Balancing Customer Care and Employee Civil Rights

Race Discrimination When an Employer Grants a Patient or Customer Request Based on Race

By Julie A. Gafkay

When a patient or customer is denied service or receives inferior service based on race or color, it seems obvious he or she should be protected under the Civil Rights Acts.[1] What about discrimination in the inverse situation: when a patient or customer preference for services based on race is granted and an employee is excluded from performing his or her job duties? This article explores whether employees excluded from providing services to patients or customers based on race or color have a discrimination claim under the Civil Rights Acts.

Various federal and state laws protect an employee from race discrimination in the workplace.[2] Courts have routinely applied the same standard of proof under federal and state laws for establishing race discrimination in employment.[3] While this approach seems logical, some courts, like the U.S. Court of Appeals for the Sixth Circuit, have taken a different

approach to deciding whether a claim exists for intentional discrimination in employment when the plaintiff presents direct evidence under 42 USC 1981.[4] The slight disparity in application can make the difference between whether an employee who is reassigned or not assigned based on race has a claim or not.

At a Glance

An employee reassigned or not assigned based solely on race because of a patient or customer request should be able to pursue a claim for intentional discrimination. If an employee is prevented from bringing a claim because he or she did not suffer a materially adverse change in employment, the very discrimination proscribed by the statutes will go unchallenged.

Adverse employment action under *Kocsis*

Caselaw under both federal and state discrimination law requires an employee bringing a claim for race discrimination to demonstrate an adverse employment action. The Sixth Circuit has held that not every action taken by an employer rises to the level of an adverse action and, instead, requires an employee to point to a materially adverse change in the terms or conditions of employment.[5] A materially adverse change has been found to include significant changes in responsibility, decreased salary, less distinguished title, material loss in benefits, and other indices that might be unique to a particular situation.[6]

Typically, cases involving an employer's granting or accommodating a patient or customer request for care or service based on race or color does not change an employee's pay, hours, title, benefits, or position. It involves the employee's being reassigned or not assigned to care for or assist the patient or customer based solely on race. Under this scenario, there is direct evidence of intentional race discrimination. However, if a court strictly follows the *Kocsis v Multi-Care Management* test to determine whether there is an adverse employment action, an employee subject to intentional race discrimination in his or her assignment may not have a claim.[7]

De minimis and temporary

The Sixth Circuit has also held there is no adverse employment action when the impact on the employee is de minimis and temporary.[8] In applying this standard to a case involving an African-American nurse manager excluded from a patient's room based on race, the Western District of Michigan, in an unpublished decision, stated:

> [T]he Court finds that an adverse employment action may be based on the employer's race-based assignment of duties even without a change in pay, benefits, prestige, or responsibilities. Defendant's argument that Plaintiff's claim fails because there was no change in her work hours, compensation, job duties, or benefits is unpersuasive. However, Defendant's argument that the employment action here was *de minimis and merely temporary is persuasive. It is undisputed that Plaintiff worked only two shifts while this patient was in the hospital, and she had no specific assigned responsibility to care for the patient because she was a supervisor.*[9] (Emphasis added.)

Arguably, the court's decision would have been different if the nurse was a direct care worker assigned to the patient. However, even then, the court may have concluded that reassignment of a nurse from treating a patient is temporary, especially if the patient in question had an acute condition requiring quick medical treatment or a limited stay. In the instance of a retail setting, if a customer requests assistance based on race, presumably any sales transaction would not last long, so the discrimination would automatically be temporary and, therefore, de minimis.

In a landmark busing case, segregating passengers based on race on city buses was found to be a violation of civil rights, regardless of the length of the ride.[10] Likewise, an employee's civil rights are violated when segregation based on race in the workplace prevents the employee from performing job duties regardless of how long the discriminatory behavior lasts. "Civil rights are founded not on a relativist calculus of discriminatory behavior but on the principle that deprivations of rights resulting from racial animus are unlawful."[11]

Segregation is prohibited under the Civil Rights Act

Title VII of the Civil Rights Act of 1964 specifically states that "[i]t shall be an unlawful employment practice for an employer to…segregate…employees…in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race."[12] An employer is essentially segregating employees based on race if it grants a patient or customer request for care or service on the basis of race.

An employer permitted to segregate employees based on race as long as employees are treated equal in pay, benefits, duties, hours, and position sounds much like the long overruled doctrine of "separate but equal."[13]

Bona fide occupational qualification

Under Title VII of the Civil Rights Act of 1964, an employer is permitted to discriminate against certain protected classes if it can bear the burden of proving a bona fide occupational

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qualification (BFOQ).[14] For instance, courts have held that concerns for privacy in providing personal hygiene care support same-sex assignment to a patient as a BFOQ.[15] Even for protected classes such as gender where a BFOQ is permissible, customer preference can only be taken into account if it is based on a company's inability to perform the primary function or service it offers.[16]

The exception does not apply to race.[17] In other words, under no circumstances may an employer discriminate based on race, even for patient or customer preference. Despite this, a 2012 study published in the *UCLA Law Review* stated:

> One of medicine's open secrets is that patients routinely refuse or demand medical treatment based on the assigned physician's racial identity, and hospitals typically yield to patients' racial preferences.[18]

Cases finding racial preferences in assignment is discrimination

Despite *Kocsis* and other cases requiring a materially adverse change in the terms or conditions of employment to establish a Title VII violation, courts have sustained a race discrimination claim premised on reassignment of an employee from his or her job duties based on a patient or customer request.[19]

In 1999, the U.S. Court of Appeals for the Eleventh Circuit decided the case of *Ferrill v Parker Group, Inc*, involving a telephone marketing corporation that was hired to perform work for political candidates.[20] When requested by customers, the company would segregate employees by assigning separate calling areas and scripts according to race. The court found segregation of assignments based on race was direct evidence of intentional race discrimination in job assignments in violation of § 1981.[21]

In a 2005 decision out of the Western District of Pennsylvania,[22] a patient's daughter asked the employer not to send black nurses to her father's home because he was prejudiced. The admission nurse made the notation "no black RNs" in the patient's documentation.[23] A black employee, who saw the notation, still cared for the patient as assigned.[24] The employer claimed it did not honor such requests.[25] The court concluded that even in the absence of monetary loss, job assignments based on race constituted an adverse employment action because they affect the terms and conditions of employment.[26]

In 2010, the U.S. Court of Appeals for the Seventh Circuit decided the case of *Chaney v Plainfield*, involving an African-American certified nursing assistant prohibited from caring for a white resident who had requested no African-American caregivers.[27] The court rejected the employer's assertion that its deference to the patient's expressed preference was "reasonable" and held: "It is now widely accepted that a company's desire to cater to the perceived racial preference of its customers is not a defense…for treating employees differently based on race."[28]

In a 2016 decision, the U.S. District Court for the Eastern District of Michigan found even a brief abridgement of an employee's rights is actionable. The case involved a respiratory therapist who was unable to care for a patient whose record indicated he wanted no black employees.[29] The court found that § 1981 protects a non-white person's "enjoyment of all

benefits, privileges, terms, and conditions of the contractual relationship" and held that assignments based on race constitute an adverse employment action "because such assignments affect the terms and conditions of employment."[30]

Resolving racial prejudice in favor of the employee

Employers may suggest that a patient or customer request for service based on race should be granted in some circumstances, especially if the employee suffers no job detriment such as a reduction in pay, demotion, change in title, or discharge. In many circumstances, a patient's or customer's racial preference is accompanied by racial slurs. Employers may unilaterally reassign an employee to offer protection and defend its position by suggesting that if the employee was not reassigned, he or she may allege racial harassment.

The flaw in this reasoning is the failure to recognize that complying with a racist request gives power to the patient's or customer's prejudice. If the employer is concerned about racial harassment by the patient or customer, it should inform the employee of the request and allow the employee the option to decide whether he or she will provide services. Unreasonable patient or customer demands are routinely rejected; a request based on race is no different and should be denied outright.

Conclusion

Race discrimination in the workplace is illegal under the Civil Rights Acts. An employee reassigned or not assigned based solely on race because of a patient or customer request should be able to pursue a claim for intentional discrimination. If an employee is prevented from bringing a claim because he or she did not suffer a materially adverse change in employment, the very discrimination proscribed by the statutes goes unchallenged. To fully vindicate the purposes of the Civil Rights Acts and eliminate discrimination, an employee reassigned or not assigned based on a racial preference should have a remedy under the Civil Rights Acts.[31] ■

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ENDNOTES

1. See, e.g., *Jackson v Waffle House*, 413 F Supp 2d 1338 (ND Ga, 2006) (a customer filed suit against the defendant restaurant for race discrimination because of inferior service and requiring black customers to prepay for takeout orders); *Bobbitt v Rage, Inc*, 19 F Supp 2d 512, 518–520 (WD NC, 1998) (customers were forced to prepay for food in a pizza restaurant based on race); and *Washington v Duty Free Shoppers*, 710 F Supp 1288, 1289–1290 (ND Cal, 1988) (African-American customers were told they needed to show their passports and airline tickets before shopping for duty-paid goods while other customers were not required to do so).
2. 42 USC 1981; Civil Rights Act of 1964 § 7, 42 USC 2000e *et seq.* (1964); 42 USC 1983; and Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*
3. *Kresnak v City of Muskegon Hts*, 956 F Supp 1327 (WD Mich, 1997) (applied the same standard of proof to § 1981, § 1983, Title VII, and Elliott-Larsen race discrimination claims); *Noble v Brinker Int'l, Inc*, 391 F3d 715 (CA 6, 2004) (applied the same standard of proof for § 1981 and Title VII race discrimination claims); and *Rogers v Henry Ford Health Sys*, 897 F3d 763 (CA 6, 2018) (applied same standard of proof for § 1981, Title VII, and Elliott-Larsen race discrimination claims).
4. *Amini v Oberlin College*, 440 F3d 350 (CA 6, 2006) (an employee must show term or condition of employment affected as opposed to having to show materially adverse change in term or condition of employment).
5. *Kocsis v Multi-Care Mgt, Inc*, 97 F3d 876, 885 (CA 6, 1996) ("reassignments without salary or work changes do not ordinarily constitute adverse employment decisions in employment discrimination claims.").
6. *Id.* at 886.
7. *Foster v Mary Free Bed Rehab Hosp*, unpublished opinion of the United States District Court for the Western District of Michigan, issued August 6, 2015 (Case No. 1:13-cv-1350).
8. *Bowman v Shawnee State Univ*, 220 F3d 456 (CA 6, 2000) and *Kauffman v Allied Signal, Inc*, 970 F2d 178 (CA 6, 1992).
9. *Crane v Mary Free Bed Rehab Hosp*, unpublished opinion and order of the United States District Court for the Western District of Michigan, issued March 13, 2015 (Case No. 1:13-cv-1294).
10. *Browder v Gayle*, 142 F Supp 707 (MD Ala, 1956).
11. *Yates v Hagerstown Lodge No 212*, 878 F Supp 788, 796 (D Md, 1995).
12. 42 USC 2000e-2(a)(2).
13. *Plessy v Ferguson*, 163 US 537; 16 S Ct 1138; 41 L Ed 256 (1896) was overruled by the landmark case of *Brown v Bd of Ed*, 347 US 17, 43; 74 S Ct 323; 98 L Ed 455 (1954) (holding that separate but equal means there is no racial discrimination).
14. Religion, sex, or national origin. 42 USC 2000e-2(e).
15. *AFSCME v Michigan Council 25*, 635 F Supp 1010 (ED Mich, 1986).
16. *Diaz v Pan American World Airlines*, 442 F2d 385 (CA 5, 1971).
17. *Miller v Texas State Bd of Barber Examiners*, 615 F2d 650 (CA 5, 1980).
18. Paul-Emile, *Patients' Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L Rev 462 (2012), available at <https://www.uclalawreview.org/pdf/60-2-3.pdf> (accessed April 12, 2019) [https://perma.cc/3HUU-ANBK].
19. *Crane v Mary Free Bed Rehab Hosp*, 634 Fed App'x 518 (CA 6, 2015); *Novotny v Reed Elsevier*, 291 Fed App'x 698 (CA 6, 2008); *Fischer v UPS, Inc*, 90 Fed App'x 802 (CA 6, 2004); and *Akers v Alvey*, 338 F3d 491 (CA 6, 2003).
20. *Ferrill v Parker Group, Inc*, 168 F3d 468, 471 (CA 11, 1999).
21. *Id.* at 472.
22. *Patterson v UPMC South Hills Health Sys Home Health, LP*, unpublished opinion of the United States District Court for the Western District of Pennsylvania, issued May 15, 2005 (Civ Action No. 03-89).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Chaney v Plainfield Healthcare Ctr*, 612 F3d 908 (CA 7, 2010).
28. *Id.* at 913.
29. *McCrary v Oakwood Healthcare, Inc*, 170 F Supp 3d 981 (ED Mich, 2016).
30. *Id.* at 988–989.
31. The employee may not have economic damages, but the Civil Rights Act includes remedies for compensatory, punitive, and statutory attorney fees. 42 USC 1981a.