Harassment in the workplace

Key words: Employment law, harassment, independent contractors.

Although it has been more than 30 years since Congress made sexual harassment a violation of federal law, the courts are still attempting to define the boundaries of the law, to agree on what behavior constitutes sexual harassment, and to determine what employers are obligated to do about it. In a recent case, (Cabaniss v Coosa Valley Medical Center, 1995 WL 241 937 (N.D. ALA)), two CRNAs were attempting to sue a hospital because of offensive behavior on the part of an anesthesiologist assigned to supervise them. Although the federal district court sitting in Alabama dismissed the case, the case will be interesting to CRNAs because of the court's treatment of a structure found in many anesthesia departments.

One of the plaintiffs contended that she had been subject to "gender harassment" by the anesthesiologist. This included several instances where she was yelled at, told that she was "stupid," "brain dead," and a "dumb ass." Once, the anesthesiologist came into a room and made her stand in the corner. On another occasion the anesthesiologist came into the room and told her to call another nurse anesthetist (who was a male) as a replacement without ever telling her what she had done.

The second CRNA involved in the case had been working for about two weeks when she had an unpleasant experience with the same anesthesiologist over the use of a suction machine. She discussed it with the head of the CRNA group who offered to speak to the anesthesiologist, but she felt that things would go better for her if she didn't mention it. Sometime later, she had another unpleasant experience with the anesthesiologist. When she found out that the head of the CRNA group had, in fact, discussed the incident over the suction machine with the anesthesiologist, the CRNA was very upset. Later that day the anesthesiologist snatched a syringe out of her hand. She told the head of the CRNA group that working with the anesthesiologist was too stressful, and she no longer wanted to work with him.

The hospital contracted out its anesthesia services. It had contracts with both an anesthesiology group and with a nurse anesthetist group. Nurse anesthetists were supervised by an anesthesiologist who was an independent contractor. The court reviewed a number of legal theories and issues involved in the case before coming to the conclusion that the hospital was not liable. The court's discussion of the issues is more valuable than its conclusion. The CRNAs sued the hospital in which they worked, even though they were employees of the CRNA group, not the hospital. The hospital argued that, because it was not the employer of either CRNA, it had no obligation to them under the Civil Rights Act of 1964 which prohibits sexual discrimination. Moreover, even if the hospital was the employer of the plaintiff, the doctor who had
engaged in the objectionable behavior was also an independent contractor. The hospital claimed that it was not responsible for the activities of independent contractors.

**Determining who is an employee**

As we have seen before, the issue of who is an employee can be difficult to answer and may depend on the context. The hospital pointed to a long list of facts which it believed established that the CRNAs were not its employees for purposes of the Civil Rights Act. The hospital did not pay the CRNAs any wages; they were compensated by the CRNA group. The hospital did not control the hours that the CRNAs worked; the president of the CRNA group made assignments in his role as chief CRNA. The hospital did not provide the CRNAs with any benefits; the CRNA corporation had its own plans and paid Social Security taxes on behalf of the CRNAs. The hospital did not provide the CRNAs with vacation; the CRNA group did.

The CRNAs countered that they were required to have “affiliate privileges” at the hospital and that the hospital required that they work under the supervision of an anesthesiologist. Moreover, the hospital provided all supplies and equipment used in administering anesthesia. Because the case is being considered by the court on a summary judgment basis, the court could not rule in favor of the hospital if the plaintiffs can offer any evidence to support the claims. The court concludes, for purposes of the summary judgment motion, that the CRNAs might be employees of the hospital within the meaning of the Civil Rights Act.

Even though the court did not rule on whether the hospital could be held liable for the discriminatory actions of an independent contractor, the court set forth the respective legal arguments that both sides were making. The hospital felt that the statute should not make it responsible for every person present in the hospital who made objectionable remarks. The hospital had an obligation to control the behavior of its employees, but the anesthesiologist was not a hospital employee. The CRNAs argued that the anesthesiologist was acting as an agent of the hospital. Hospital bylaws required that CRNAs be supervised by anesthesiologists, and the hospital assigned the defendant to supervise the nurse anesthetists. His offensive behavior was in the line and scope of his authority and should be charged against the hospital. The hospital argued on the other hand, that since both the anesthesiologist and the nurse anesthetist were independent contractors, the Civil Rights Act did not apply.

**Distinction between quid pro quo and hostile environment**

The court cited some cases which drew a distinction between “quid pro quo” and “hostile environment” cases. In a “quid pro quo” case, a supervisor requires sexual favors in exchange for job benefits. In this type of case, the courts have imposed strict liability on the employer, whether or not the employer even knew about it. The hospital put someone in the position of supervising and if the supervisor requires sexual favors, he is acting on behalf of the hospital. In a “hostile environment” case, the supervisor or other employee creates a hostile environment. In these cases, the supervisor usually acts for personal reasons, outside the scope of his employment or agency, and the courts generally hold that liability exists only where the defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.

Once the hospital had been placed on notice of sexual harassment in the workplace environment, the hospital should have taken prompt action to address and remedy the alleged gender-based mistreatment. In this case, the hospital administrator contacted the director of nursing, the operating room director, the chief of surgery, the chief CRNA, and the defendant anesthesiologist. At the conclusion of the investigation, the hospital notified the anesthesiologist by letter that no further inappropriate conduct would be tolerated. The anesthesiologist was also told that if any further CRNA turnover occurred, the hospital would reevaluate its contract with his group. Under the circumstances, the court felt that this was all that the hospital was required to do since neither CRNA reported any additional harassment after the anesthesiologist was warned and both quit within a short time after lodging their complaints. Consequently, the court felt that the CRNAs had not given the remedial action a chance to work. They were not entitled to “simultaneous action” only to prompt remedial action, once the hospital became aware of the difficulty.

One of the major questions was whether the conduct actually rose to the level of sexual discrimination at all. There was no question that the anesthesiologist had engaged in inappropriate behavior, but was it sexual discrimination prohibited by the statute. The hospital introduced evidence that the anesthesiologist engaged in conduct which was offensive to male as well as female employees. There was testimony that four male CRNAs had resigned because of conflicts with the anesthesiologist and that five male locum tenens would not re-
turn to work at the hospital because of conflicts with him. If the anesthesiologist had limited his offensive behavior only toward women, there may have been a claim that he was engaged in gender discrimination. However, the court referred to him as engaging in "equal opportunity" conflicts. The court remarked that Federal law does not guarantee "a utopian workplace or even a pleasant one." The law requires only a workplace that is nondiscriminatory. The anesthesiologist's behavior did not qualify as "quid pro quo," and the court felt that the hospital had acted as it was required to act in "hostile environment" cases.

One further issue was raised in this case: Could the CRNAs recover directly against the anesthesiologist? The court concluded that they could not because of the way the statute was worded. The statute provides that it is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. While it is not necessarily required that you be an employee to be protected, it is necessary that you be an employer to be subject to the statute. Here, the anesthesiologists were independent contractors in a separate organization and did not owe any duty to the plaintiffs under the provisions of the Act.

Hospital should be notified of offending conduct

Nurse anesthetists who believe that they are the subject of sexual harassment should not be discouraged from pursuing their rights merely because they are independent contractors or because their harasser may be an independent contractor. For purposes of the Civil Rights Act, CRNAs may be able to show that they are entitled to protection as if they were hospital employees. Under the Act, a hospital is only liable for a hostile environment if it knew or should have known of the harassment and failed to take prompt remedial action. Consequently, it is important that the hospital be notified and given a chance to cure the offending conduct. The only exceptions are when the harassment is so pervasive that the hospital must have been aware of it or when a direct supervisor or clear agent of the hospital engages in activities which are in the nature of "quid pro quo."

Once a complaint has been made with the hospital, the hospital is obligated to investigate it and if it finds that the complaint is justified, the hospital is required to take remedial action and to follow-up. A simple investigation which is a pretext for doing nothing is not satisfactory. Finally, it should be kept in mind that this is a developing area of the law and that even though it is a federal statute, the interpretations have varied from area to area. Therefore, CRNAs who feel they have been subject to sexual harassment must obtain competent legal advice.

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Book Reviews

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Despite falling short of perfection in the first edition, Drs. Parillo and Bone are to be congratulated for their success in assembling a remarkably comprehensive overview of critical care medicine that is much more than cursory, while as promised, remaining manageable in size.

Overall this is an excellent reference work that is in most ways superior to other available critical care medicine texts. Especially appealing is the merger of scientific basis and clinical application found in most of the chapters. It is appropriate reading for anyone involved in the comprehensive care of critically ill patients. Due to its multidisciplinary content, both nurses and physicians will find it useful, particularly as a reference volume.

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