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HOSTILE WORK ENVIRONMENTS CAN BE CREATED BY PATIENTS AND OTHER THIRD PARTIES, TOO

A recent federal appeals court decision reminds us that employees can bring sexual harassment claims based on the conduct of non-employees, including patients. A recent decision by the U.S. Court of Appeals for the Fifth Circuit reminds us of that risk.

THE FACTS AND ALLEGATIONS

In *Gardner v. CLC of Pascagoula, LLC*, a nursing assistant at an assisted living facility claimed that a resident with dementia created a sexually hostile work environment. The patient, who was elderly and diagnosed with mental illnesses, had a reputation for groping staff members and becoming physically aggressive when confronted about his behavior. The conduct included lewd comments, frequent requests for sex and grabbing in inappropriate ways. The plaintiff claimed the patient subjected her to this behavior on a daily basis. According to the court, the resident's conduct was well known to leadership in the organization. And, according to the plaintiff, when she expressed concern to her supervisor, the supervisor laughed, and the facility's administrator told her to "put [her] big girl panties on and go back to work."

The plaintiff began a leave of absence due to a workplace injury after an especially egregious incident in which the patient allegedly groped her, punched her when she resisted his behavior and became even more physically aggressive. During the course of events, according to some who documented events at the time, the plaintiff swung at the patient and brushed his head with her arm. After the incident, the plaintiff reportedly remarked, "I guess I'm not the right color," apparently a comment comparing her own race (black) to that of a nurse (white) because the nurse could calm the patient and she could not. She then told the administrator and nurse that she would not care for the patient anymore and asked to be reassigned, but her request was denied.

THE PLAINTIFF SUES AFTER TERMINATION

As a result of injuries she sustained during the incident, the plaintiff took a leave of absence. Shortly after she returned three months later, the facility terminated her employment. The employer gave three reasons for the termination: (1) her violation of the patient's rights (due to the race-related comment and swearing at him); (2) her refusal to care for the patient; and (3) for attacking him.

The plaintiff brought various claims under Title VII of the Civil Rights Act of 1964, each of which was dismissed on the employer's motion for summary judgment. The plaintiff maintained, on appeal, that her claims for retaliation and hostile work environment should have proceeded to a jury.

THE COURT OF APPEALS ADDRESSES THE UNIQUE EMPLOYMENT CIRCUMSTANCES OF CARING FOR PATIENTS WITH MENTAL ILLNESS

The Court of Appeals reversed the district court's decision with regard to the hostile work environment claim. The court did not struggle with whether the conduct was sufficiently pervasive or severe to create a hostile work environment. Instead, the court discussed at greater length whether a resident's conduct could form the basis for hostile work environment liability against the employer regardless of the behavior. In two past cases, the Fifth Circuit had found that the conduct of residents at one assisted living and one nursing home did not do so. The court explained, however, that in those past cases, the conduct was verbal in nature (one racial and one sexual) and that courts should consider the "specific circumstances" in determining "whether a reasonable person would find the work environment hostile or abusive taking due account of the unique circumstances involved in caring for mentally diseased elderly patients" (internal quotations omitted). The court went further to point out what it regarded as a "difficult line-drawing problem of what separates legally actionable harassment from conduct that one should reasonably expect when assisting people suffering from dementia." The line in this case, according to the Fifth Circuit, rested on the fact that a "facility must take steps to try to protect an employee once there is physical contact that progresses from occasional inappropriate touching or minor slapping to persistent sexual harassment or violence with the risk of significant physical harm." In the end, the court held that a "jury could conclude that an objectively reasonable caregiver would not expect a patient to grope her daily, injure her so badly she could not work for three months and have her complaints met with laughter and dismissal by the administration."

In addressing the facility's concern that it has no control over the conduct of a patient, the court disagreed. It noted that some nursing homes have avoided liability by actions such as "assigning a security escort, reassigning the victimized employee, and offering to remove

the patient from the facility." In addition, in this case, the patient was later transferred to an all-male facility after the patient assaulted another patient.

PRACTICAL TAKEAWAYS

There should be no dispute, at least according to the Fifth Circuit, that the conduct of non-employees can create a hostile work environment. Therefore, whether the underlying behavior is perpetrated by a vendor, patient, customer or other third party, employers must be mindful that a prompt investigation and appropriate remedial action are necessary when the behavior rises to the level of a hostile work environment. In the case of health care organizations (whether hospitals, assisted living facilities or otherwise), solutions include (but are not limited to) expulsion consistent with other law, transfer of the patient to a different caregiver, reassignment of staff and security escorts. A careful analysis of the options and remedies is necessary because there is no "one size fits all" answer. The best solution lies with a careful examination of the circumstances and often consultation with legal counsel.

If you have any questions about this case or other concerns about managing such situations, please contact Jon Rabin at (248) 457-7835 or jrabin@hallrender.com or your regular Hall Render attorney.