Care Plan Team on the Case

Strategies that address behaviors in people with dementia can exacerbate a subset of the population who is angry, advised attorney **Joanne Lax**, who co-presented with Gavin. There are quite a number of cognitively intact residents with catastrophic conditions who are angry -- and not just young residents, she added.

Be prepared: "Behaviors due to primary mental illness, closed-head injury or dementia resulting from vascular causes are less predictable than those one typically sees in people with Alzheimer's dementia," cautions **Lynda Mathis, RN**, lead clinical consultant with **LTC Systems** in Conway, AR.

Assessment is the linchpin: Do a careful assessment of a resident's physical and mental health to identify potential causes of aggressive verbal or physical behaviors. Uncontrolled pain is one possibility. Look for UTI and metabolic disorders or skin irritations, Lax suggested.

Medications alone or taken in combination can cause people to act out, she said. If the resident has asked for something important to him and doesn't get it, that may cause him to become upset, Lax pointed out.

Identify the triggers for behavior for each individual resident who creates a hostile environment, Lax suggested. Once you identify the triggers, "brainstorm" about strategies to eliminate the triggering event.

Continue to monitor the care plan for effectiveness, and readjust as needed. Don't give up at some point.

### **Behavioral Contracting an Idea**

Behavior contracting may be effective with cognitively intact residents (for details on how Maryland is allowing nursing facilities to use that approach, including a copy of the behavior contract, see the November 2005 issue of Long-Term Care Survey Alert available in the archives of the Online Subscription System).

"The model behavioral contract is still in place [in Maryland], and we have heard a number of nursing facilities are using it," says **Wendy Kronmiller**, director of the Maryland survey agency. "We see it as having utility for patients who have intentional bad behavior that gets mixed in with mental health issues." Sometimes it's hard to tell the difference between the two, she adds.

Discharge could be an option: "Facility staff needs to assess whether skilled nursing facility placement is the most appropriate for cognitively intact residents," Lax said. She noted that an increase in home and community-based waivers following the enactment of the Deficit Reduction Act of 2005 may offer opportunities for chronic-care residents to receive care in a less restrictive setting.

Remember: Family members who harass staff can also lead to litigation. (For a focus on preventing and addressing this problem, see the upcoming Vol. 10, No. 8 of Long-Term Care Survey Alert.)

