



## The GSH 60-Second Memo

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### When It Comes to Title VII Obligations, the Customer Isn't Always Right

By Elizabeth Conkin, Esq.

All employers know that Title VII requires them to protect their employees from a hostile work environment based upon discrimination and harassment by co-workers and supervisors. Employers also know that staying in business requires focusing on the needs of their clients. But sometimes those two tenets conflict, and for some employers, this conflict is a difficult one. They want to protect their employees, but they fear losing a valuable account or client. Recent economic difficulties have only accentuated this problem. But as some recent cases show, when the conflict is between a customer and Title VII, the law wins out.

Last year, in [Chaney v. Plainfield Healthcare Center](#), 612 F.3d 908 (7th Cir. 2010), Chaney, an African-American Certified Nurse Aid ("CNA") sued her employer, a long-term care center, because the company continually acceded to a patient's demand to receive no assistance - at any time - from African-American employees. Each day, Chaney and her fellow CNAs received an assignment sheet that noted that the aforementioned patient "Prefers No Black CNAs." By Plainfield's own admittance, agreeing to the patient's demands effectively banned African-American employees from caring for the patient. Plainfield claimed that it acceded to the patient's demands because it feared violating Indiana's patients' rights laws by forcing the patient to have an African-American CNA.

The district court dismissed the case, concluding Plainfield's policy was reasonable given its good-faith belief that ignoring patients' racial preferences would violate state patient-rights laws. However, the Seventh Circuit (covering Illinois, Indiana, and

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Wisconsin) disagreed and reversed the district court's decision. The Seventh Circuit held that catering to the racial preferences of patients is no defense to a Title VII violation and that patient privacy does not include racial preferences. As the Seventh Circuit noted, while privacy concerns lead the law to tolerate single-sex bathrooms, single-sex changing rooms, and preference for the sex of medical caretakers (in certain instances), privacy concerns do not dictate the tolerance of racial segregation in any fashion. Thus, rather than protecting its employees from exposure to racial harassment from its residents, Plainfield's policy of honoring its residents' racial preferences in assigning health-care providers created a racially-charged workplace that poisoned the work environment.

Cases demonstrating this lesson last year were not just limited to the Seventh Circuit. In Maryland, a healthcare provider settled a lawsuit brought by the EEOC based on similar Title VII violations. In *EEOC v. HiCare, Inc.*, the defendant employer had a policy of assigning caregivers to elderly patients in accordance with the patients' racial preferences. The case, however, never reached trial, as HiCare chose to settle with the EEOC, paying \$150,000 to the affected employees, agreeing to cease race-based assignment of employees, and instituting annual civil rights training of recruiters and human resources personnel.

Meanwhile in Texas, Guardsmark, LLC, a major North American and British provider of security services, settled some of the claims of sex discrimination brought by the EEOC. In the case, *EEOC v. Guardsmark, LLC*, the EEOC alleged Guardsmark discriminated against female security guards by acceding to customer preferences for male security guards and reassigning female security guards to inconvenient, lesser-paying security guard posts. In announcing the settlement, the EEOC stated, "This settlement serves as a reminder to businesses that a customer's preference to be staffed or served by workers of a particular gender is never an excuse to engage in illegal sex discrimination. The EEOC will take all necessary steps to ensure that job opportunities traditionally reserved for men are open to all employees."

Thankfully, there are easy steps employers can take to protect themselves from these sorts of claims. First, employers should develop policies that protect employees from discriminatory and harassing conduct by customers, clients, and vendors. Second, employers should provide employees with guidelines for handling workplace hostility created by customers, clients, or vendors. Finally, when appropriate, employers should advise customers, clients, and vendors that racial and gender preferences are unlawful and cannot be accommodated.

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