The Patient Is Not Always Right: Discriminatory Staffing Requests Can Create Legal Exposure

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Employer reports of bigoted or inappropriate comments made by customers to employees or other patrons have become increasingly common for employers in all industries. In the healthcare industry, this often takes the form of a patient requesting care from employees of a specific race or color. Honoring such discriminatory requests is a risky proposition. Failing to neutralize these situations may not only have a negative effect on workplace morale but could also lead to discrimination claims.

This article outlines recent court decisions involving race-based patient staffing requests and discrimination claims that resulted from honoring such requests. It concludes with recommendations on how best to proactively address these situations before they become public relations nightmares or legal headaches.

Don't Patients Have The Unfettered Right To Choose Who Cares For Them?
The Emergency Medical Treatment and Active Labor Act, which requires any hospital accepting federal Medicare payments to screen, stabilize, and treat patients suffering from an emergency medical condition, also ensures that their patients have the right to refuse medical care if they so choose. Additionally, certain federal and state laws allow patients to access healthcare providers of their choice.

While courts have routinely recognized these patient rights, they have also regularly rejected the notion that a patient's racial preferences could trump a healthcare employee's right to be free from discrimination in the workplace.

One such court decision is the 2010 ruling in *Chaney v. Plainfield Healthcare Center*. In that case, the 7th Circuit Court of Appeals – which covers Indiana, Illinois, and Wisconsin – found that a long-term care facility violated the law by honoring the racial preferences of its residents when assigning healthcare providers. According to the facility's policy, black certified nursing assistants were barred from entering certain rooms, performing certain care, and assisting certain patients. The facility defended this policy by arguing it would otherwise risk violating state and federal laws granting residents the right to choose providers (along with the right to privacy and bodily autonomy), even if the patient's choice was based on race.

Brenda Chaney, a black nursing assistant, was forced to abide by the nursing home's policy even though the race-based limitations saddened her and she routinely left work teary-eyed. She worked at the nursing home for only three months before the healthcare center terminated her employment. She filed a federal lawsuit alleging discrimination and a hostile work environment, which eventually found its way to the federal appeals court.

The court ruled in Chaney's favor, rejecting the employer's attempt to have the case dismissed and clearing it for trial. In the years since the court's decision, it has been frequently cited by other courts around the country when addressing similar claims, and thus taken on additional significance.

While the decision provides significant restrictions when it comes to race-based decisions, the 7th Circuit Court of Appeals recognized that gender-based decisions may be permitted in the healthcare setting under certain circumstances. The *Chaney* decision cited to a long history of Title VII cases finding gender to be permissible as a legitimate, bona fide occupational qualification (BFOQ) if it accommodates a patient's privacy interests. Because there is greater legal support for gender-based patient preferences, you should feel much more confident accommodating such requests so long as they are grounded in privacy concerns.

What About A Temporary Race-Based Staffing Directive Resulting From A Patient's Threats?
A recent body of law suggests that courts will likely not find a patient's threats adequate to justify what amounts to a "separate-but-equal" staffing policy. In July 2016, the Washington Supreme Court held that a state-run psychiatric hospital's temporary race-based staffing directive violated state antidiscrimination laws.

The case involved a patient making credible threats against a black caregiver, including a statement that he was going to "f--- up any [n-word]" working with him. In response, the hospital made a temporary staffing decision preventing non-white employees from working in the patient's area of the facility over the course of one weekend. The Washington Supreme Court held this directive was unlawful regardless of its temporary and well-intentioned nature.

Similarly, in *Chaney*, the 7th Circuit rejected the long-term care facility's argument that its policy was necessary to protect its employees from patient harassment and potential violence. Indeed, there appears to be no court that has condoned a discriminatory policy, even if motivated by a patient's threat.

What Can A Healthcare Provider Do?
In light of the above cases, what can you do to limit your liability in similar scenarios? The first step is to adopt a written policy that makes clear your facility does not honor any patient staffing request that violates any applicable equal opportunity law. Lacking such a written policy may tilt the scales in favor of a discrimination finding should a former employee bring a lawsuit involving a patient's biased staffing request.

A specific written policy is a good start, but solid preventative measures should not end there. Adequate training and communication will help ensure that employees who provide direct patient care can appropriately address these challenging situations. Factors to consider include:

- whether to tell patients about your nondiscrimination policy prior to admission and how to do so;
- how your employees should address a patient's discriminatory staffing request after admission; and
- how to assign staff to patients using race-neutral criteria to minimize the risk of conflict.

Of course, no policy or practice can guarantee racial harmony, but it should be comforting to know that reasonable measures are available to avoid, or at least minimize liability in these situations. Courts from an array of jurisdictions have made clear they will expect you to take such efforts.

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