



Patient Choice Versus Employee Rights: Conflicting Obligations?

Courts say race can't be a factor in assigning nursing home caregivers

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Nursing homes and hospitals encounter patients who insist on caregivers of a particular race or national origin. Such requests may stem from the shift towards patient-centered care models and the adoption of statutes commonly called a Patient's Bill of Right, which are designed to provide patients with increased input into their care and management of their affairs.

Connecticut's Patient's Bill of Rights contains a broad, detailed set of rights an individual must be informed of prior to their admission or during their stay. Among these rights is the right to voice grievances and "recommend changes to policies and services," the right to receive quality care and services "with reasonable accommodation of individual needs and preferences," and the right to "associate and communicate privately with persons of the patient's choice, including other patients."

Read broadly, these rights would appear to give patients input on which staff members care for them or interact with them. Recent cases demonstrate, however, that there are limits to a patient's staffing requests. More specifically, these cases demonstrate that assigning caregivers based on a patient's racial preferences violate the caregiver's civil rights, may lead to litigation against the facility, and may cause substantial disruption to a facility's business operations.

For example, in *Chaney v. Plainfield*

Health Care, a nursing home resident informed the administration of the Indiana nursing home that she did not want any assistance from black certified nursing assistants (CNAs). Complying with that resident's preferences, the nursing home informed Brenda Chaney and other CNAs that "no black" CNAs should provide this resident with care or even enter her room. Ms. Chaney sued, claiming, among other things, that the nursing home's orders respecting the patient's racial preferences for care givers created a hostile work environment.

The nursing home admitted that it had barred black CNAs from the resident's room. It argued, however, that such an order was necessary "because otherwise it risked violating the state and federal laws that grant residents the rights to choose providers, to privacy, and to bodily autonomy." The district court agreed, concluding that the nursing home's order was reasonable given its good-faith belief that ignoring the patient's request would have violated the patient's rights under Indiana's patient-rights laws.

On appeal, the decision was reversed by the 2nd Circuit Court of Appeals. The



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appeals court concluded that the choice granted by the Patient's Bill of Rights law did not trump the prohibitions against employment discrimination.

The nursing home also argued that disregarding the wishes of the patient would have subjected the black employee to harassment, for which it would be liable. The court rejected this argument, explaining that the employer had several alternative approaches that it had not tried. These included warning residents upon admission that discriminatory requests and/or harassment of employees would not be tolerated, informing employees of their right to complain about such conduct, and, ultimately, discharg-

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ing a racially hostile patient.

In support of its conclusions, the court distinguished staff assignments based on a resident's gender preferences from staff assignments based on a resident's racial preferences, finding that the former is permissible under Title VII—just like single-sex bathrooms and other gender-related limitations. The case was sent back to the district court for a trial and a determination of the money owed the CNA as damages.

'Circle Dots'

More recently, and after the issuance of the Seventh Circuit's *Chaney* opinion, a health care provider in Maryland settled a case brought by the Equal Employment Opportunity Commission on the same topic. In that case, *EEOC v. HiCare Inc.*, the EEOC received a complaint from a caregiver about her employer's discriminatory policy of assigning caregivers to elderly patients.

The EEOC contended that the employer utilized a racial-coding system under which clients who "preferred" Caucasian caregivers were coded as "circle dots," with assignments being made based on those codes.

The EEOC sought to enjoin this practice, as well as an award of compensatory and punitive damages.

Rather than proceed with litigation, the employer entered into a settlement agreement. Under the agreement, the employer agreed to pay the EEOC \$150,000 in damages and to "cease any practices, current or previous, which permit customers or clients to dictate defendant's business operation with respect to race-based assignment of employees based on the customer's racial preference unless specifically requested by the caregiver." In addition, the employer agreed to train all recruiters and human resource personnel each year on compliance with civil rights laws, and submit the training materials and attendance reports to the EEOC annually.

Finally, the employer agreed to implement the following policy: "We will not permit customers or clients to dictate our business operation with respect to race-based assignment of employees based on the customers' racial preference. When the patient or his or her family has indicated a preference not to have an attendant of

a certain race, and there is a risk that client will become violent, we will notify the caregiver of the patient's request and the caregiver may refuse the assignment if he or she chooses."

The district court approved the agreement, retained jurisdiction over the case for five years, and retained the ability to issue any orders to effectuate the agreement.

As these two recent cases demonstrate, nursing homes and other health care providers should not place a patient's racial preferences above the civil rights of their employees. Instead, such employers should develop comprehensive policies that provide patients and employees with advance notice that racial preferences will not be followed when making staff assignments, and that provide guidelines and procedures for handling an employee's complaints of racial harassment.

By having such policies in place, employers can provide clients with quality health care, comply with the Patient's Bill of Rights, and avoid the costly litigation recently faced by the two health care providers in Indiana and Maryland. ■