



Questionable Behavior in the Dental Office

BY JAIME WELCHER

Once a quarter, the *Journal* features a TDIC risk management case study, which provides analysis and practical advice on a variety of issues related to liability risks.

Authored by TDIC risk management analysts, each article presents a case overview and real-life outcome, and reviews learning points and tips that everyone can apply to their practice.

Dentist-Employee Relationship Brings Harassment Allegations

An office manager alleges sexual harassment, hostile work environment, unlawful retaliation, and intentional infliction of emotional distress.

Dr. Brown hired Ms. Turner, a 24-year-old dental assistant, as his office manager/patient coordinator in December 2004. Her duties included managing patient contracts, handling accounts payable, and scheduling and participating in patient consultations.

On her first day, Dr. Brown took Ms. Turner to lunch to welcome her. During lunch, he inquired whether she was married or had children. She told him that she was not married or dating anyone, nor did she have any children. A few days later, Dr. Brown asked Ms. Turner to join him for dinner at a restaurant not far from the office. She agreed. After dinner, he invited her to his house for a nightcap. She agreed, but followed him in her car. She spent the night. They had dinner again one month later. Again, the

evening ended at Dr. Brown's house.

Over the next two months, Ms. Turner learned the responsibilities of the new position and established friendships with co-workers. In her third month of employment, Dr. Brown arranged for him and Ms. Turner to attend a dental conference in Chicago. Because he did not make hotel reservations in advance, the hotel only had adjoining rooms available when they checked in. Ms. Turner told him she felt the adjoining rooms were not professional and placed her in an awkward position. However, since there were no alternatives available, she said, "It would be fine." They attended the conference and returned to the office the following Monday.

After the conference, Ms. Turner visited Dr. Brown's house on three more occasions — to take his puppy to the groomer; to go with Dr. Brown to shop for a doggie door; and finally, to have dinner with Dr. Brown and his mother.

Shortly thereafter, Ms. Turner shared with her co-workers that she started

dating someone new. She mentioned how excited she was about this relationship and hoped it would develop into something serious. Dr. Brown overheard the conversation and wished her well. However, within a month's time he:

- Verbally reprimanded Ms. Turner for having lunch with her co-workers. He said she disregarded the office policy that stated, "There must be at least one staff person at the front desk at all times on days patients are in the office. Lunches needed to be staggered. On nonpatient days, staff may lunch together."

- Gave her a written warning for giggling during an initial patient consultation. He told her the patient was already self-conscious and having a staff person laugh at his predicament was offensive.

- Gave her a written warning for wearing street clothes and not the required uniform as the office policy dictated. He wrote that staff had complained since her first day of employment and patients complained that her outfits were too provocative. During the discussion, Ms. Turner adamantly refused to wear a uniform. She didn't believe an office manager should wear a uniform.

Two weeks later, Ms. Turner asked Dr. Brown if she could leave work early to have her car serviced. Because the schedule was full, Dr. Brown asked her to do it the next morning. Ms. Turner yelled at him in the operatory with two staff members witnessing the scene. She walked out of the office and did not return to work the next day.

Two days later, a co-worker called her to see when she would be returning to work. Ms. Turner said she had found another job and would not be returning.

Three weeks later, Ms. Turner filed a complaint alleging sexual harassment,

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hostile work environment, unlawful retaliation, and intentional infliction of emotional distress. She was seeking compensation for special damages, emotional distress, punitive damages, and attorney fees. Since Dr. Brown's practice is to have all employees sign an arbitration agreement in the employee manual, the case went to arbitration.

During Arbitration

Binding arbitration occurs when both the plaintiff and defendant agree to abide by the arbitrator's final decision. The arbitrator is usually a retired judge or attorney, and both the plaintiff and defendant must agree on the arbitrator. If dentists have Employment Practices Liability coverage, TDIC will represent them. The plaintiff typically retains an attorney. Each side provides the arbitrator with their view of the events.

The arbitrator considered whether:

- Ms. Turner suffered quid pro quo sexual harassment at the hands of her employer, Dr. Brown;
- Dr. Brown subjected Ms. Turner to a hostile work environment in retaliation for her rejection of his sexual advances; and
- Dr. Brown committed intentional infliction of emotional distress against Ms. Turner.

The arbitrator found both sides diametrically opposed in their version of the facts, even down to the smallest details. The case turned entirely on the credibility of Dr. Brown and Ms. Turner.

HER SIDE OF THE STORY ...

Ms. Turner asserted she engaged in nonconsensual sex with Dr. Brown on at least two occasions. He engaged in unwelcome touching and sexually charged comments in the workplace. She also claimed Dr. Brown created an intolerably hostile work environment because of her eventual rejection of his sexual advances.

Ms. Turner claimed that within days of beginning her employment, Dr. Brown invited her out for a drink on the pretext of discussing business with her. He arranged for them to be seated in a booth at the back of the restaurant. The booth was outfitted with curtains that he pulled across for privacy. Dr. Brown then began to fondle and kiss Ms. Turner. She said she "froze." As they were leaving, Dr. Brown asked her to go with him to his house. She claimed she agreed because she felt helpless.

A similar incident occurred when they went to dinner and returned to Dr. Brown's house for the night. After that, Ms. Turner claimed Dr. Brown repeatedly made sexually suggestive remarks to her and inappropriately touched her at the office. She asserted that she did not willingly participate in the relationship. She claimed that because he was her employer and she needed her job, she had to cooperate with him.

During the dental conference in Chicago, Ms. Turner stated Dr. Brown asked to come into her room several times. She denied his advances each time. After returning from the conference, Ms. Turner claimed Dr. Brown embarked on an escalating course of retaliation by criticizing her work, her manner of dress, and her interaction with patients. She characterized Dr. Brown's treatment of her as displays of temper, yelling, and picking on her

to the point where she did not feel like she could do anything right. Finally, he “wrote her up” for seemingly trivial things. She believed it all stemmed from her denial of his advances during the Chicago trip and of his learning she was dating. On the final day of Ms. Turner’s employment, she asked Dr. Brown if she could leave early. When he began yelling, she left because she “could not take the abuse any longer.”

Ms. Turner’s attorney produced former employees to attest to Dr. Brown’s demeanor toward younger females in his employ. Three former staff reported that his offensive behavior led them to quit. Ms. Turner sought help from a psychologist who testified she was psychologically troubled due to past family issues. She diagnosed Ms. Turner as suffering from severe post-traumatic stress disorder resulting from her encounters with Dr. Brown. The psychologist claimed Dr. Brown’s behavior severely exacerbated whatever pre-existing condition Ms. Turner may have had.

HIS SIDE OF THE STORY ...

Dr. Brown admitted to inviting Ms. Turner to lunch during her first week of employment. He denied taking her to dinner, sitting in a private booth, touching or kissing her, and inviting her back to his house. He denied making sexually suggestive comments or touching her in the office. He said she was the one who came onto him by flirting and giving him flattering attention. He said they both agreed to the hotel situation in Chicago. He denied making sexual advances to her while there. He denied his attitude toward her changed after the trip and stated that the “write-ups” were for good reasons. He said that she abandoned her job when she

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walked out the day he told her she could not leave early to attend to her car.

Dr. Brown’s attorney produced current employees who attested that Ms. Turner was sexually aggressive toward Dr. Brown and often disrespectful to both him and patients.

Findings and Conclusions

The arbitrator determined Ms. Turner suffered quid pro quo sexual harassment. He observed Ms. Turner’s demeanor during the interview and concluded that she did not have the guile to make the story up. He concluded that she was telling the truth about her intimate relations with Dr. Brown and opined that she did so unwillingly, fearing she would lose her job if she resisted.

The arbitrator found Dr. Brown’s denials of an intimate relationship with Ms. Turner unconvincing. He also found Dr. Brown retaliated against Ms. Turner by criticizing her failure to follow office policy, her attire, and her interaction with patients. These incidences began and escalated upon their return from the Chicago conference, and after Dr. Brown learned she was dating someone else. He discredited Dr. Brown’s testimony that Ms. Turner was fine with sharing adjoining rooms during that conference, and that he made no sexual advances.

The arbitrator concluded Ms. Turner presented a prima facie case for an award of punitive damages, i.e., the conduct described in the record was malicious

and oppressive. He found Dr. Brown took unconscionable sexual advantage of a vulnerable young woman in his employ and when she rejected his sexual overtures, he embarked on a harassment campaign to make her workplace environment so intolerable that she would ultimately quit.

The arbitrator awarded past and future economic damages equaling \$25,000 and emotional distress damages equaling \$55,000. Since Ms. Turner was the prevailing party, she was also entitled to an award of attorney fees. Dr. Brown also bore the costs of the arbitrator, court reporter, production of the transcripts, and administrative fees totaling \$15,000. Dr. Brown exhausted his \$30,000 Employment Practices Liability policy limit during the arbitration process and was responsible for paying the remaining \$65,000.

Lessons Learned

What lessons can be learned from reviewing this case?

ARBITRATION AGREEMENTS

Arbitration is the referral of a dispute to a third-party instead of a court or jury for either binding or nonbinding decision. By signing an arbitration agreement, the employer and the employee give up their rights to have their case heard in front of a jury and agree to accept alternative dispute resolution. Consult with an attorney before drafting or establishing an arbitration agreement for your office.

By signing the arbitration agreement Dr. Brown had in his employee manual, both parties agreed to abide by the arbitrator’s decision. While it is difficult to predict how a person will think, Dr. Brown may have had an easier time creating doubt in the minds of 12 jurors rather than having to convince one person of his innocence.

EMPLOYMENT PRACTICES LIABILITY INSURANCE

Dr. Brown had Employment Practices Liability insurance through TDIC, which pays for defense costs, settlements, and civil damages one might incur and be legally obligated to pay as a result of an actual or alleged wrongful employment act claimed by an employee or applicant for employment. While the policy covered some defense costs, the results of his actions cost more than the policy could bear. He reached his policy limit prior to the three-day arbitration. Dr. Brown understood that all charges occurring after the limits were exhausted were his responsibility.

It is important to conduct an annual review of your policy limits. As his practice grew, Dr. Brown failed to review his limits. What was adequate coverage for a two-person office was not sufficient when Dr. Brown increased his staff to six full-time employees. Contact your TDIC service manager to review your policy limits annually.

DENTIST/STAFF RELATIONSHIPS

TDIC does not recommend engaging in intimate relationships with employees. The likelihood of the staff person alleging sexual harassment and a hostile work environment is high. In today's climate, arbitrators, judges, juries, and even the law seem to lean toward believing the employee.

Even the most innocent gestures or comments can become suspect. Telling an off-color joke will likely offend someone. A simple hug after receiving good news can be misinterpreted. Suddenly, your office has become a hostile work environment or a staff person may allege sexual harassment charges against you. It is best to refrain from any sort of touching. Respect others per-

Allowing yourself or other staff to partake in questionable behavior may bring hostile work environment charges along with sexual harassment charges.

sonal space. If a staff person shares good news, offer congratulations and then get his or her permission to make an announcement at the next staff meeting. Refrain from telling off-color jokes and stop your staff and patients from telling them. Allowing yourself or other staff to partake in questionable behavior may bring hostile work environment charges along with sexual harassment charges.

Employers should immediately address, investigate, and correct any inappropriate behavior, even just between staff personnel. You, as the owner/employer, will be held responsible for failing to address such issues, even though you are not an active participant. Regardless of intent, inappropriate behavior can likely lead to professional embarrassment, time spent away from your practice, and loss of revenue in trying to defend your actions.

Just because you and your staff get along and share jokes now, it will not prevent a staff person from becoming upset down the road — even over something unrelated — and suing you alleging inappropriate behavior and/or harassment.

OFFICE ENVIRONMENT

To prove a hostile work environment, Ms. Turner had to show that:

- She was subjected to verbal or physical conduct (comments or advances) of a racial or sexual nature,
- The conduct was unwelcome, and

■ The conduct was so severe or pervasive that it altered the conditions of her employment.

Keep in mind that hostile work environment claims are not just related to race and sexual harassment. They can be based on any of the grounds for harassment and discrimination, including race, religion, creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, gender, age, or sexual orientation.

Employers must lead by example. Dr. Brown set the tone by being sexually suggestive in his office with Ms. Turner and other past employees. Additionally, sexual harassment can occur through the actions of nonemployees who frequent the office, including patients, vendors, and other visitors. Employees may also use incidents of harassment directed at other employees to prove their hostile environment claims. As an employer, you are obligated to investigate, address, and put an end to such behavior. Taking corrective action against the offending party and documenting the process from start (initial investigation) to finish (corrective action) may provide you with an affirmative defense in a harassment lawsuit. Remember to keep the process confidential and respect the privacy rights of all involved.

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