

LABOR & EMPLOYMENT

SPECIAL ALERT TO HEALTH CARE PROVIDERS

Employees' Right to a Non-Discriminatory Workplace Trumps Patients' Right to Choose Their Health Care Provider

The Seventh Circuit Court of Appeals recently reversed an order of summary judgment granted in favor of a nursing home that implemented a written policy of not allowing a black nursing assistant to provide care for a resident who did not want care from black assistants. This decision applied the now widely held view that a company's "decision to cater to the perceived racial preferences of its customers is not a defense under Title VII" to the field of health care providers. The court found that the racial preference policy violated Title VII by creating a hostile working environment and that a patient's privacy interest does not excuse disparate treatment based on race.

In *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010), a black nursing assistant brought an action under Title VII claiming that the nursing home's practice of acceding to the racial biases of its residents was illegal and created a hostile work environment. Plainfield had a practice of listing CNAs' shift duties on an assignment sheet that listed the residents and their corresponding care needs. One column on this sheet contained miscellaneous notes about each resident's condition, including statements such as "Prefers No Black CNAs." Chaney asserted that these type of restrictions greatly diminished her ability to provide care and created a hostile work environment. Chaney also claimed that the practice of honoring residents' racial preferences was accompanied by racially-tinged comments and epithets from co-workers. Plainfield acknowledged its policy of honoring the racial preferences of its residents in assigning health-care providers and claimed it did so to avoid violating state and federal laws that grant residents the rights to choose providers, to privacy, and to bodily autonomy. The district court entered summary judgment in favor of Plainfield and found that its policy was reasonable given its good-faith belief that ignoring the resident's preferences would violate the state's patient-rights laws. In finding that Plainfield acted to foster a racially-charged environment through its established policies, the Seventh Circuit disagreed and reversed this decision.

The court centered its decision on the view that a company's desire to cater to its customers' racial preferences is not a defense under Title VII for treating employees differently based on race. It dismissed Plainfield's contention that its patients' privacy interests excused such disparate treatment based on race and affirmed that Title VII forbids employers from using race as a bona fide occupational qualification ("BFOQ"). The court reasoned that the privacy interest at issue was not analogous to the privacy interests protected by allowing a patient to choose a same-sex health care provider: "The privacy interest that is offended when one undresses in front of a doctor or nurse of the opposite sex does not apply to race." The court stressed that, although state law accommodates patient choice, this law does not trump an employer's duty to its employees to abstain from race-based work assignments.

In dismissing Plainfield's defense of avoiding the risk of exposing a black employee to racial harassment from a resident, the Court cited several ways that a long-term care facility confronted with a hostile resident can deal with the issue without exposing itself to hostile workplace liability:

- Warn residents before admitting them of the facility's nondiscrimination policy and secure the resident's consent in writing
- Attempt to reform the resident's behavior after admission
- Assign staff based on race-neutral criteria that minimize the risk of conflict
- Advise employees that they can ask for protection from racially harassing residents

The court reasoned that each of these measures exemplify reasonable steps that an employer could undertake to avoid liability for known workplace harassment and that Plainfield's failure to take such measures created "daily reminders that Plainfield was employing [Chaney] on materially different terms than her white co-workers."

This ruling provokes an important issue for health care providers across the country. It is necessary that health care facilities are mindful of institutional policies that could be found to violate Title VII in this way. A fine line exists between a health care worker's right to a non-discriminatory workplace and a patient's right to his/her choice of a health care provider. The *Plainfield* decision provides even more instruction in mastering that line.

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