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Patient harassment: It is no laughing matter

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A recent Fifth Circuit Court opinion begins, “Claims of sexual harassment typically involve the behavior of fellow employees. But not always.” The opinion illustrates the dangers of failing to take an employee’s complaints of harassment by a patient seriously.[1] In its opinion, the Court reminds employers of Title VII’s mandate that they take reasonable steps to protect employees once they know that the employees are subject to abusive behavior. An employer’s failure to take action could allow an employee’s claim to proceed to trial.

The Fifth Circuit’s pronouncement in the Gardner case is not novel. In the midst of the #MeToo movement, it does serve as a timely reminder, however. It also underscores that healthcare employers—that chaperone an environment rife with challenges—are not above reproach. The duty to provide a safe workplace exists regardless of that workplace’s inherent and expected hazards.

Gardner v. CLC of Pascagoula, LLC: A brief overview

CLC of Pascagoula, LLC is an assisted living facility that operates on the Mississippi Gulf Coast.Kimberli Gardner worked as a Certified Nursing Assistant (CNA) for CLC.[2] Before that, Gardner worked for other facilities and in-home care providers, two of which specialized in care for the mentally disabled. Gardner was no stranger to patients who were mentally ill, some of whom were physically combative or sexually aggressive. In fact, she was trained in defensive and de-escalation tactics so she could properly care for those patients in a way that did not jeopardize her safety.

Given Gardner’s experience and training, it should be no surprise that CLC assigned her to care for “J.S.,” an elderly resident who suffered from a variety of physical and mental illnesses, including dementia, traumatic brain injury, personality disorder with aggressive behavior, and Parkinson’s disease. J.S. was hardly an easy patient. He had a history of exhibiting violent and sexual behavior toward other patients and CLC staff. Indeed, CLC knew that J.S. was more aggressive toward female caregivers, that he would sexually assault them by grabbing their private areas, and that he asked for explicit sexual acts on a regular basis.

J.S.’s persistently inappropriate behavior prompted numerous staff complaints during his tenure at CLC, with Gardner’s among them. In response to one of Gardner’s complaints, CLC management purportedly laughed and told Gardner to “put [her] big girl panties on and go back to work.” For those who are not well-versed in Southern colloquialisms, this is the equivalent of management telling Gardner to “just deal with it.” So, Gardner did.

One day, Gardner reached a breaking point. She was assisting J.S. out of bed when he began to try to grope her. Gardner pivoted, and J.S. punched her left breast. Gardner sought the assistance of another member of the staff, and the two tried to move J.S. into his wheelchair. J.S. then punched Gardner a second time. A third employee came to assist, and while the trio was ultimately successful in situating J.S. in his chair, J.S. was able to get a third punch in. What happened next is in dispute, but witnesses said Gardner took a swing at J.S., though she did not

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actually hit him. Gardner denies this allegation. Gardner also allegedly stated in front of J.S. that she was "not doing shit else for [J.S.] at all" and that she guessed she was "not the right color" (presumably because Gardner is African-American, whereas the third employee to join the effort is Caucasian). Following the incident, Gardner advised members of CLC's management team that she would no longer provide care for J.S. and asked to be reassigned. Her request was denied.

Gardner then reported to the emergency room for treatment of the injuries she sustained from J.S.'s physical abuse. She remained out of work for three months. Shortly after she returned, she was terminated. Her supervisor explained the decision was because of her insubordination in refusing to care for J.S., for violating J.S.'s resident rights by swearing in front of him and making a "racist-type statement," and for attacking J.S. by swinging at him. Nothing happened to J.S.—at least not until an altercation with a resident on the day of Gardner's termination, which resulted in his relocation to an all-male "lockdown" unit.

Gardner filed suit in federal court and asserted various claims under Title VII of the Civil Rights Act of 1964. CLC moved to dismiss all of those claims, and the District Court obliged. Gardner pursued an appeal on her claims of hostile work environment and sexual harassment. The Fifth Circuit, the federal appellate court for Mississippi, Louisiana, and Texas, reversed and remanded Gardner's appealed claims.

What lessons should employers learn from the Court's opinion? Do not mock employee complaints of harassment, at least try to protect them from abusive behavior, and think twice before you base a termination decision on an employee's refusal to perform work that she believes subjects her to unlawful conduct.

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