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Case Law Overview: Employer Liability Issues Associated with Accommodating Customer Demands for Service Providers Based on a Protected Category

Melanie Houghton, LHC Group, Inc.

A. Chaney v. Plainfield Healthcare Center, 612 F.3d 908 (7th Cir. 2010)

- Plaintiff brought an action under Title VII alleging that Defendant’s practice of acceding to the racial biases of its residents is illegal and created a hostile work environment. She also alleged she was terminated because of her race. The District Court granted summary judgment to the Defendant. The Seventh Circuit reversed.

- Plaintiff worked for Defendant, a nursing home, as a Certified Nursing Assistant (“CNA”). Defendant detailed Plaintiff’s daily shift duties on an assignment sheet that she and other employees received upon arriving at work. One of the sheets provided to plaintiff indicated that a resident or the nursing home “Prefers No Black CNAs.” Plaintiff complied with the request and with the request of at least two other patients who expressed similar preferences. She alleged that Defendant’s practice of honoring the racial preferences of residents “was accompanied by racially-tinged comments and epithets from co-workers.” Plaintiff complained to her supervisor who addressed the comments but not the race-based patient assignments. She was separated the following day for due to an alleged patient complaint.

- In reversing the District Court’s grant of summary judgment on Plaintiff’s hostile work environment claim, the Seventh Circuit considered the racial epithets but also reasoned that Defendant “acted to foster and engender a racially-charged environment through its assignment sheet that unambiguously, and daily, reminded [Plaintiff] and her co-workers that certain residents preferred no black CNAs.”

- Defendant argued that while its policy was to honor the racial preferences of its residents, it “otherwise risked violating state and federal laws that grant residents the rights to choose providers, to privacy, and to bodily autonomy.” In support of its argument, Defendant cited several cases permitting sex discrimination in the healthcare setting.

- The Court rejected Defendant’s argument, concluding that the cases relied on by Defendant hold that gender may be a BFOQ for accommodating patients’ privacy interests. “It does not follow, however, that patients’ privacy interests excuse disparate treatment based on race.” The Court further stated: “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.”

- With regard to federal and state law governing healthcare, the Court concluded that the regulations do not state that a “patient’s preference for white aides that [Defendant] employs trumps [Defendant’s] duty to its employees to abstain from race-based work assignments.” Rather, the law may only require Defendant to allow the resident reasonable access to the preferred caregiver.

- Next, the Court rejected Defendant’s argument that failure to accommodate a patient’s preferences risks exposing employees to racial harassment from the residents and, in turn, exposing itself to hostile workplace liability. The Court reasoned that Defendant has a range of other options to address this problem including warning residents prior to admission of the facility’s nondiscrimination policy, attempting to reform the resident’s behavior after admission, advising employees that they can ask for protection from racially harassing residents, and assigning staff based on race-neutral criteria that minimize the risk of conflict.¹

- Finally, the Court reversed summary judgment on Plaintiff’s wrongful termination claim, reasoning that a reasonable jury could conclude that Defendant’s reasons for terminating Plaintiff “cloaked the forbidden motivation of race.”

B. Ferrill v. The Parker Group, Inc., 168 F.3d 468 (11th Cir. 1999)


- Plaintiff was hired to complete “get-out-the-vote” calls for various political candidates preceding the November 1994 election. Approximately 10% of the calls were “race-matched, such that employees were assigned to separate calling areas and separate scripts according to their race. According to Defendant, race-matched calling was used only when specifically requested by customers. To facilitate supervision, Defendant also physically segregated employees who performed the race-based calls.

- Plaintiff was hired as a temporary employee to fill pre-election staffing needs relative to a gubernatorial campaign that called for race-matched calls. She was subsequently laid off during a reduction in force after the election.

- Plaintiff alleged race discrimination in her termination and job assignment. Both parties filed cross-motions for summary judgment. The District Court granted Defendant’s motion on the unlawful termination claim because Plaintiff failed to rebut the company’s proffered legitimate, non-discriminatory reason for the termination. The District Court granted Plaintiff’s motion on the unlawful job assignment claim, which Defendant appealed.

The Eleventh Circuit stated that disparate treatment on the basis of a protected category is allowed in three circumstances: (1) where a particular religion, sex, or national origin is deemed a qualification necessary to the functioning of a business, i.e. a bona fide occupational qualification (“BFOQ”); (2) where an employer implements a facially neutral business practice that disparately impacts a protected class if justified by business necessity; and (3) under the rubric of “affirmative action.”

The Court rejected the BFOQ defense, noting it is an extremely narrow exception under 42 U.S.C. §2000e-2(e)(1) and is not available for racial discrimination based on previous court cases that have interpreted the statutory language. The Court concluded that “Because §1981 proscribes discrimination solely on the basis of race, and the BFOQ defense does not apply to racial discrimination, the BFOQ defense is never available to the §1981 defendant.”

The Court also rejected the business necessity defense, reasoning that “[b]ecause §1981 liability must be grounded on intentional discrimination . . . and the neutral practice mode of proof is inapposite in §1981 cases, the business necessity defense is not available to the §1981 defendant.”

Finally, the Court held that Defendant’s actions could not be classified as affirmative action because they were based on a racial stereotype and on the premise that Plaintiff’s race was directly related to her ability to do the job.

Ultimately, the Eleventh Circuit affirmed summary judgment for Plaintiff on her §1981 claim based on her race-based job assignment. The Court did, however, reverse her punitive damages award holding that the record was “devoid of evidence of the ill will required to support the imposition of punitive damages.”

C. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981)

- Plaintiff alleged sex discrimination in violation of Title VII and in connection with her employer’s refusal to promote her. The District Court granted summary judgment for Defendant. The Ninth Circuit affirmed.
- Plaintiff worked as an administrative assistant to the Vice President of Defendant’s International Operations division. She later requested consideration for a position as Director of International Operations (“DIO”) when the position was open. The company hired a male to fill the position.
- Defendant argued that it legitimately declined to promote her to the DIO position because she lacked the qualifications for the job. Defendant also argued that male sex is a BFOQ for a job performed in foreign countries where women are barred from business including South America where “clients would refuse to deal with a female DIO.” The District Court found for Defendant on both alternative arguments.
• The Ninth Circuit affirmed the District Court’s finding after a bench trial that Plaintiff failed to demonstrate she was qualified for the DIO position and that, even if she was minimally qualified, the individual hired for the position was more qualified.

• However, the Ninth Circuit rejected the District Court’s findings with regard to Defendant’s BFOQ defense because it was “based on an erroneous interpretation of Title VII.” According to the Ninth Circuit, 42 U.S.C. § 2000e-2(e) permits hiring decisions to be based on gender if gender is a BFOQ reasonably necessary to the normal operation of the particular business. “However, stereotyped impressions of male and female roles do not qualify gender as a BFOQ. . .Nor does stereotyped customer preference justify a sexually discriminatory practice.”

• The Ninth Circuit rejected Defendant’s argument that a separate rule applies in international contexts, stating that “[t]hough the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court’s rule would allow other nations to dictate discrimination in this country.”


• Plaintiff, who is African American, alleged race discrimination in violation of Section 1981, Title VI of the Civil Rights Act of 1964, and Michigan’s Elliott-Larsen Civil Rights Act, as well as intentional infliction of emotional distress. Defendant filed a motion for summary judgment, which the Court granted.

• Plaintiff, a Registered Nurse, worked for Defendant as a nursing supervisor. According to Plaintiff, a family of a man with a brain injury “requested that no African Americans provide care for the patient.” Plaintiff reported the request to the Vice President of Clinical Services. The request was discussed at a nursing supervision meeting and the leadership team determined it would honor the request. Plaintiff alleges that some African American employees were reassigned because of the family’s request but that some African Americans did care for the patient when other employees were not available. Plaintiff’s hours, job status, responsibilities, wages, and benefits were not impacted by the request, but Plaintiff chose not to pick up extra shifts during the patient’s stay because she wanted to avoid the situation.

• The hospital’s policy regarding patient requests states that “a patient or family member may request to receive care from a specific caregiver or to exclude a specific caregiver or caregiver group.”

• Defendant argued that Plaintiff cannot prove a claim of race discrimination based on the race-based caregiver request because she was not subjected to an adverse employment action; her hours, duties, pay, and benefits were not changed. Defendant further asserted that there was no evidence the hospital enforced the race-based caregiver requirement because African American caregivers continued to provide care for the patient and no
employees were sent home, barred from entering the room, or disciplined for providing care. Defendant also argued that Plaintiff’s discrimination claim failed because she had no evidence of discriminatory intent.

- The Court granted Defendant’s motion on Plaintiff’s discrimination claims under Section 1981 and Michigan state law. As a preliminary matter, however, the Court disagreed that Plaintiff did not suffer an adverse employment action because “job assignments based on race are adverse employment actions even when there is no monetary loss, because such assignments affect the terms and conditions of employment.” The Court nevertheless determined that the employment action was de minimus because Plaintiff worked only two shifts while the patient was in the hospital and, unlike the plaintiff in Patterson, see infra, she had no specific assigned responsibility to care for the patient because she was a supervisor. Because the impact on Plaintiff was de minimus, the Court held that Plaintiff’s discrimination claims “must fail in their entirety.”

- The Court also dismissed Plaintiff’s claim under Title VI, prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance. The Court did not provide reasoning for its holding, but Plaintiff concurred with the dismissal.


- Plaintiff, a Muslim of Arab ancestry, filed a lawsuit against his employer, the Mandarin Oriental Hotel Group, alleging discrimination and retaliation on the basis of his race, color, religion and national origin in violation of Title VII, Section 1981, and the District of Columbia Human Rights Act. Defendant filed a motion to dismiss, which the Court granted in part and denied in part.

- According to Plaintiff’s complaint, he is a Muslim of Arab Ancestry who worked for Defendant as a valet dry cleaner. His job duties included entering guests’ rooms to gather and deliver dry cleaning. He often received tips from the guests that he assisted.

- In December 2010, an Israeli delegation stayed on the 8th and 9th floors of the hotel. Plaintiff alleged that his direct supervisor instructed him not to provide services to those guests during their stay. Plaintiff complied with his supervisor’s instructions and was deprived of the tips from the guests on those floors. Plaintiff also alleged that the hotel instructed other employees who were either Arab or Muslim to refrain from entering the floors occupied by the Israeli delegation. He further claimed that several of his coworkers “ridiculed [him] as a potential terrorist, poking him in the stomach to feign checking his body for explosives.”

- Plaintiff met with a supervisor to complain about the hotel’s actions and was allegedly advise that “the Israeli delegation is very selective about who serves them” and the hotel accommodates their preferences.
The Court noted that disparate treatment claims brought under §1981, state law and Title VII are routinely scrutinized using the Title VII legal framework and concluded that all three statutes require an adverse employment action. The Court dismissed Plaintiff’s disparate treatment claims, holding that Plaintiff’s loss of potential tips from the 8th and 9th floor during three days in December did not amount to a materially adverse action, nor did barring him from the 8th or 9th floors for three days rise to the level of material adversity. The Court denied Defendant’s motion to dismiss Plaintiff’s retaliation claims, holding that Plaintiff adequately alleged facts necessary to state a claim under all three statutes.


Plaintiff, who is African American, filed a lawsuit, alleging race discrimination under 42 U.S.C. § 1981. Defendant filed a motion for summary judgment, which the Court denied. The case ultimately went to trial and the jury returned a verdict in favor of Defendant.

Plaintiff worked for Defendant, South Hills Health System, as a home care nurse. Defendant’s home care nurses are assigned to teams which cover different geographical areas. Each home care nurse employed by Defendant has a productivity requirement of 6 patient visits per day. Nurses are paid a base salary which is not impacted by productivity. Failure to meet productivity requirements, however, may have an impact on future raises and the ability of the clinicians to earn incentive compensation.

When a patient is referred to home care services, employees of the home care agency work with the patient to develop a plan of care and also develop a “Case Management Tool,” which lists details regarding the patient as well as the clinicians assigned to provide care to the patient.

In 2002, one of Defendant’s admission nurses visited a patient (“Patient A”) for an initial evaluation. During the visit, the patient’s daughter asked the nurse not to send “any black RNs – black nurses, black therapists, black people, into the home” because her father “is prejudiced, very prejudiced” and can be “nasty.” The daughter testified that the nurse did not indicate there would be any problem in honoring her request.

Subsequent to the admission visit, the team leader developed the necessary Case Management Tool. The document noted the race-based preference of Patient A as “no black RNs” and also noted that Defendant’s scheduling department was to be notified of Patient A’s request. Despite the request, Plaintiff was scheduled to provide in home skilled nursing services to Patient A on two occasions, one of which Plaintiff could not accommodate due to illness. Upon initially receiving the assignment, Plaintiff received a copy of the Case Management Tool and saw the “no black RNs” notation. She notified her supervisor of the notation after which the supervisor reeducated the agency’s staff regarding Defendant’s non-discrimination policy.
• Defendant filed for summary judgment, arguing: (1) Plaintiff cannot establish a *prima facie* case because she did not suffer an adverse employment action; and (2) Plaintiff cannot demonstrate that its articulated reason for assigning other nurses to provide home care services for Patient A is a pretext for unlawful discrimination.

• The Court denied Defendant’s motion. With regard to the first argument, the Court found that a reasonable jury could conclude that Defendant segregated Plaintiff’s work assignments based on her race. The Court then concluded “it is clear that, even in the absence of monetary loss, job assignments based on race constitute adverse employment actions because such assignments affect the terms and conditions of employment.”

• As to the second argument, the Court determined that the evidence submitted by Plaintiff raised a material issue of fact with regard to Defendant’s asserted reasons for assigning nurses other than Plaintiff to visit Patient A, including the “no black RNs” notation on the Case Management Tool and the lack of evidence that any of the employees involved were aware of defendant’s procedures for handling race-based preference requests.