

## Fifth Circuit Permits Employee Allegedly Harassed by Patient to Proceed to Trial

---

Wednesday, August 1, 2018

A recent Fifth Circuit decision reminds healthcare employers that liability not only stems from potential harassment of employees by coworkers, but by patients as well. In [Gardner v. CLC of Pascagoula, L.L.C. dba Plaza Community Living Center](#), 2018 U.S. App. LEXIS 17939 (5th Cir. June 29, 2018), the Fifth Circuit held that Kymberli Gardner, a former assisted living facility certified nursing assistant who was allegedly harassed by a patient, can proceed with her hostile work environment claim to trial. The Court reversed the district court's grant of summary judgment in favor of the employer.

The patient at issue is an elderly man who resided in the employer's assisted living facility and suffers from illnesses, such as dementia and Parkinson's disease. Gardner and other female nurses complained to their supervisor about the patient's inappropriate behavior, including repeated groping and lewd sexual comments. The plaintiff also asserts that, as a result of the patient's behavior, she was required to take a leave of absence from work. The plaintiff alleges that, instead of taking action, her supervisor laughed at her concerns, and told her to "put [her] big girl panties on and go back to work." Gardner later requested reassignment after an incident wherein she was reportedly punched by the patient three times while assisting him out of bed. The plaintiff's request was denied and she was ultimately terminated based on her response to this incident, as she is alleged to have made inappropriate comments (including swearing and racial statements) and tried to hit the patient.

The Fifth Circuit overturned the lower court's summary judgment finding in favor of the employer, concluding that a jury could find that these disputed facts satisfy the elements of a hostile work environment claim under Title VII of the Civil Rights Act of 1964 (Title VII). The Court emphasized the patient's physical assaults, distinguishing "occasional inappropriate touching or minor slapping" from "persistent sexual harassment or violence with the risk of significant physical harm." The Court held that under the facts presented, 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." The Court also noted the employer's alleged lack of remedial measures in light of their knowledge of the patient's conduct based on informal complaints, and that the behavior was recorded in the patient's chart. In making this finding, the Court recognized the employer's demonstrated ability to fix the situation, as the patient was later removed to an all-male facility after assaulting another patient.

This decision is another important reminder of the complexities facing healthcare employers in addressing hostile work environment claims, not just amongst employees but based on patient behavior as well. Healthcare employers must expand sexual harassment discussions beyond employee-employee interactions, and maintain a workplace culture where employees feel comfortable sharing their concerns.

Jackson Lewis P.C. © 2019

**Source URL:** <https://www.natlawreview.com/article/fifth-circuit-permits-employee-allegedly-harassed-patient-to-proceed-to-trial>



Article By [Jackson Lewis P.C. Sarah R. Skubas](#)  
[Healthcare Workplace Update Blog](#)

[Health Law & Managed Care  
Litigation / Trial Practice  
Professional / Malpractice  
5th Circuit \(incl. bankruptcy\)](#)