Reprinted with permission of the authors and the Association of Corporate Counsel as it originally appeared: “Liability for Acceding to a Customer’s Racial Intolerance,” *ACC Docket* Vol. 29, No. 3 (April 2011): 50-56. © 2011 the Association of Corporate Counsel. All rights reserved.

LIABILITY FOR ACCEDING TO A CUSTOMER'S RACIAL INTOLERANCE

BY JASON M. CROWDER AND TAMARA K. HACKMANN

Courts have long recognized employers may be liable for harassment of an employee by a coworker or supervisor. Consistent with EEOC regulations, most courts also recognize employer liability when an employee is harassed by a non-employee third party when the employer was aware, or should have been aware of the harassment, and failed to act reasonably to prevent future harassment.[1]

A large number of third-party harassment cases involve factual scenarios where the employee is actually harassed by the third party, and the issue is whether the employer was made aware of the harassment and then took reasonable action to prevent additional harassment by that third party. In some cases, a simple transfer of the offending non-employee to a different shift or location within the same building is sufficient.[2]

A different circumstance arises, however, when a non-employee patient demands that a person of a certain race provide his care. Under this circumstance, there is no actual "patient-employee" harassment if the employer accedes to the demand and prevents certain employees from providing care to the biased patient. The issue then becomes whether the employer's policy, in and of itself, creates a hostile environment.

An employer faced with an ethnicity-based patient preference should be cautious in its response based on a recent decision from the 7th Circuit Court of Appeals. In *Chaney v. Plainfield Healthcare Center*,[3] Chaney, who is African American, was hired to work as a nurse aide for Plainfield Healthcare Center in Plainfield, Ind. Her job duties included monitoring patients, responding to patient requests for services and assisting with their daily living needs.

Plainfield maintained an assignment sheet that detailed shift duties for Chaney and others, and it was given to Chaney upon her arrival for her shift. The assignment sheet listed residents in Chaney's unit, and included notes about their condition and care needs. In the case of one resident, the assignment sheet noted that she "prefers no black CNAs." There were at least two other residents in the facility that had a similar preference.

While working for Plainfield, Chaney complied with the patient's racial preferences. When Chaney found one racially biased patient on the floor, she searched the facility to locate a white CNA who could provide assistance. Another resident similarly refused Chaney's assistance while in the shower, asking for assistance from a different CNA. Chaney was reminded by a co-worker that certain residents were "off limits," and she was subjected to race-based comments. After three months of employment, Chaney was ultimately fired because she said the word "shitting" in the presence of a resident. Chaney subsequently sued, asserting claims of hostile environment and discriminatory discharge.

Plainfield raised two essential defenses: The first focused on patients' rights; the second focused on the employee's right to be free from harassment. Neither argument prevailed.

Preemptory actions to prevent a claim of hostile environment **cannot be used** when those actions are **targeted at the employee,** as opposed to the biased **patient or resident.**

JASON M. CROWDER is corporate counsel for Petersen Health Care Inc., which owns and operates long-term care facilities in Illinois, Indiana and Missouri. He provides counsel on a wide variety of issues, including labor and employment, and manages employment litigation matters. Crowder received his JD from Loyola Chicago School of Law. He can be contacted at *jmcrowder@petersenhealthcare.net.*

TAMARA K. HACKMANN is a partner with Heyl, Royster, Voelker & Allen, P.C. in Urbana, IL. Her general practice includes the defense of cases involving employment, civil rights and commercial disputes. She can be contacted at *thackmann@heylroyster.com.*

Plainfield admitted it had a policy of honoring racial preferences of its residents, and it argued that state and federal laws required it to respect those patient preferences. The 7th Circuit rejected Plainfield's "state law argument," finding Indiana law did not require Plainfield to accede to the patient's racial preferences. And even if Indiana law did contain such a requirement, the argument would still fail because any state law requiring a nursing home to abide by a patient's racial preferences would conflict with the federal non-discriminatory requirements of Title VII. In the case of a conflict between state and federal law, the federal law would prevail under the Supremacy Clause.[4]

Also rejected was Plainfield's argument that the Medicare Act required it to abide by the patient's racial preferences. The court found that while the Medicare Act provided Medicare beneficiaries the right to choose an attending physician, that provision did not require Plainfield to institute race-based policies with respect to other service providers.

The court also rejected Plainfield's reliance on cases permitting facilities to abide by a patient's gender-based preferences. Healthcare employers can lawfully accede to a patient's gender-based demands, as the patient's privacy interests give rise to a bona fide occupational qualification.[5] When, however, the patient's preferences are based on an employee's ethnicity, the same privacy considerations supporting a bona fide occupational qualification (BFOQ) defense for gender preferences, disappears.

Plainfield also argued that its race-based policy was necessary to prevent harassment of Chaney by its residents who had racial preferences. According to Plainfield, discharging biased residents would be illegal, and prohibiting Chaney from caring for these residents was necessary to avoid harassment of her by residents. This argument was equally unavailing, as the 7th Circuit held Plainfield had a variety of options, including:

- warning residents before their admission of the facility's nondiscrimination policy;
- securing the resident's consent and agreement to abide to that policy prior to admission;
- attempting to reform the resident's behavior after admission; and
- assigning staff based on race-neutral criteria that minimize the risk of conflict.[6]

Explaining its decision, the court noted that the nursing facility could have told employees that they could ask for protection from racial harassment.

> Too often, **employee handbooks** are written **to address coworker** discrimination and harassment, **and not third-party** discrimination and **harassment.**

While *Plainfield* involved allegations of racial epithets plus a race-based policy, the 7th Circuit suggested the race-based policy alone would have been sufficient to establish a hostile environment. According to the court, the race-based policy "creat[ed] a racially charged workplace that poisoned the work environment."[7] And although the racial slurs stopped after Chaney complained, "Plainfield never corrected the principal source of the racial hostility … its willingness to accede to a patient's racial preferences." Because of the facility's policy, Chaney was reminded daily that she was being employed on materially different terms than her white coworkers.[8]

The *Plainfield* decision has many implications for the industry that provides care to individuals who, in some cases, suffer from mental or other illnesses that make it difficult, if not impossible, to control their behavior and relationships with employees. These facilities also have residents who, while mentally sound, harbor racial biases. It is clear from the *Plainfield* decision that nursing facilities cannot, as a matter of policy, accede to the racially biased demands of their residents. They instead must take actions to protect their employees from a racially charged working environment.

Protect the employee, not the biased patient

A chilling reality that is evident from this case is that employers are essentially told not to take efforts to protect the employee unless the employee asks for the employer's help or complains to the employer. Preemptory actions to prevent a claim of hostile environment cannot be used when those actions are targeted at the employee, as opposed to the biased patient or resident.

Plainfield argued that the racial preference policy benefitted the employees because it prevented exposing black employees to racial harassment from the residents, which would have then exposed Plainfield to hostile workplace liability. The 7th Circuit rejected this argument and stated that "Plainfield could have ... advised its employees that they could ask for protection from racially harassing residents. That way, Plainfield would not be imposing an unwanted, race-conscious work limitation on its black employees; rather, it would be allowing all employees to work in a race-neutral, non-harassing work environment, as is commonly expected of employers." The scenario that developed in Plainfield was that the resident made her ethnicity-based preference known. Rather than acceding to the race preference, Plainfield should have simply advised its ethnic employees of the resident's preference and made sure the employees knew that if they wanted protection from the racially harassing resident, the employer would make the appropriate accommodation. From a practical standpoint, employee handbooks should be updated to include language advising employees to notify their employer of any discrimination or harassment, including actions of customers, residents or patients, and the employee's right to request an accommodation when faced with a biased patient. Too often, employee handbooks are written to address coworker discrimination and harassment, and not third-party discrimination and harassment. In addition, so that supervisors do not get in the habit of "protecting" employees from potential harassment, staffing policies should be developed that specifically require neutral assignments unless an accommodation by an employee has been requested and granted.

Address the issue at the time of admission

The 7th Circuit places an additional burden on the employer by suggesting that the healthcare provider should address biased patient preferences at the time of admission. The 7th Circuit stated, "[long-term care facilities] can warn residents before admitting them of the facility's nondiscrimination policy, securing the resident's consent in writing." The 7th Circuit is not advocating asking potential residents whether they have an ethnicity-based provider preference, and this clearly is not the way a healthcare provider should approach this issue. The proper approach is to create a document much like an employer's equal opportunity policy, and address the policy with the potential resident at the time of admission, explaining that the provider is an equal opportunity employer and the provider has a nondiscrimination policy that the resident must consent to before being admitted into the facility. As noted by the 7th Circuit, exceptions can be made if the patient or resident prefers a male or female to provide care for privacy reasons; that exception would not appear to apply, however, if the patient prefers one sex over the other for some other non-privacy related reason. The resident or patient's consent to this policy should be in writing and then placed in the resident's business file. Due to the complications in discharging residents from long-term care facilities, the consent should also contain language that the resident agrees to a discharge in the event the resident violates the nondiscrimination policy.

ACC Extras on… Third-Party Harassment

ACC Docket

- *Ten Strategies Your Company Can Take to Help Avoid an Employment Lawsuit (April 2010).* With more and more employees filing discrimination allegations — and following the passing of significant employment laws and regulations — in-house counsel need to be proactive. Learn 10 tried and true strategies for avoiding employment-related litigation. *www.acc.com/docket/10strg_avoid/emplyls_apr10*

InfoPAK℠

- *Responding to Equal Employment Opportunity Agency Charges of Discrimination (Sept. 2009).* This InfoPAK provides an overview of the administrative process and the necessary steps the employer must take to properly respond to an agency charge of discrimination. *www.acc.com/infopaks/rspd-dscrm_sep09*

Article

- *Is There a Target on Your Back? How to Prevent and Respond to an Agency Pursuit of Pattern and Practice, or Systemic Discrimination Claims (Oct. 2010).* An in-depth article on how to prevent and respond to an agency pursuit of discrimination claims. Written and prepared by the Session 806 speakers of the 2010 ACC Annual Meeting. *www.acc.com/patt&prac_oct10*

Quick References

- *How HR Best Practices Can Help Defeat Subsequent Employment Claims (Oct. 2009).* This paper discusses a variety of HR best practices including investigations, reductions in force, settlement releases, ediscovery and electronic communications policies. *www.acc.com/quickref/HR-sbsqt-claims_oct09*
- *Respect for Coworkers and Others: Policy Against Discrimination and Harassment (March 2005).* This policy emphasizes to employees that certain interpersonal conduct is inappropriate and unacceptable. *www.acc.com/forms/discr&hrs/pol_mar05*

ACC has more material on this subject on our website. Visit *www.acc.com*, where you can browse our resources by practice area or search by keyword.

Title VII as a defense to patient complaints

It is clear that any state statute or regulation, which purports to support the resident's right to choose providers of services when the resident's choice is based on a protected class, does not trump Title VII requirements. Therefore, a state statute or regulation cannot in application conflict with Title VII. In fact, Title VII provides an affirmative defense to an employer that is sued for violating a state law, so long as in complying with the law the employer would have been in violation of Title VII.

However, in reality, healthcare providers answer to more than just the patient if it ignores a patient's ethnicity-based provider request. State public health agencies regulate the healthcare industry, and patients have easy access to hotlines to log complaints. It remains to be seen how public health agencies will react to a provider who ignores a patient's ethnicity-based provider request and attempts to use Title VII as its justification for doing so.

General application

This case has specific application to long-term care and other healthcare providers, but the 7th Circuit's decision clearly has application to the service industry. As the 7th Circuit pointed out, "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." For example, it's conceivable that a customer at a restaurant would make an ethnicity-based preference for a waiter. An employer whose approach is to satisfy the customer by removing a minority waiter based on a customer's preference would subject itself to the same liability encountered by Plainfield Healthcare Center. The lesson to be learned is that if a customer, resident or patient expresses an ethnicity-based preference, the employer cannot respond by altering the protected employee's environment.

Have a comment on this article? Visit ACC's blog at www.inhouseaccess.com/articles/acc-docket.

NOTES

1 *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); 29 C.F.R. §1604.11(e).
2 *Zupan v. State of Illinois*, 1999 WL 281344 (March 30, 1999).
3 *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010).
4 Id., 612 F.3d at 914.
5 See, e.g., *Jennings v. N.Y. State Office of Mental Health*, 786 F.Supp. 376, 383 (S.D.N.Y. 1992).
6 Id., 612 F.3d at 915.
7 Id.
8 Id.