Protecting Employees From Patient Harassment: It's No Laughing Matter

Insights
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"Claims of sexual harassment typically involve the behavior of fellow employees. But not always." So begins a recent opinion from the 5th Circuit Court of Appeals that illustrates the dangers of failing to take an employee's complaints of harassment by a patient seriously. 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 do so could allow an employee's claim to proceed to trial.

The 5th Circuit's pronouncement in the 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—which 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 beautiful, family-friendly Mississippi Gulf Coast (a shameless plug by this article's author, who resides on said gulf coast—a real hidden gem among beach destinations). Kymberli Gardner worked as a Certified Nursing Assistant for CLC. Before that, she worked for other facilities and in-home care providers, two of which specialized in care for the mentally disabled. Ms. 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 Ms. 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 had sexually assaulted 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

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CLC, with Ms. Gardner's among them. In response to one of Ms. Gardner's complaints, CLC management purportedly laughed and told Ms. 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 Ms. Gardner to "just deal with it." So, Ms. Gardner did.

One day, Ms. Gardner reached a breaking point. She was assisting J.S. out of bed when he began to try to grope her. Ms. Gardner pivoted, and J.S. punched her left breast. Ms. 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 Ms. 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 Ms. Gardner took a swing at J.S. but did not actually hit him. Ms. Gardner denies this allegation. She also allegedly stated in front of J.S. that she was "not doing sh*t-else for him at all" and that she guessed she was "not the right color" (presumably because Ms. Gardner is African-American, whereas the third employee to join the effort was Caucasian). Following the incident, Ms. Gardner advised members of CLC's management team that she would no longer provide care for J.S. and asked to be reassigned. Facility managers denied her request.

Ms. Gardner then reported to the emergency room for treatment of the injuries she sustained from J.S.'s physical abuse, and she remained out of work for three months. Shortly after she returned, the facility terminated her employment. 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 taking a swing at him. Nothing happened to J.S.—at least not until an altercation with a resident on the day of Ms. Gardner's termination, which resulted in his relocation to an all-male "lockdown" unit.

Ms. Gardner filed suit in federal court and asserted various claims under Title VII of the Civil Rights Act of 1964. The trial court dismissed her case and she appealed her hostile work environment and sexual harassment claims. On June 29, the 5th Circuit Court of Appeals (which hears federal appeals from Mississippi, Louisiana, and Texas) reversed the dismissal and resurrected her claims.

The lessons employers should 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.

Non-Employee Harassment In The Healthcare Space: It's Complicated

It is well-settled that Title VII does not prohibit all harassment, but does prohibit harassment because of sex (or other protected characteristics) that is sufficiently severe or pervasive to affect the terms and conditions of employment. There are subjective and objective components to this analysis. Thus, a plaintiff must subjectively perceive the harassment as severe or pervasive, and a plaintiff's subjective belief must be objectively reasonable. What this means in healthcare can be different from what this means in other industries.

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It is the opinion of many that no workplace in America presents greater challenges than those in the healthcare setting. Abuse and harassment are common. From patients with diminished capacity to those under the influence of drugs, employment can be difficult, if not downright dangerous. But the law takes these things into account, and courts are required to judge the specific circumstances of each claim when evaluating whether the conduct at issue constitutes actionable harassment or conduct that an employee should reasonably expect to occur in the particular work environment.

Given the nuances of the law when applied to the healthcare workplace, courts have held that conduct by a patient who is medically incapable of conforming their conduct to societal norms might not necessarily create a hostile work environment, even if the same behavior by a coworker would. This leeway does not immunize healthcare employers that fail to take action when allegations of abuse or harassment come to their attention, however.

Practical Steps To Avoid Liability And Create A Safe Workplace

Savvy employers will take heed that simply doing nothing is the wrong approach. That said, there is no magic elixir to eliminating 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.

As a critical first step, you should maintain a policy that prohibits discrimination, harassment, and retaliation. Not only should this policy apply to conduct by employees, but also to non-parties 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 reporting mechanism, as well as an accompanying instruction that employees are expected to raise complaints.

Policies are ineffective if employees are unaware they exist. So your 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 breakroom or other employee area.

You may (read: should) also accomplish this step 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 non-employees) may be the cause of the harassment, and how to address issues concerning harassment when they arise.

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

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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.

Finally, there should be some sort of accountability. What this means when a patient is involved is difficult to say. But just because the 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.

The Takeaway: Don't Do Nothing

Instead of doing nothing, do something. These tips are a great start, but the work of a healthcare provider that is truly invested in creating a culture both satisfying to its employees and focused on top-notch patient care is never done. To learn what else you can do, contact your Fisher Phillips attorney or any of the attorneys in our Healthcare Practice Group.

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