Legal Update Article

Healthcare Employers' Title VII Obligations in Harassment, Discrimination of Employees by Patients

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Title VII of the Civil Rights Act requires healthcare employers to protect their medical staff and employees from harassment and discrimination and respond to any such behaviors swiftly and effectively, even if the actor is a patient, rather than a coworker or supervisor. A decision from the U.S. Court of Appeals for the Fifth Circuit illustrates employers' obligations when the harasser is a patient. *Gardner v. CLC of Pascagoula, L.L.C.,* 915 F.3d 320 (5th Cir. 2019).

Title VII

While claims of discrimination or harassment that create a hostile work environment under Title VII are based most often on employee-to-employee behavior, healthcare employers may be held liable for patient-to-employee conduct. In a patient harassment case, an employee must show the employer knew, or should have known, about the hostile work environment created by the patient, but failed to take prompt and appropriate corrective measures.

Fifth Circuit Case

In a case in which the harasser was a patient at an assisted living center suffering from dementia, the Court reversed a district court's summary judgment in favor of the healthcare employer and ruled the case should proceed to trial.

Kymberli Gardner, an African American Certified Nursing Assistant (CNA), claimed her employer failed to address the alleged hostile work environment created by the patient's persistent physical and verbal harassment.

Gardner, who had training in defensive and de-escalation methods for aggressive patients, admitted that, during her career, she often assisted patients who were physically combative or sexually aggressive. She said that patient "J.S." was the worst. J.S. had a long history of violent and sexual behavior toward other patients and staff and a reputation for groping female employees and becoming physically aggressive when admonished. Gardner alleged J.S. was inappropriate daily, grabbing her and making repeated sexual comments and requests. She said his behavior was documented on his records and reported to supervisors. On one occasion, when supervisors witnessed J.S.'s assaultive behavior toward another employee, he was transferred to another wing of the facility and psychiatrically evaluated. Gardner claimed that in response to her complaints about J.S.'s behavior, her supervisors allegedly laughed and told her "to put big girl panties on and go back to work."

The CNA continued to care for J.S. until one day, as she was helping J.S. out of bed, she alleged he tried to grope her. When she tried to move out of the way, J.S. allegedly punched her. She then went for help and returned with another employee.

J.S. allegedly punched Gardner a second time and tried to grab the other employee. The two employees sought additional assistance from a nurse, who was white. The three of them were able to put J.S. into his wheelchair. It was disputed whether Gardner tried to hit the patient during the incident. After the last assault, she allegedly said, "I'm not doing sh** else for this [patient] at all" and "I guess I'm not the right color," perhaps referring to the nurse. As a result of the incident, Gardner sought hospital treatment for her injuries and was on workers' compensation leave for three months, although her actual injuries were unclear.

Later that same day, J.S. had an altercation with another resident that resulted in another psychiatric evaluation for him and his transfer to an all-male lockdown unit at another facility.

After returning from leave, the employer terminated Gardner for insubordination for refusing to continue to care for J.S., violating the patient's rights by using profane language in front of him, making a "racist type" statement, and attacking the patient by swinging her hands above his head.

The Fifth Circuit noted that many years of unwelcome sexual grabbing or explicit comments could be deemed under Title VII severe or pervasive if the patient was not mentally impaired. The Court also acknowledged the challenge when an impaired patient engages in such conduct. It considered other cases where verbal harassment (repeated propositioning for sex and calling an employee disparaging names or racial slurs) was obviously offensive, but not sufficiently severe or pervasive to create a hostile work environment because of the work environment and the source. Other courts have permitted claims alleging a hostile work environment to go to trial, the Court said, when patients engaged in extreme physical assault or rape. While the Court did not find the present case to be so extreme, because the conduct occurred daily and included physical assault that left the CNA unable to work for three months, it deemed the allegations were sufficient to allow the case to go to trial. Moreover, the Fifth Circuit noted a jury could find that an objectively reasonable caregiver would not expect a patient's behavior would result in not working for three months, while their complaints were unduly dismissed by leadership.

Best Practices

Healthcare employers should consider these and other best practices:

- Confirm the company's harassment and discrimination policy specifically applies to and addresses not only employee-to-employee or supervisor-to-employee conduct, but patient-to-employee conduct;
- Respond appropriately to employees and maintain a prompt, thorough investigation process unique to the issues that arise in patient-to-employee harassment and discrimination claims;
- Provide training to employees on the company's harassment and discrimination policy and avenues to complain and include examples of unacceptable patient-to-employee harassment and discrimination;
- Ensure employees who care for patients are trained regularly (at least annually) to properly respond to and address patients with diminished capacity who may exhibit inappropriate behaviors;
- Notify employees when they may encounter a patient with previous incidents of

harassment and discrimination;

- Manage the offending patient commensurate with their physical and mental health needs; and
- Assess the patient's physical and mental health needs in light of the clinical capacity of the healthcare facility and consider whether the patient's interests would be best served in an alternate healthcare setting.

For additional guidance on these issues, please contact a Jackson Lewis attorney.