

## Sexual Harassment: Court Sees Harassment But Finds No Excuse To Abuse The Patient.

The aide had grounds to sue her former employer for sexual harassment from a resident while she was still on the job at the nursing home, the US Court of Appeals for the Tenth Circuit ruled.

Even so, the facility had the right to terminate her after she lashed out verbally against the resident when she could no longer tolerate the situation.

### **Facility Knew of the Resident's Propensity for Abuse**

The resident had criminal charges pending against him from domestic abuse, assault and battery and violation of a protective order when he was admitted to the facility. Staff transported him to and from his court dates on numerous occasions.

### **Resident Began to Harass the Aide**

The resident seemed to be attracted to the aide in question. He acted out when she was not assigned to care for him.

It is a red flag when a resident who has been observed interacting inappropriately with staff members requests a specific caregiver, the Court said, but his requests were nevertheless granted with the proviso that two staff persons were to be in the room with him at all times.

Even with the second aide present the resident still fondled the aide routinely and made sexually explicit comments.

The aide complained to the directors of nursing and social services, but all that was done was to add language to the care plan that the resident would be discouraged from asking for a specific aide.

Eventually he physically assaulted her. He grabbed her and held her down so that she could not get up until he let her. He was later convicted of criminal charges.

The assault was followed by a tirade of verbal provocation in the dining room claiming she had withheld his medications.

### **Aide Admitted Verbal Abuse**

The aide was called in to the administrator's office the next day. He was not aware of her ongoing complaints of sexual harassment. When she admitted she called the resident a "prick" during his tirade the administrator fired her for patient abuse.

**Aguir v. Bartlesville Care Ctr.**, 2011 WL 1461541 (10th Cir., April 18, 2011).

***The resident routinely subjected the aide to unwanted touching, interfered with her work and finally assaulted her. The resident was eventually convicted of assault and battery for attacking the aide.***

***However, the employer nevertheless had a legitimate, non-discriminatory reason for firing the aide.***

***Verbal abuse of a patient by a care-giving employee is never excused.***

***The facility's employee handbook explicitly warned that verbal abuse of a resident was grounds for immediate termination. The facility's policy in this regard is perfectly legal.***

***Sexual harassment can be seen in a hostile work environment where the harassing conduct, from a client of the employer or from a co-worker, is sufficiently severe or pervasive to alter the terms and conditions of the victim's employment and create an abusive working environment.***

***To be the basis for a lawsuit the offensive conduct must be frequent, severe and physically threatening or humiliating, not just offensive.***

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT  
April 18, 2011