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Protecting Employees from Sexual Harassment by Patients: Health Care Providers' Obligations in the #MeToo Era

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Undoubtedly employers have been under heightened scrutiny since the resurgence^[1] of the #MeToo movement in October 2017. For the most part, the health care industry has not been the target of intense media analysis regarding the #MeToo movement, but circumstances are changing. For instance, Time's Up Healthcare, a new division of the anti-sexual harassment and discrimination organization launched on March 1, 2019, with a mission of "provid[ing] visibility to persistent gender inequities and harassment in health care through data and through narratives."^[2] Another central mission of Time's Up Healthcare is to encourage health care organizations to make the issue of combatting sexual harassment "central and visible."^[3]

While the #MeToo movement has been primarily focused on highlighting sexual harassment between coworkers, recent headlines and court decisions have shed light on the delicate issue of handling employees' reports of alleged sexual harassment by non-employees, such as patients, customers, and vendors. The Equal Employment Opportunity Commission (EEOC) reconvened its task force on workplace harassment to focus on preventing the harassment of employees, including harassment from customers and guests.^[4]

While health care providers are not always liable for the sexual harassment committed by patients, employees do not assume the risk of patient harassment when they accept employment either. The Fifth Circuit's recent decision, *Gardner v. CLC of Pascagoula, L.L.C.*,^[5] demonstrated the balancing act that courts, and, as a result, employers must engage in to determine their obligation to protect employees when it comes to a patient's conduct. The court began its opinion by noting that "[c]laims of sexual harassment typically involve the behavior of fellow employees. But not always."^[6]

In this case, Kymberli Gardner, a Certified Nursing Assistant, filed suit claiming that she was sexually harassed by a resident of an assisted living facility.^[7] Gardner claimed that J.S., an elderly patient, had a reputation for groping the female employees and becoming physically aggressive when reprimanded.^[8] Additionally, J.S. was diagnosed "with a variety of physical and mental illnesses including dementia, traumatic brain injury, personality disorder with aggressive behavior, and Parkinson's Disease."^[9] According to Gardner, every day J.S. would physically grab her, repeatedly ask for explicit sexual acts, and make other lewd comments.^[10] Gardner said her supervisor had witnessed J.S.'s sexually inappropriate behavior and had also received complaints from nurses.^[11] Gardner documented the behavior, and discussed her concerns with her supervisors, which were dismissed.^[12] According to Gardner, her supervisor laughed and told her to "put [her] big girl panties on and go back to work."^[13] Then, one day while attempting to help J.S. out of bed, the resident groped Gardner, attempted to touch her left breast, punched the side of her breast, and over the course of her attempts to seek help and move him out of bed, punched Gardner twice more.^[14] Gardner refused to continue to care for J.S. because of the repeated harassment and asked to be reassigned.^[15] The request was denied.^[16] After the incident Gardner went on a leave of absence related to her injuries.^[17] Upon her return, she was fired for insubordination (refusing to care for J.S.); swearing in front of J.S. during the incident; and allegedly swinging her fist over J.S.'s head during the incident.^[18] The assisted living facility did not reprimand J.S. for the incident with Gardner.^[19]

The district court dismissed all of Gardner's claims, including her hostile work environment and retaliation claims by finding that it was "not clear to the Court that the harassing comments and attempts to grope and hit are beyond what a person in Gardner's position should expect of patients in a nursing home."^[20]

In overturning the district court's decision, the Fifth Circuit acknowledged that despite all of the behavior the "complication is the one we have already mentioned: the source of the harassment is the resident of an assisted living facility who suffers from dementia."^[21] The Fifth Circuit noted, however, that there is no "categorical bar" prohibiting employees from succeeding on claims stemming from harassment by patients.^[22] The Fifth Circuit further held that there is no "default presumption against Title VII liability when the harasser is suffering from mental disability" and that "while a diminished mental condition of the harasser is an important consideration, it does not preclude [employer] liability."^[23] Ultimately, the appeals court determined that a jury could conclude that an objectively reasonable caregiver would not expect to be sexually harassed daily, injured, or be dismissed (and met with laughter) after raising complaints.^[24] Thus, Gardner will have her day in court.

In *Gardner*, the appeals court continued^[25] to develop the appropriate balance between an employer's (in this case a health care provider) inability to control its customer/patient and an employee's right to work in an abuse-free environment. While the extent of this obligation will likely continue to be litigated, employers should take proactive steps to mitigate their liability exposure by adopting policies and procedures for responding to customers and patients who sexually harass employees and develop and implement sexual harassment training for employees.

Five key takeaways for health care providers:

1. Employers should reevaluate workplace policies to ensure they address potential harassment and discrimination from patients, vendors, and other third parties. Policies should also include various methods for reporting complaints.
2. Employers should not ignore complaints regarding patient conduct and should take all complaints seriously. It is critical that Human Resources and supervisory employees are trained how to promptly and thoroughly investigate complaints.
3. Employers should attempt to remedy the complained-of conduct by taking affirmative steps to prevent harassment by patients. Supervisory employees should be trained regarding how to address harassment from patients (and other third parties), in conjunction with Human Resources.
4. Employers have an obligation to protect employees from patients when occasional incidents of inappropriate physical contact progress to persistent behavior.
5. Employers should adopt policies and incorporate procedures into existing sexual harassment training regarding the appropriate response and procedures for handling sexual harassment by patients.

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Endnotes

^[1] The #MeToo movement was originally founded by Tarana Burke in 2007 as an organization to assist victims of domestic violence and sexual assault. See *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. Times, Oct. 20, 2017, <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> (last visited Apr. 17, 2019).

[2] See <https://www.timesuphealthcare.org/mission> (last visited Apr. 17, 2019).

[3] *Id.*

[4] Alexandra Yoon-Hendricks, *Spurred by #MeToo, a Harassment Task Force Reconvenes*, N.Y. Times, June 12, 2018, <https://www.nytimes.com/2018/06/12/us/politics/eeoc-harassment-task-force.html>.

[5] *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320 (5th Cir. 2019).

[6] *Id.* at 321.

[7] *Id.* at 322.

[8] *Id.* at 323.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 324.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 325.

[21] *Id.* at 326.

[22] *Id.*

[23] *Id.*, fn. 7.

[24] *Id.* at 327.

[25] For instance, in *Hewitt v. BS Transportation of Illinois LLC*, et al., Civil Action No. 18-712, 2019 WL 199900 (E.D. Pa. Jan. 10, 2019), an employee filed suit alleging hostile work environment based on sexual harassment. The court denied the employer's motion to dismiss because the employee had been subjected to repeated sexual advances and sexual assault by a customer. *Id.* at *6-7. The court further noted that the employee's supervisor failed to investigate the employee's complaints. *Id.* at *7.