

Discrimination: US Appeals Court Strikes Down Race-Based Patient-Care Assignments.

A long-term care facility had an express policy calling for residents' racial preferences to be taken into account in assigning CNA caregivers.

The rationale was that doing otherwise would violate residents' rights to personal privacy and autonomy in making health-care decisions, rights ostensibly guaranteed by state law and regulations defining Federal Medicare and Medicaid patient-care standards.

The daily patient assignment sheet posted for the CNA's had a column for miscellaneous treatment notes which expressly said "Prefers No Black CNA's" for certain residents. African-Americans were "banned" from interacting with such residents.

The CNA in question was also the object of racial slurs from her coworkers throughout her three months at the facility.

After she complained several times she was abruptly terminated for allegedly using a vulgar word for defecation while she and another CNA were assisting a white resident onto the commode.

Residents' Rights *versus*

Caregivers' Rights

The US Court of Appeals for the Seventh Circuit had to resolve the apparent conflict between residents' rights to personal privacy, bodily integrity, autonomy and choice of healthcare providers *versus* the rights of minority healthcare employees to freedom from racial discrimination and hostility in the workplace.

The Court ruled that the facility's practice of honoring patients' requests for caregivers based on race was overtly discriminatory and violated Title VII of the US Civil Rights Act.

Beyond that, posting such requests from patients for all employees to see and abide by created a racially hostile work environment for African-American employees. The racist attitudes and behaviors of the other CNA's were the direct result of the racially hostile work environment the facility created, the Court said.

Gender-Preference Cases Are Not Analogous

Federal and state courts have ruled that a caregiver's gender can be a bona fide occupational qualification for a healthcare facility striving to protect a patient's personal privacy rights surrounding intimate personal care.

It is not gender discrimination not to allow an opposite-sex caregiver to provide such intimate personal care to a patient who has expressed a preference for a same-sex caregiver.

However, according to the Court, the personal privacy right that is violated when a patient is required against his or her wishes to undress in front of and/or be touched by a doctor or nurse of the opposite sex does not apply to race. The law tolerates same-sex restrooms and dressing rooms but not white-only restrooms or dressing rooms.

A healthcare employer can respect a patient's preference for a same-sex caregiver, but not same-race, the Court went on to say. Chaney v. Plainfield Healthcare, __ F. 3d __, 2010 WL 2813644 (7th Cir., July 20, 2010).

The work environment was racially hostile. That hostility came from daily reminders to the CNA that she was looked down upon as less than her white coworkers.

The daily assignment sheet noted some patients' preferences for "No Black CNA's."

Not only was that humiliating to her, it brought out racist attitudes and sanctioned racist behavior from other employees.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT
July 20, 2010

Post-Surgical Care: Changes In Neuro Status Not Reported.

The fifty-eight year-old patient came in for a CT scan after bouts of dizziness and blurred vision.

The scan showed a possible mass near the pineal gland. The mass was removed surgically. The post-operative orders included an MRI to be done that evening.

Troubling neurological signs seen during the night were not reported to a physician until the next morning.

A CT scan done in the morning revealed bleeding at the surgical site. A clot was surgically removed that afternoon, but the patient lingered in a persistent vegetative state for several months in a nursing home and then died.

The patient's Glasgow Coma Scale score was 12 when she was transferred to the neurosurgical intensive care unit.

Four hours later, around midnight, her score had dropped to 9 and her pupils, fully reactive before, had become sluggish, but the nurses did not notify the medical staff.

The MRI ordered for that evening was never done.

CIRCUIT COURT
WAYNE COUNTY, MICHIGAN
January 27, 2010

The husband's lawsuit filed in the Circuit Court, Wayne County, Michigan settled for \$575,000.

The settlement was based on the hospital's nurses' failure to monitor the patient, failure to report her change in health status to a physician, that is, the drop in her Glasgow Coma Scale score and change in pupil reactivity, and failure to carry out the order for the MRI the evening after her brain surgery. Brown v. Henry Ford Health Sys., 2010 WL 2488536 (Cir. Ct. Wayne Co., Michigan, January 27, 2010).