

Gardner v. CLC of Pascagoula, LLC –What Constitutes “Severe and Pervasive” Conduct With Respect to “Third-Party Harassment”?

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Employers may be liable to their employees for harassment by non-employees under Title VII. Courts have found liability for this so-called “third-party harassment” in some of the following fact-specific contexts: waitresses harassed by their dining customers; casino dealers suffering harassment from gamblers at the table; and vendors being harassed by clients they visit onsite for sales and service calls. In *Gardner v. CLC of Pascagoula, L.L.C.*, Case No.: , 2019 WL 458376 (5th Cir. Feb. 6, 2019), as revised (Feb. 7, 2019), the Fifth Circuit addresses what constitutes third-party harassment under Title VII in the following context: harassment against healthcare workers by patients of diminished capacity. In its opinion, the Court grapples with how to determine what reasonable healthcare workers should expect when their job requires them to provide services to mentally incapacitated patients.

Plaintiff Kimberli Gardner was a CNA at an assisted living facility, trained in caring for combative and sexually aggressive patients. For some period of time, Gardner was assigned to care for an elderly man with a history of verbal and physical assaults on care workers. Gardner ultimately refused to continue assisting the patient after he grabbed her breasts and punched her. She was terminated, and the defendant’s articulated reasoning for the termination included insubordination for her refusal to continue to work with the abusive patient and swearing and swinging at the patient during the punching incident.

Gardner sued, bringing numerous claims under Title VII and Mississippi state law. The Southern District of Mississippi granted the defendant's motion for summary judgment on all claims, holding that the harassing comments and attempts to grope and hit were what a person in Gardner's position should have expected of diminished capacity patients in a nursing home. *Gardner v. CLC of Pascagoula, LLC*, 2017 WL 487031, at *5 (S.D. Miss. Feb. 6, 2017). In so holding, the district court noted that Gardner had been trained to deal with combative, sexually aggressive patients, and, therefore, it was not unreasonable for her to expect to encounter a combative, sexually aggressive patient under her care, noting that "the behavior exhibited by nursing home patients suffering from dementia or other mental diseases can be expected to be outside ordinary social boundaries; it is the reason they reside in such facilities." Further, the district court held that only "unusually egregious working conditions" are sufficient to establish a hostile work environment and determined that the evidence presented by Gardner did not qualify.

Gardner appealed her retaliation and hostile work environment claims. On appeal, the Fifth Circuit initially ruled on June 29, 2018. However, on February 6, 2019, the Fifth Circuit withdrew that opinion and issued its substituted opinion, which it immediately withdrew and replaced with yet a *third* opinion the following day, February 7. In its final opinion, the Fifth Circuit reversed the majority of the district court's ruling, holding that the evidence of abuse on file was sufficient to create a genuine issue of material fact such that a reasonable jury *could* conclude that the line between "reasonable conduct in a nursing home" and "conduct creating a hostile work environment" had been breached in Gardner's case. The patient's dementia, was an important piece of the analysis because lewd comments from an incapacitated patient would not be "physically threatening or humiliating" in the same way they would be from a person with full faculties. In other words, the reasonable person in that work environment would understand the "unique circumstances involved in caring for mentally diseased elderly patients," and would "reasonably expect when assisting people suffering from dementia." Following the note, however, the Fifth Circuit departed from the district court and concluded that Gardner had supplied enough evidence to overcome summary judgment: "the evidence of persistent and often physical harassment by J.S. is enough to allow a jury to decide whether a reasonable caregiver on the receiving end of the harassment would have viewed it as sufficiently severe or pervasive even considering the medical condition of the harasser." The Court remanded the case back to the district court, noting that although the jury *could* find for the plaintiff, it was not *required* to because the plaintiff must also show that the employer knew or should have known of the harassing conduct and failed to take steps to prevent it.

The *Gardner* opinion may complicate the ability for defendants to prevail on summary judgment in similar contexts. However, employers can take affirmative steps now to assure their policies and procedures for workers' reports of third-party harassment are up to date and assure worker concerns are being properly handled consistent with those policies in order to mitigate any potential liability.

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