

## Employment Discrimination:

Can Nursing Homes Be Liable For Employment  
Discrimination When Residents Or Their Visitors  
Harass The Staff?

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Every nursing home has had the experience of having residents who act out in a sexually or racially inappropriate manner. Usually, although not always, the behavior is a result of the resident having Alzheimer's or another type of dementia. In addition to the usual concern of treating the resident for the good of the resident, should the nursing home be concerned about the affect of this behavior on the staff? Can a nursing home be liable to a staff member who is racially or sexually harassed, not by a co-worker or other employee, but by a resident?

The short answer is that an employer can be liable for harassment by a non-employee, i.e., the resident.<sup>1</sup> The longer answer is we need to review how an employee shows they were harassed to determine when this applies in a nursing home.

In order to prove a case of a hostile work environment based on harassment, an employee must show:

1. The employee belongs to a protected class;
2. The employee was subjected to unwelcome harassment;
3. The harassment of which the employee complains was based on race or sex;
4. The harassment affected a term, condition, or privilege of employment; and

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<sup>1</sup>*Pickett v. Sheridan Healthcare Center*, 2008 U. S. Dist. LEXIS 20662 (N.D. Ill., March 14, 2008) (a nursing home could be liable under Title VII for sexual harassment of a nursing home housekeeper by nursing home residents); *Ligenza v. Genesis Health Ventures of Massachusetts*, 995 F. Supp. 226 (D. C. Mass. 1998) (nursing home can be liable for sexual harassment of a respiratory therapist by a nursing home patient).

5. The employer knew or should have known of the harassment and failed to take remedial action.<sup>2</sup>

The employee must perceive the harassment as sufficiently severe or pervasive and this perception must be objectively reasonable. The first issue in a nursing home setting is determining whether the harassment was severe and pervasive. This requires consideration of the following factors:

1. What is the frequency of the harassment?
2. Was it physically threatening or just offensive words?
3. Does it unreasonably interfere with the employee's work performance?
4. What is the source? (The below language is from a home healthcare case, but it just as applicable to a nursing home.)

"The home healthcare industry was created to assist individuals who lack the ability to care for themselves. Many of these individuals become dependent on home healthcare as a direct result of debilitating diseases such as Alzheimer's and Parkinson's. As an Advanced employee, *Cain's* daily routine included dealing with the victims of those diseases and their particular failings. In this context, Marcus' improper requests and tasteless remarks cannot form the basis of a justiciable claim for sexual harassment. We note that Cain never alleged any physical conduct that made her feel threatened, nor did she accept Advanced's offer of reassignment, relieving her of the responsibility of care-taking for Marcus. Marcus' unacceptable but pitiable conduct was not so severe or pervasive as to interfere unreasonably with *Cain's* work performance or, given the circumstances, to create an abusive work environment."

See *Cain v. Blackwell*, 246 F.3d 758 at 760-761 (5<sup>th</sup> Cir., 2001). The Court concluded that while the patient's statements were clearly crude, humiliating and insensitive, the **unique circumstances** in the case made the elderly and obviously impaired patients commentary insufficient to establish sexual

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<sup>2</sup>*Johnson v. Nexion Health at Broadway, Inc.*, 205 U. S. Dist. LEXIS 32360 (September 28, 2005); *Cain v. Blackwell*, 246 F.3d 758 (5<sup>th</sup> Cir., 2001).

harassment.<sup>3</sup> The language from the *Cain* case tells us that the Court will consider very strongly the source of the harassment. Harassment by a resident with a mental disease process will not be viewed as severe, threatening or disruptive as the conduct of a co-worker. In another case, the Court stated that it was, "[N]evertheless reluctant, given the context of a nursing home providing care for residents with mental illnesses, to conclude that three instances of inappropriate resident conduct over the course of eight months are sufficiently severe or pervasive."<sup>4</sup>

If the Court should find that a resident's conduct constituted sexual or racial harassment, it will then look to whether the nursing home knew or should have known of the harassment and did they take action to remedy the situation. In this analysis, the Court should recognize that the nursing home has certain restraints in dealing with residents. What are the options?

Transferring a resident is generally not the answer. A resident may be transferred only if:

1. The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
2. The safety of individuals in the facility is endangered;
3. The health of individuals in the facility would otherwise be endangered;
4. The resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility; and/or
5. The facility ceases to operate.

See 42 C.F.R. § 483.12(a); O.C.G.A. § 31-8-116 (Bill of Rights for Residents of Long Term Care Facilities).

Depending upon the nature of the harassment, it is possible that a transfer could be justified based upon the endangerment of the safety of individuals in the facility. In most cases, however, this

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<sup>3</sup>*Cain v. Blackwell*, 246 F.3d 758 (5<sup>th</sup> Cir., 2001).

<sup>4</sup>*Pickett v. Sheridan Healthcare Center*, 2008 U. S. Dist. LEXIS 20662 (N.D. Ill., March 14, 2008).

would be a stretch. As anyone who has tried to involuntarily transfer a resident from a facility, it can be a long, difficult and expensive road.

On the other hand, a nursing home cannot simply "throw up its hands" and say we could not transfer the resident so there was nothing we could do about the harassment. While a court will recognize the various federal and state regulations that limit the nursing home's ability to involuntarily transfer a resident or take other action, the nursing home should be prepared to at least show that they considered transfer and determined that it was not a viable option under the regulations based upon the resident's conduct.<sup>5</sup>

#### What Are Other Potential Options For Dealing With A Resident's Harassing Behavior?

1. If the behavior is physical, can the resident be restrained?

Generally not a reasonable or recommended option. It would be difficult to justify restraint, except perhaps under the most severe situations. Is there any quicker way to get yourselves in trouble as a nursing home than to use restraints? See 42 C.F.R. § 4083.13(a); O.C.G.A. § 31-8-109, for restrictions on use of restraints.

2. Offer a transfer to the employee.

Offer the employee the option of working in a different area of the nursing home so as not to come into contact with the offending resident. If the harassing behavior is racially based, consider having only employees who are of the same race as the resident, provide care to the resident. Similarly, if a male resident sexually harasses female staff, consider having only male staff provide care to the resident.

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<sup>5</sup>*Ligenza v. Genesis Health Ventures of Massachusetts*, 995 F. Supp. 226 (D. C. Mass. 1998) (a nursing home cannot shield itself from liability for workplace harassment simply by saying there are regulations that limit it from dealing with a resident's harassing behavior).

3. Psychiatric and Medical Care

Continued involvement of the physician and the resident's family in an effort to provide the appropriate medical and psychiatric care, which would perhaps address and put a stop to the inappropriate behavior.

4. Involve the Family.

Make sure the family is aware of the resident's behavior and discuss with them how to correct the resident's behavior.

**TAKE AWAY POINTS**

1. If an employee complains of workplace harassment by a resident, do not ignore the complaint.
2. Do not think there is nothing you can do to address the situation simply because such behavior is expected of some patients with dementia and the employee should know that it "comes with the territory."
3. Do what you can within the framework of regulations that limits your options.

**What Happens When A Staff Member Is Harassed By A Resident Family Member Or Other Visitor?**

The same general analysis applies to this situation as when the harassment is by a resident. Once again, the keys will be to look at the behavior itself to determine whether the conduct is so severe or pervasive as to alter the conditions of employment and create an abusive working environment. The next, and more important, consideration for the nursing home is what can you do within the regulatory framework to alleviate the harassment.

The right of a nursing home resident to have visitors is governed by 42 C.F.R. § 483.10(j) and several statutes under the Bill of Rights of Residents of Long Term Care Facilities, O.C.G.A. § 31-8-111; § 31-8-114 and § 31-8-120. Under the federal regulation, "the resident has the right and the facility must provide immediate access to any resident by the following. . . . immediate family or

other relatives of the resident; and subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time, others who are visiting with the consent of the resident.

State regulations give residents the right to associate, meet, and communicate privately with persons of the resident's choice. O.C.G.A. § 31-8-111(3). The residents have the right to unimpeded and private visitation, provided that such visitation does not disturb other residents. O.C.G.A. § 31-8-114(4). Visitors must be granted access to residents, who have the right to refuse or terminate any visit. . . . access under this Code section shall be allowed during normal visitation hours. O.C.G.A. § 31-8-110(a). The administrator or person in charge of a facility may refuse access as described in this Code section or require a person to leave a facility only if he has reason to believe that the presence of the person seeking access would result in severe harm to any resident's health, safety, or property . . . O.C.G.A. § 31-8-120(c).

Restricting visitation is a difficult proposition. Clearly, residents have the right to have visitors almost anytime they desire. It is interesting to note that visitation can be restricted if there is reason to believe the visitor would cause severe harm to any **resident's** health, safety or property. The statute does not express any concern for the health, safety or property of the staff!

Another option, similar to when the resident is the one exhibiting the harassing behavior, is to offer a transfer to the staff member to another part of the nursing home. Of course, any harassing behavior should be discussed with the offending visitor. While some behavior is very obviously harassing, other behavior might not be thought by the visitor to be harassing because of the visitor's background, culture, upbringing, etc.

Similar to when the resident is harassing the staff, an important element of the analysis will be the level of control the nursing home can exert over the offender. I would submit that a nursing home does not have very much control over the behavior of visitors. While a nursing home has

tremendous control over an employee who harasses, by disciplining or terminating the employee, federal and state regulations limit the nursing home's control over residents, and to an even greater degree, over visitors.