

# Strategies for Addressing Claims of Harassment in the Workplace



GORDON REES SCULLY MANSUKHANI  
YOUR 50 STATE LAW FIRM™

Suzanne Walker and Benjamin Williams · February 27, 2024

# Harassment in the Workplace. New Approach to an Old Problem.

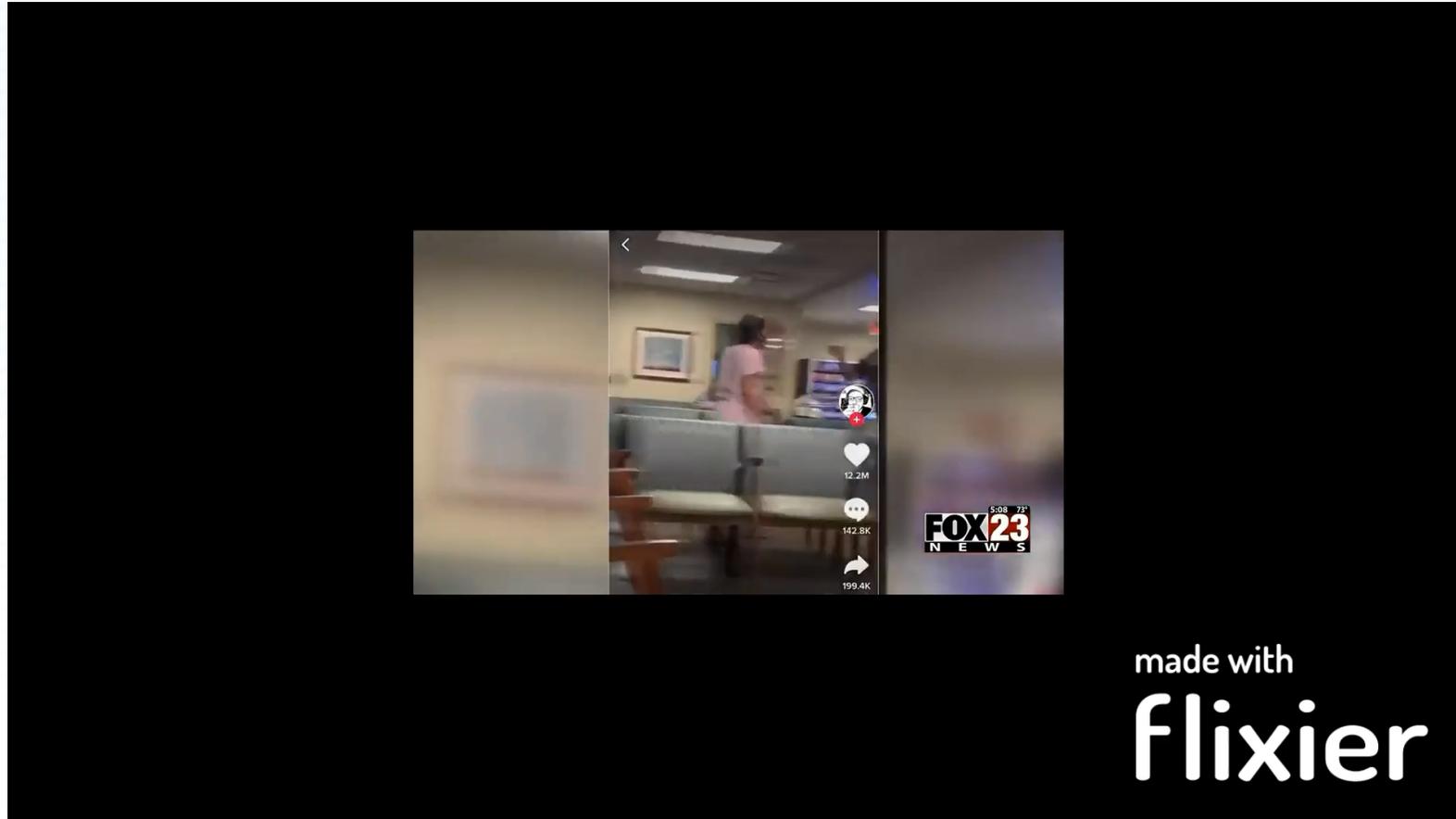


# The Problem

- How many “non-employees” enter your facility each day?
  - Patients
  - Family Members
  - Contract Staff/Providers
  - Vendors
  - Friends
  - Religious/Spiritual Leaders
- Any of these “non-employees” can say or do hurtful things to you, your coworkers, or employees.
- How you handle harassment can have serious ramifications.



# Hostile Security Guard



# What is Your Duty to Your Employees?

- Employers must provide a workplace that is free of harassment or discrimination that is based on any protected characteristic, such as race, sex, disability, age, religion, etc.
- Whenever a coworker or non-employee alleges harassment, the employer must take “prompt and effective remedial action.”



# The Law

- “An employer is liable under Title VII for third parties creating a hostile work environment if the employer **knew or should have known** of the harassment **and failed to take prompt remedial action** reasonably calculated to end the harassment.”
- This rule applies regardless of whether the harassment is from an employee or a third party.
- NOTE: An employer can be “vicariously liable” for the discriminatory actions of supervisors.



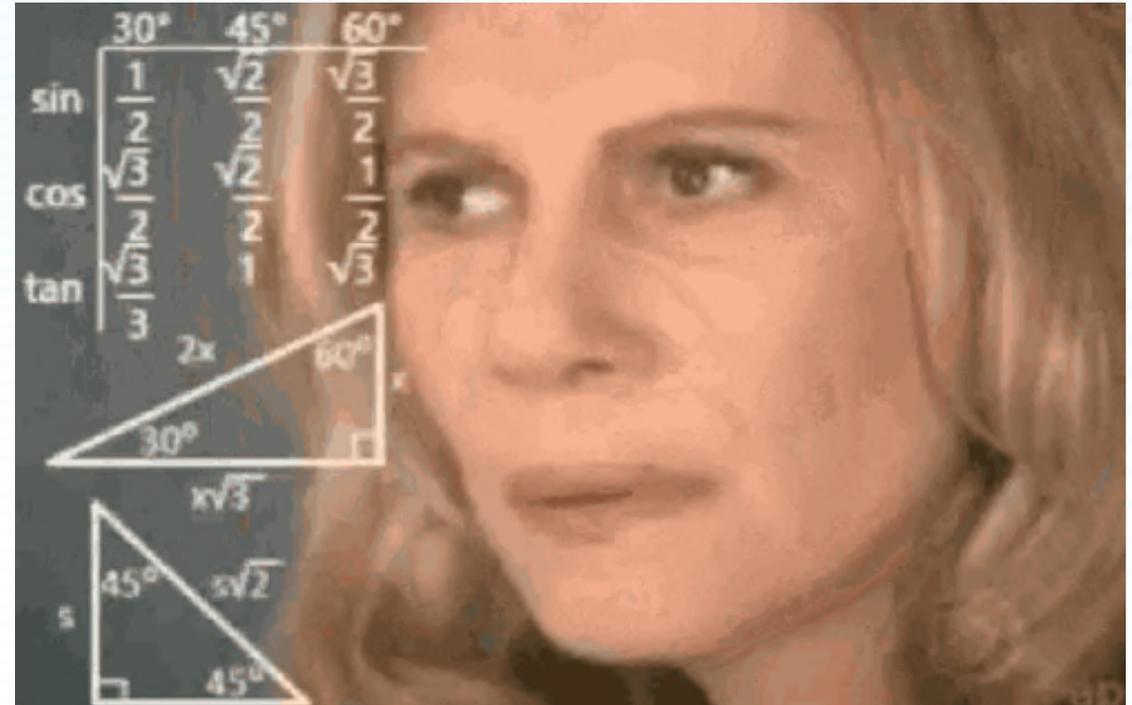
# Who Employs the Bad Actor?

- Like the Security Guard in our first example, *who* employs the guard can matter.
- As the employer, our tools for taking prompt and effective remedial action change based on whether the alleged bad actor is our "employee."

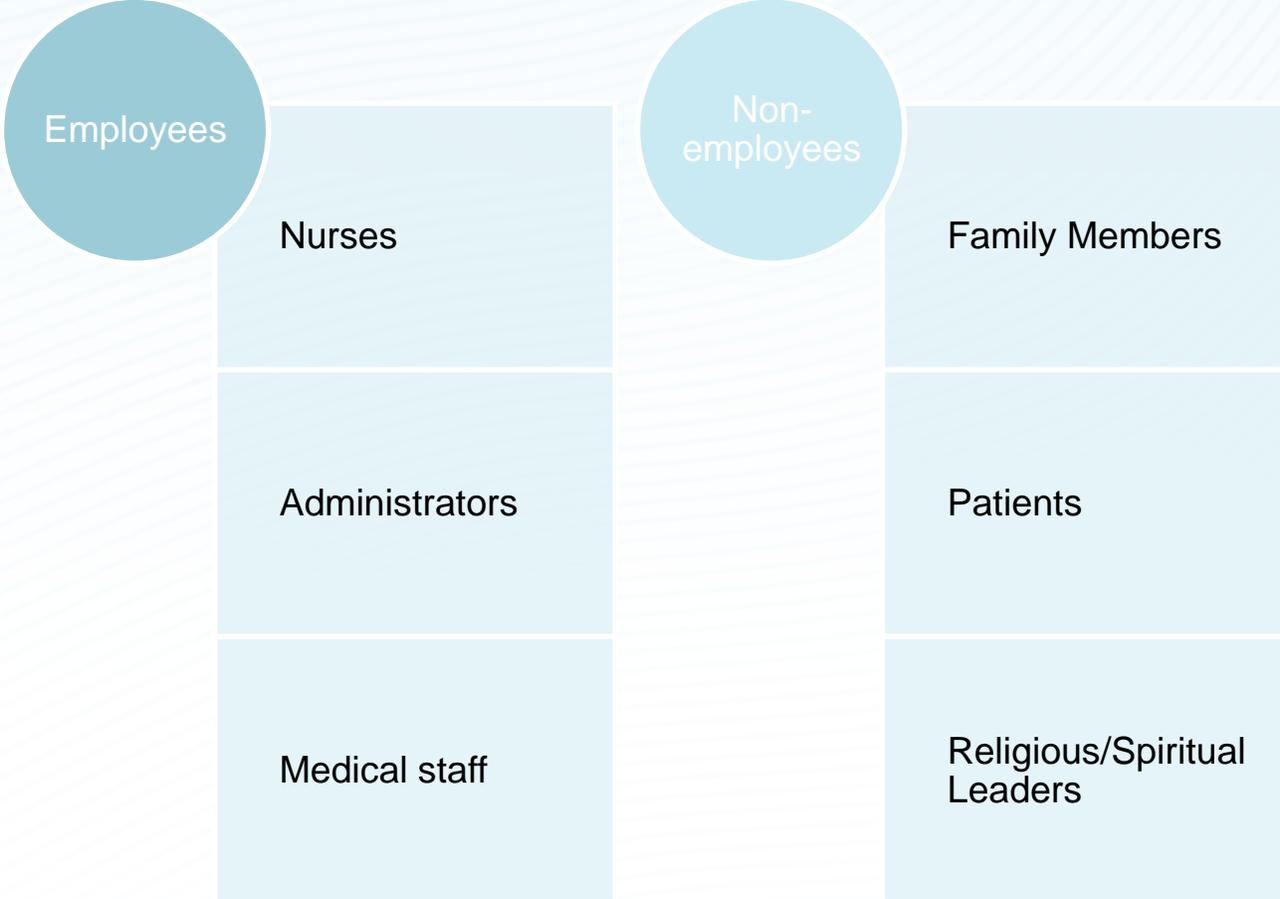


# Title VII Employer and Employee Defined?

- Employer:
  - A person engaged in an industry affecting commerce who has fifteen or more employees...
- Employee:
  - An individual employed by an employer...



# Hospitals or Facilities – the Easy Cases



# The Harder Cases

- Contract nurses and other contract staff
- Therapy staff (PT, OT, ST)
- Security guards
- Food service/custodial workers
- Physicians
- Dietitians
- Etc.



# Employees Can Have More Than One Employer Under Title VII

Hospital

Physical Therapy Staffing Agency



Courts have attempted to bring some clarity to the poor definition Congress provided in Title VII.

How do I protect my organization and my employees when another employee or a third party engages in discriminatory behavior?



# The Process

First, identify the bad actor(s) a worker alleges created an uncomfortable working environment.



## The Process Cont.

Determine if you are the worker or bad actor's "employer." Beware of the "non-employee" that might have multiple employers.



## The Process Cont.

Evaluate your options based on your ability to control or discipline the worker and bad actor(s), or limit your employee's exposure to them.



# An Example – The Case of Travel Nurse Nancy

- Nurse Nancy is employed by a staffing agency, Nurses USA Staffing, and works at Blue Ridge Mountain Hospital.
- While working night shift on a med surg floor a hospital nurse yells racially charged language directed at Nancy.
- Nurse Nancy is in a protected class. HR has received prior complaints regarding the hospital nurse.



# The Hybrid Test

- The Big Three
  - Can you hire or fire the individual?
  - Do you have day-to-day supervision of the individual, including discipline?
  - Do you provide the individual with the equipment and facilities they use?
- The Tie-Breakers
  - Do you maintain employment records like payroll, insurance, and taxes for the individual?
  - How long has the individual worked with you?
  - Do you provide the individual any training?
  - Are the individual's duties similar to those of regular employees?
  - Is the individual assigned to work for anyone else?
  - Did you and the individual intend to enter into an employment relationship?



# Who is Nancy's Employer?

Blue Ridge Mountain  
Hospital



Nancy works at Blue Ridge and wears hospital scrubs with the Blue Ridge logo on it and has a Blue Ridge badge



Blue Ridge sets schedule, provides training, facilities, supplies, and parking

Nurses USA Staffing



Nancy got the job through Nurses USA, a Travel Nurse agency



Nurses USA Staffing maintains personnel file and has ultimate responsibility for hiring and firing

# So, who is Nancy's "Employer"?

- Nurses USA?
- Blue Ridge Hospital?
- Both?
- Since Both entities are Nancy's employer, both of them are required to comply with Title VII.



# Another Example – The Malicious Vendor



# The Malicious Vendor

- Elders' Paradise ("EP") is an Assisted Living Center in Mt. Gilead, NC.
- Janice works in EP's purchasing department, and has to interact with vendors often.
- Dylan is EP's vendor for certain medical equipment, and visits EP on a weekly basis.



# Malicious Vendor Cont.

- Dylan begins to make disparaging comments to Janice based on her race, and regularly uses slurs in conversation with Janice.
- Dylan goes so far as to make objectifying comments about Janice's daughter based on a family picture Janice has in her office.
- Janice became so frustrated at Dylan's conduct and her boss's failure to address it, she resigned her employment with EP.



# Let's Use our Three Step Process to Analyze this Problem under Title VII

- Who is the bad actor the worker (Janice) is alleging made her work environment uncomfortable?
- Is EP the bad actor's (Dylan) employer? What about Janice's Employer?
- Because Dylan is not an EP employee, but Janice is, this impacts what we can do to help prevent Janice from experiencing harassment.



# What can EP, as the Employer, do?

- Can Dylan's behavior be harassment that requires action by the employer under Title VII?
- What steps can EP take to prevent Janice from experiencing harassment from Dylan at work?
  - Report Dylan's conduct to his company?
  - Ask Dylan's company to assign a new vendor?
  - Require the vendor to have a different point of contact at EP?



# The Nefarious Neurologist

- Brynn is a physical therapist with Awesome Therapists, LLC who specializes in stroke patients.
- Brynn provides therapy at Best Hospital Ever, Inc.
- Dr. Samuelson is one of the neurologists at Best Hospital Ever, and many of his stroke patients use Brynn for PT.



# Nefarious Neurologist Cont.

- Because their patients overlap, Dr. Samuelson starts asking Brynn for updates on how his patients are progressing.
- Dr. Samuelson then asks Brynn to get coffee with her, but she politely declines.
- Dr. Samuelson begins creating unnecessary reasons to interact with Brynn, and keeps asking her out for coffee.
- Eventually, Brynn becomes so uncomfortable she reports Dr. Samuelson to Best Hospital Ever.
- Remember to investigate employee complaints thoroughly. As Risk Managers, you can work with HR to report these allegations, and HR can work with outside counsel to conduct a protected investigation.



# Responding to Brynn's Complaint about Dr. Samuelson

- Now that we know the law and the process, lets evaluate how the hospital can respond.
- Assume for this example, the hospital substantiated Brynn's complaint and used the Hybrid Test to determine that BOTH Brynn and Dr. Samuelson are hospital employees under Title VII
- What prompt and effective remedial action can the hospital take to protect Brynn from unwanted attention by Dr. Samuelson?



# Responding to Brynn's Complaint about Dr. Samuelson Cont.

- Because both Brynn and Dr. Samuelson are hospital employees under Title VII, it is required to provide a workplace free of discrimination for both of them.
- If Dr. Samuelson has another employer, such as the physician group, could the hospital inform them of his misconduct?
- If the hospital makes schedules, can it schedule Dr. Samuelson and Brynn to work for different shifts?
- Can the hospital discipline Dr. Samuelson?
- Can the hospital ask Awesome Therapists to send a different PT?



# Bad Actors in the News

The New York Times

## The Big #MeToo Moment for Doctors Is Finally Here

Nov. 20, 2023



The New York Times

## Manhattan Doctor Is Sentenced to 2 Years in Prison for Sexually Abusing Patients

Share full article



Dr. David Newman, right, arriving at State Supreme Court in Manhattan on Monday. Anthony Lanzilote for The New York Times

# Conclusion

- Title VII requires employers to protect employees from harassment by **both employees and non-employees**.
- How employers **respond** to worker complaints can depend on whether the people involved are employees.
- If employers take **prompt and effective remedial action** in response to harassment complaints from employees and non-employees, it can shield itself from Title VII liability.
- And of course, document EVERYTHING!



# Questions?



## Contact Info:

- Suzanne Walker
  - [swalker@grsm.com](mailto:swalker@grsm.com)
  - (984) 242-1811
- Benjamin Williams
  - [blwilliams@grsm.com](mailto:blwilliams@grsm.com)
  - (984) 242-1789





GORDON REES SCULLY MANSUKHANI  

---

YOUR **50 STATE** LAW FIRM™

[grsm.com](http://grsm.com)