Several years ago, a podiatrist in his late 40s who runs his own practice with three employees needed a lawyer. He and his back-office assistant who was in her late 20s had been sharing texts containing shocking or outlandish jokes and pictures, some of a sexual nature, in an effort to see “who can gross whom out more.” One day, the podiatrist sent his employee a photo of a penis abnormality. She, in turn, showed the photo to her older sister who then became aware of the “game” they’d been playing. Outraged, the employee’s sister called the podiatrist and informed him that her sister was resigning effective immediately, and they expected him to pay her two months’ severance. The employee’s sister also told the podiatrist that he was lucky he wasn’t being sued for sexual harassment. He apologized immediately and agreed to pay the severance if the employee would sign a release for him and the practice.

The podiatrist hired June Laird, a partner in the Colorado law firm McElroy, Deutsch, Mulvaney & Carpenter, to draft the document. The state authorities or a lawsuit,” Laird says. “There was no sexual relationship between the podiatrist and his employee. He was adamant on that point, and there was never any allegation of a sexual relationship from the employee. But it still teaches an important lesson. This conduct was unquestionably inappropriate and should not have been going on, even though it was consensual. The podiatrist did not have a written policy defining sexual harassment and all of its components.

“If there had been a written sexual harassment policy, hopefully, the podiatrist and the employee would have thought twice before engaging in such behavior.”
**Legal Issues**

**Crossing the Line (from page 85)**

Podiatrist and the employee would have thought twice before engaging in such behavior. Following this incident, Laird created a written sexual harassment policy for the podiatrist.

**Obvious vs. Less Obvious**

In the #MeToo era, most people are aware of what constitutes obvious sexual harassment, including propositions to engage in sexual activity, unwanted physical contact, comments about anatomy or body parts, being asked repeatedly for a date, offers of a promotion in exchange for a sexual favor, infringing on a person’s body space, and rape. Less obvious is over-familiarity, flirting, inappropriate jokes, and sexual banter among employees. While it may seem harmless, this type of behavior may cross the line into illegal conduct when it is unwelcome. It is often referred to as a “hostile work environment.”

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII is a federal law that prohibits discrimination in employment on the basis of sex, race, color, national origin, and religion. It applies to employers with 15 or more employees. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. If your podiatry practice has fewer than 15 employees, you are likely subject to anti-discrimination and anti-harassment state laws.

According to the EEOC, sexual harassment can occur in a variety of circumstances, including but not limited to the following: The victim

- son harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.

**Prevention is Key**

Prevention is the best way to eliminate sexual harassment in your office. “Podiatry offices are often in a confined space, forcing various employees to be in close contact with each other,” says Lawrence Kobak, DPM, JD, senior counsel in Frier Levitt’s healthcare department in New York. “The best way to prevent sexual harassment among co-workers is to have a comprehensive written policy that is enforced. Most healthcare attor- neys should be able to provide sexual harassment policy for you. More generic versions are available on-line. The best policies are specific for your office.”

It’s also important to train employees on a sexual harassment policy. “You can bring in an outside consultant or trainer,” Kobak says, adding that there are also online training videos. New York State, for example, recently published two sexual harassment prevention training videos, which are available for download or viewing on YouTube (www.ny.gov/combating-sexual-harassment-workplace/employers).

Sarah Avilleira, practice administrative leader, is responsible for training new employees at Family Foot & Ankle Specialists, a New Jersey podiatry practice that has two offices and 19 employees, including three male podiatrists and one female podiatrist. Peter Wishnie, DPM, worked with a lawyer to create the original employee handbook, which includes a sexual harassment policy. It states: “It is the policy of Family Foot & Ankle Specialists to recognize the right of all employees to a workplace environment free from sexual harassment.” The policy defines sexual harassment and includes a complaint policy for employees who believe that they are the victims of harassment: “Employees who believe that they are the victims of harassment should immediately report the incident to the senior doctor in charge of the office. If the complaint involves the doctor in charge of the office, the employee should report the incident to the junior doctor.”

“About five years ago, we updated the handbook to include hostile work environment,” Avilleira says. It states: “Employers have an obligation to provide a workplace that is free from harassment. Actions which can be part of a hostile work environment can include physical touching and assaults, inappropriate or insulting comments and jokes, racial, sexual or other epithets, explicit emails or pictures, excessive yelling, screaming, or swearing, and other offensive or demeaning conduct that is motivated by race, age, gender, pregnancy, mental or physical disability, religion, color, national origin, sexual orientation, military status, or any

**The harasser can be the victim’s supervisor, an agent of the employer, a supervisor in another area, a co-worker or a non-employee.**

Continued on page 88
It almost always is a male. “In a case accused of sexual harassment. It’s very rare that a female doctor is the doctor. I would refuse to do training without the doctor being present. It has to involve the entire office to be effective, and the biggest risk is typically the doctor. It’s very rare that a female doctor is accused of sexual harassment. It almost always is a male.” In a small practice, there often is an office manager who can field complaints. West says. But if she is being harassed by the doctor, there is really no remedy other than filing a charge of discrimination. These cases are almost always someone’s word against the other, he adds.

West recalls defending a podiatrist who was accused of harassing a medical assistant. “She said she was texting suggestive comments to her and making inappropriate remarks,” West says. “She kept the texts, but it turned out to be banter and she was a willing participant. She quit, then filed a charge with a human rights commission and went through an investigation. The human rights commission didn’t find cause, she filed a lawsuit and she ended up dropping the case. The doctor behaved inappropriately.

“When I hear someone say, ‘our office is different, we are a very close group,’ my legal radar goes on” says C. Keith Greer, a California attorney who has been handling the legal needs of podiatric physicians for 26 years and is an adjunct professor of jurisprudence at the California School of Podiatric Medicine. “This frequently means that co-workers share very personal information and experiences with each other, including getting together outside the office, and the boundaries between professional relationships and social relationships are blurred. The risks of a sexual harassment or hostile work environment law suits increase when co-workers rely too heavily on office relationships to fulfill their social and emotional needs. The challenge is finding that balance between an overly rigid environment that no one wants to be part of and a comfortable office in which employees feel they are part of a team, but understand it is still a workplace.

“It’s all about boundaries and a professional office culture.”—C. Keith Greer
new employee gets more attention, one party to the relationship has a negative emotional reaction, such as jealousy or envy.”

It’s up to the podiatrist to let staff know what isn’t proper in the workplace, Greer says. “Risqué comments, improper language, and any comments of a sexual nature are simply not acceptable in today’s hypersensitive environment,” he says. “If an employee ever makes you aware of any behavior that has sexual connotations, you must immediately address the issue, document the action you have taken, and make sure the offending employee knows that such behavior cannot be tolerated. If you don’t, you are setting yourself up for a lawsuit, even though you’re not the one causing the problem.”

"If a co-worker tells you, either verbally or by body language, that they are uncomfortable, listen!"—Dr. Kobak

For additional guidance, consider the American Podiatric Medical Association’s Code of Ethics: “The podiatrist shall not engage in any deliberate act of emotional abuse, physical abuse, sexual misconduct, or sexual exploitation related to the podiatrist’s position as an employer, employee, partner, or associate. Sexual intimacy with any employee, associate, or business partner is inappropriate unless the personal relationship precedes the business relationship.” If you don’t already have a written sexual harassment policy, the APMA recommends contacting an attorney that specializes in healthcare law.

Finally, if you’re not sure how to distinguish between friendly banter and inappropriate behavior, Kobak says, “common sense and manners go a long way. If a co-worker tells you, either verbally or by body language, that they are uncomfortable, listen!” PM