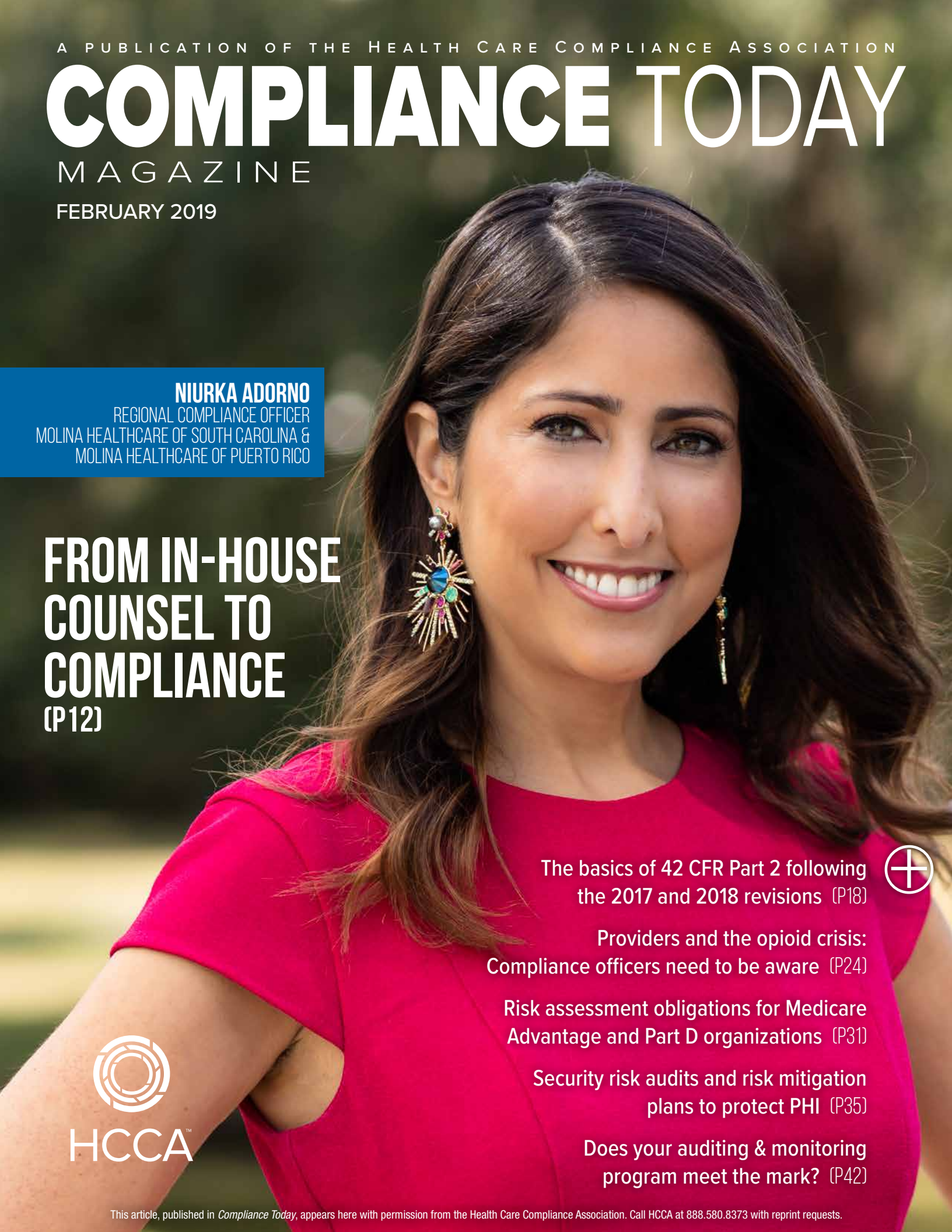
A PUBLICATION OF THE HEALTH CARE COMPLIANCE ASSOCIATION

COMPLIANCE TODAY
MAGAZINE

FEBRUARY 2019



NIURKA ADORNO
REGIONAL COMPLIANCE OFFICER
MOLINA HEALTHCARE OF SOUTH CAROLINA &
MOLINA HEALTHCARE OF PUERTO RICO

FROM IN-HOUSE COUNSEL TO COMPLIANCE (P12)

HCCA™

HCCA™
Health Care Compliance Association

888.580.8373 | hcca-info.org

VOLUME 21, ISSUE 2

Articles

Compliance Today (CT) (ISSN 1523-8466) is published by the Health Care Compliance Association (HCCA), 6500 Barrie Road, Suite 250, Minneapolis, MN 55435. Subscription is free to members (a $325 value). Periodicals postage-paid at Minneapolis, MN 55435. Postmaster: Send address changes to Compliance Today, 6500 Barrie Road, Suite 250, Minneapolis, MN 55435.

PATIENT HARASSMENT: IT IS NO LAUGHING MATTER

by Jaklyn Wrigley

Jaklyn Wrigley

(jwrigley@fisherphillips.com) is Of Counsel with Fisher Phillips LLP in Gulfport, MS.

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 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.

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."

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.

Avoid liability and create a safe workplace: Five takeaways

Savvy employers will take heed that simply doing nothing is the wrong approach. That said, there is no magic elixir to eliminate harassment in the workplace. Even the most ambitious and well-intentioned healthcare providers would fail in an endeavor to totally stamp it out. This is particularly true for providers who deliver care to patients with serious cognitive deficits. Fortunately, Title VII does not obligate you to eliminate harassment in the workplace. Instead, Title VII demands only that you take reasonable measures to try to abate it. Here are five takeaways to help make your job easier.

1. Anti-harassment policy

As a critical first step, maintain a policy that prohibits discrimination, harassment, and retaliation. This policy should apply not only to conduct by employees, but also by nonparties such as patients, vendors, customers, and any other third party that may interact with your employees. The policy should also include a detailed but user-friendly

The foundation for any response is an immediate and thorough investigation. This means you must take all complaints seriously.

reporting mechanism, as well as an accompanying instruction that employees are expected to raise complaints.

2. Communication

Policies are ineffective if employees are unaware they exist, so the next step must be to make sure the policy is communicated to all employees in a regular and conspicuous way. You may accomplish this by requiring employees to acknowledge receipt and understanding of your handbook (or other document that houses the policy) and posting information about the policy in a break room or other employee area.

3. Training

You may (read: should) also accomplish Step 2 by providing training to both hourly employees and managers. Hourly employees should be trained on what type of behavior violates the policy, that they have an obligation to report that behavior, and how to make such a report. Members of management should be trained on how to identify harassment in the workplace, that patients (and other nonemployees) may be the cause of the harassment, and how to address issues concerning harassment when they arise.

4. Respond immediately to complaints

Now that the workforce is educated on your policy, you must be prepared to handle an employee's complaint. The foundation for any response is an immediate and thorough investigation. This means you must take all complaints seriously. Certainly, you should refrain from mocking the employee who raises the complaint. Not only does this shirk your Title VII responsibilities, but it also allows the toxic workplace culture that birthed (at least partially) the #MeToo movement to fester. This may breed additional harassment claims, which are regarded as particularly loathsome in the current climate.

5. Accountability

Finally, there should be some sort of accountability. What this means when a patient is involved is difficult to say, but the mere fact that a situation may be challenging does not mean you should do nothing. In the end, simply chalking things up to the fact that the bad actor "can't help it" does not license you to ignore the misdeeds.

Summing it up: Don't do nothing

Instead of doing nothing, do something. These tips are a great start, but the work of a healthcare provider is never done if it is truly invested in creating a culture both satisfying to its employees and focused on top-notch patient care. CT

Endnotes

1. *Gardner v. CLC of Pascagoula, LLC*, 894 F.3d § 654 (5th Cir. June 29, 2018). https://bit.ly/2yWTrZH
2. *Gardner v. CLC of Pascagoula, LLC*. U.S. District Court, S.D. Mississippi, Feb 6, 2017. https://bit.ly/2PRXRod

Takeaways

- Employers should note that simply doing nothing in the face of workplace harassment is the wrong approach.
- Even the most well-intentioned healthcare providers would fail in an endeavor to totally stamp out harassment, particularly among those who care for patients with serious cognitive deficits.
- Title VII does not obligate employers to eliminate harassment in the workplace, but demands only that leaders take reasonable measures to try to abate it.
- Maintain a policy that prohibits discrimination, harassment, and retaliation by employees, patients, vendors, customers, and any other third party that may interact with your employees.
- Ensure the policy is communicated to all employees by requiring them to acknowledge receipt and understanding of the policy and posting information about the policy in a break room or other employee area.