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7th Circuit: Racial Preferences Can't Determine Work Assignments

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Brenda Chaney, a certified nursing assistant (CNA), claims in a lawsuit that she was restricted from helping a patient in need because her employer enforced a racial preference policy that prevented Chaney from helping the patient because of the color of her skin. The 7th U.S. Circuit Court of Appeals, in *Chaney v. Plainfield Healthcare Center*, held that this type of policy is unlawful in a July 20 opinion.

According to the 7th Circuit's opinion, Plainfield Healthcare Center, a nursing home in Indiana, was sued by Chaney, a former employee, under Title VII of the Civil Rights Act on the basis of a racially hostile work environment. Her basis for the hostile work environment claim was twofold.

First, Chaney, who is black, alleged that a hostile work environment was created by Plainfield when it required its employees to abide by a resident's desire not to have any black nurses. Second, Chaney alleged that racial slurs and comments by Chaney's co-workers either directed at her or about her contributed to the creation of a hostile work environment.

According to the opinion, each CNA was given a daily assignment sheet that listed the unit each CNA is responsible for along with miscellaneous notes about each resident's condition. Chaney's unit included a woman for whom, each day, the miscellaneous note indicated "Prefers no Black CNAs." Because she feared being fired for disobeying this restriction, Chaney abided by this restriction, which served as a daily reminder of a racial divide in what the employees were allowed to do.

Based on the facts detailed in the opinion, this was not a simple directive to follow. For instance, one day, "Chaney found [the resident] on the ground, too weak to stand. Despite wanting badly to help, Chaney had to search the building for a white CNA," the opinion said. Not only was Chaney allegedly prevented from doing her job because her employer was enforcing this racial restriction, but when a resident was in need Chaney had to go through the embarrassing task of finding a white nurse and telling that nurse that she needed help on account of her race.

According to the decision, this was not an isolated incidence of a single resident's prejudice, as Chaney was allegedly warned by co-workers of other residents who would not want her assistance because of the color of her skin. As a result of these limitations on her work, she "routinely left work teary eyed," the opinion said. Chaney alleged that her co-workers not only regularly reminded her of these racial restrictions, but also subjected her to racially charged language. While in front of a resident a co-worker allegedly called Chaney a "black bitch," and on another occasion a co-worker allegedly looked directly at Chaney while asking why Plainfield "keeps on hiring all of these black niggers," the opinion said.

The district court agreed that there was a hostile work environment as a result of inappropriate language, but Plainfield avoided liability by showing it had remedied the situation. The court treated the racial preference policy as a separate claim, and said that Plainfield acted reasonably because of its alleged good faith reliance on Indiana's patient rights laws.

The 7th Circuit was not so convinced, and reversed the district court's decision. As for the racial comments made by co-workers, the court did not believe sufficient time had elapsed between the possible remedy and Chaney's

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termination, of which the lawfulness is yet to be determined on remand, for the court to be sure the problem had in fact been resolved. And unlike the district court, the 7th Circuit found the enforcement of the racial preference policy to be part of the same hostile work environment claim.

The 7th Circuit discussed Plainfield's defense that it was acting in good faith reliance on the need to follow state laws protecting patient rights. For the most part, Plainfield was pointing to state laws that grant a patient the right to choose a medical provider. The 7th Circuit said that Plainfield misinterpreted these laws, as they do not mandate that Plainfield abide by a patient's preferences but merely give the patient a right to choose providers. Thus, a patient may hire his or her own provider and Plainfield may be required to allow that provider access. But a patient's preference does not trump "Plainfield's duty to its employees to abstain from race-based work assignments."

Further, the court pointed out that Plainfield's insistence on abiding by its interpretation of state law ignores the fact that — via the Supremacy Clause — federal law prevails. The court said, "It is now widely accepted that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race." Notwithstanding the existence of federal and state laws protecting patients' rights in a long-term care setting, those laws do not take precedence over Title VII.

The 7th Circuit also disagreed with Plainfield's attempt to show that the nature of long-term care is such that facilities should have more leeway to abide by patients' preferences prior to considering employees' Title VII rights. The court pointed to case law allowing gender to be a bona fide occupational qualification for accommodating privacy interests, and therefore allowing a patient to specify the gender of a caretaker.

The 7th Circuit clarified that enforcing a patient's gender preferences is a narrow exception from Title VII requirements. While patients' rights laws may permit a facility to abide by a patient's wishes as to the gender of a caretaker or nurse, the concept of accommodating patients' bodily privacy does not lend itself to accommodating patients' racial preference or animus. Thus, race is not a bona fide occupational qualification, and Title VII's mandates trump other laws protecting patient rights in this area.

Finally, the 7th Circuit pointed out that what allegedly happened with Chaney shows that Plainfield's policies put patient health and safety at risk, as Plainfield's alleged policy prevented a qualified CNA from caring for and assisting a patient in need.

The 7th Circuit acknowledged that a resident or patient having racial biases is a real problem that facilities like Plainfield may have to deal with. The court provided some suggestions on how this type of situation could be properly handled. Before admitting a patient, the facility can explain the non-discrimination policy and therefore either avoid having a resident who will refuse care from certain providers, or be assured that the resident will hire his or her own provider. A facility can also assign staff based on race-neutral criteria that will result in a harmonious working and living environment. And it could allow employees to ask for protection from racial harassment from patients.

Unfortunately, racial, gender and other biases and preferences do exist, so this is obviously a challenge for employers who work in sensitive areas involving direct care. According to the 7th Circuit's view, it is certainly possible, though potentially challenging, to have measures in place to assure that problems do not occur in a long-term care facility as a result of racial discrimination. However, following Plainfield's course of action, whereby it gave "daily reminders that [it] was employing [Chaney] on materially different terms than her white co-workers," was not a reasonable measure.

Certainly it is no surprise that catering to a customer's racial biases can result in liability for an employer under Title VII. Direct care medical or residency facilities are not immune to the requirements of the civil rights laws. Though *Chaney v. Plainfield* is a case from another circuit, employers here should ensure that they are not imposing unlawful policies upon employees for the sake of satisfying their customers. •

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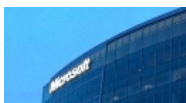
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