

11.28 SEXUAL MISCONDUCT ON A PATIENT BY AN EMPLOYEE OF THE DEPARTMENT OF CHILDREN AND FAMILIES

§ 394.4593(2), Fla. Stat.

To prove the crime of Sexual Misconduct on a Patient by an Employee of the Department of Children and Families, the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **engaged in sexual misconduct with (victim).**
2. **At the time, (victim) was a patient [in the custody of the Department of Children and Families] [residing in a [receiving] [treatment] facility].**
3. **At the time, (defendant) was an employee of the Department of Children and Families.**

§394.4593, Fla. Stat.

“Employee” means any paid staff member, volunteer, or intern of the Department of Children and Families; or any person under contract with the Department of Children and Families; or any person providing care or support to a client on behalf of the Department of Children and Families or its providers.

§394.455, Fla. Stat.

“Patient” means any person, with or without a co-occurring substance abuse disorder, who is held or accepted for mental health treatment by the Department of Children and Families.

§ 394.4593, Fla. Stat.

“Sexual misconduct” means any sexual activity between an employee and a patient, regardless of the consent of the patient.

§ 394.4593(1), Fla. Stat.

Some of these terms have their own statutory definitions which should be given if applicable.

“Sexual activity” means:

1. **Fondling the genital area, groin, inner thighs, buttocks or breasts of a person;**
2. **The oral, anal or vaginal penetration by or union with the sexual organ of another or the anal or vaginal penetration of another by any other object;**
3. **Intentionally touching in a lewd or lascivious manner the breasts, genitals, the genital area, or buttocks, or the clothing covering them, of a person, or forcing or enticing a person to touch the perpetrator;**

4. **Intentionally masturbating in the presence of another person;**
5. **Intentionally exposing the genitals in a lewd or lascivious manner in the presence of another person; or**
6. **Intentionally committing any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity in the presence of a victim.**

Give only if applicable.

Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

§ 394.4593, Fla. Stat.

The consent of the patient to sexual activity is not a defense.

§ 394.455, Fla. Stat.

“Receiving facility” means a public or private facility or hospital designated by the Department of Children and Families to receive and hold or refer, as appropriate, involuntary patients under emergency conditions for mental health or substance abuse evaluation and to provide treatment or transportation to the appropriate service provider. The term does not include a county jail.

§ 394.455, Fla. Stat.

“Treatment facility” means a state-owned, state-operated, or state-supported hospital, center, or clinic designated by the Department of Children and Families for extended treatment and hospitalization, beyond that provided for by a receiving facility, of persons who have a mental illness, including facilities of the United States Government, and any private facility designated by the department when rendering such services to a person pursuant to the provisions of this part. Patients treated in facilities of the United States Government shall be solely those whose care is the responsibility of the United States Department of Veterans Affairs.

Lesser Included Offenses

SEXUAL MISCONDUCT ON A PATIENT BY AN EMPLOYEE OF THE DEPARTMENT OF CHILDREN AND FAMILIES — 394.4593(2)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Sexual battery	794.011	Chapter 11 instructions
	Unlawful sexual activity with certain minors	794.03	11.7
	Lewd or Lascivious crimes	Chapter 800	Chapter 11 instructions
	Attempt	777.04(1)	5.1

Comments

A patient who is not being held or accepted for mental health treatment is not within the purview of this statute. Substance abuse services or treatment, without co-occurring treatment for a mental health disorder, does not constitute mental health treatment. *See Deloatch v. State*, 360 So. 3d 1165 (Fla. 4th DCA 2023).

It is a not a violation of § 394.4593, Fla. Stat., if the DCF employee were legally married to the patient or had no reason to believe that the person with whom the employee engaged in sexual misconduct was in the custody of the DCF or was residing in a receiving or treatment facility. Furthermore, acts done for a bona fide medical purpose, or an internal search conducted in the lawful performance of duty by an employee are exempted from criminal liability under the statute. As of April 2024, it was undetermined whether any of these circumstances should be treated as an affirmative defense or as an element that the State must disprove. If treated as an affirmative defense, the judge must determine who has the burden of persuasion and what that burden is (preponderance, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted on May 21, 2024.