

## MDS Alert

### Believe Allegations Of Harassment

#### **Elder abuse is a huge problem, but staff need protection from harassment, too.**

Sexual harassment and other forms of sexual misconduct in the workplace happen in all industries, not just Hollywood and politics. But working in the long-term care industry presents extra considerations for establishing policies and protocols, keeping everyone - residents, staff, and visitors - safe, and investigating allegations.

One main difference between sexual harassment in most industries versus sexual harassment in long-term care is that a skilled nursing facility is a workplace for some people and a home to others. Plus, the power differential between staff, as well as between staff and residents, is much more hierarchical than in many industries.

Providing high-quality care is necessarily a very physical task. CNAs, nurses, and therapists, especially, must manipulate and guide residents' bodies countless times a day in order to help residents. Many people who end up in skilled nursing facilities may exhibit behaviors that their families or previous caregivers found difficult to manage, including behaviors that result from dementia.

#### **Residents can be the aggressors**

Elder abuse is a very real, traumatic problem that is almost definitely underreported. But all kinds of people can end up as residents in skilled nursing facilities, and there have been reports of staff members being harassed or groped by residents.

"Patients are a unique group as they may be in pain, under medication, or have illnesses such as dementia that make them unable to understand that their actions are inappropriate," according to **Fisher Phillips LLP**, a law firm focused on workplace law, in an August 2010 issue of its healthcare newsletter, Healthcare Update.

Nurses and other medical professionals know that there is some risk for facing physical or verbal abuse when providing care, but there still must be ways to mitigate the risk so employees feel safe at work. "While there is no way to prevent all inappropriate conduct, as no one knows what a particular patient is capable of doing, the duty to protect employees still exists. Arguments that employees understand the types of risks involved in the job have no merit unless the patient care entity has proper procedures in place," Fisher Phillips LLP says.

Title VII of the Civil Rights Act of 1964 specifies sexual harassment as a form of sex discrimination. The **U.S. Equal Employment Opportunity Commission** describes how the safety and comfort of a workplace can be compromised by untoward behavior: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."

Court rulings have held facilities responsible, legally, for failing to respond to employee allegations in a way that makes their employees feel safer at work. Suffering physical, verbal, or sexual harassment or misconduct is not part of any long-term care facility employee's job description.

Various courts have ruled in favor of SNF (and home health agency) employees who suffered from sexual misconduct inflicted by residents, especially in cases where management did not intercede in a way that made the employee feel safe. Many of these cases fell into the "hostile workplace" category of sexual misconduct, where the harassment seems more innocuous than what has made the news recently. Resident harassment of staff or other residents is also tricky because of the many measures that are implemented to keep residents safe from victimization.

"If an employee complains of workplace harassment by a resident, do not ignore the complaint," says **Richard Sheinis**, an attorney with **Hall Booth Smith** in Atlanta. "Do not think there is nothing you can do to address the situation simply because such behavior is expected of some patients with dementia and the employee should know that it 'comes with the territory.' Do what you can within the framework of regulations that limits your options."

### **Have response protocols ready**

When the resident makes a skilled nursing facility a hostile workplace, there are a couple ways facilities can respond. First and foremost, support the team member: believe her or him. If you are the victim of harassment or other misconduct from a resident, visitor, or co-worker, tell your supervisor.

Facilities should have policies and procedures in place to help employees navigate workplace misconduct, including specific instructions for harassment by residents or visitors, as well as by co-workers. These policies should provide guidance on how employees can complain, as well as reassure them that they won't lose their jobs for lodging a complaint against a paying resident, Fisher Phillips LLP says.

Make sure that your facility includes training on sexual harassment and misconduct in employee orientation, and provide additional - more frequent - trainings as well. These trainings should guide staff on how to react if they suffer harassment, with the acknowledgement that SNF employees necessarily interact with residents when residents are nude and/or medicated in order to provide care.

"Provide staff with the tools to properly handle uncomfortable situations. Training caregivers on how to properly handle harassing comments or situations may stop further harassment by a patient or third party, and may limit harassment complaints by caregivers," Fisher Phillips LLP says.

Your facility and management team should treat any allegations of abuse by a resident as serious and investigate immediately. Help make sure the staff member feels supported and safe - is it possible to adjust staffing right away so she will not have to work with that particular resident?

**Note:** You can also incorporate adjustments to the resident's care plan. Make a note that two team members should be present whenever providing care to that particular resident, Fisher Phillips LLP says.



Make sure that the resident's behavior is documented, too. The MDS mentions "abusing others sexually" and "public sexual acts" in item E0200 (Behavioral Symptom - Presence and Frequency).

It's also appropriate to record sexual impropriety's effect on others in E0600 (Impact on Others). Documenting how a resident's behavior affects others could also trigger a CAA, which would be another opportunity to evaluate how to best provide care in a way that keeps everyone safe.

However, the RAI Manual explicitly states: "While behavior may sometimes be related to or caused by illness, behavior itself is only a symptom and not a disease. The MDS only identifies certain behaviors, but is not intended to determine the significance of behaviors, including whether they are problematic and need an intervention."

Ultimately, facilities need to have policies in place to provide staff with a comfortable, safe workplace. "Remember, the fact that the harassment occurs at the hand of a patient or other third party does not absolve an employer from protecting its employees. The best defense for these situations is having a good offense," Fisher Phillips LLP says.