

# Patient Objections to Caregivers Create Difficult Situations

Healthcare organizations could find themselves in a difficult position if a patient or family member refuses care from a clinician because of race, sex, or sexual orientation. If the situation arises, the law is clear even if following it will make the patient or family upset.

Sometimes, patients prefer a male or female caregiver or state they are uncomfortable with a clinician or aide who is of a certain race, sexual orientation, or religion. Accommodating the patient in these situations runs the risk of violating labor laws, says **Tom Harrington**, JD, principal with The Employment Law Group in Washington, DC.

Researchers found patients often requested providers of the same gender, race, or religion. The decision on whether to accommodate the patient usually fell to the physician, and female physicians were more likely to say yes.<sup>1</sup>

The 1964 Civil Rights Act (CRA) and Title VII of the act prohibits employers from basing decisions about job assignments, promotions, or other terms of employment on the person's status in a protected category, Harrington says. The protected categories include race, gender, national origin, disability, and age.

The question of whether sexual orientation or identity is a protected category was in dispute for many years, but the Supreme Court recently ruled Title VII does protect people from discrimination based on these categories. Making an assignment based on the discriminatory preferences of a patient would be in violation of those laws, Harrington says. Even if an employee does not know about the accommodation at the time, he or she may find out later and claim the discrimination adversely affected their job status.

Objections to care provided by transgender clinicians or aides spurred the United Kingdom's National Health Service to publish guidance warning patients could be found guilty of discrimination if they refuse care from a transgender medical professional. Healthcare leaders were told patients have no right to be informed about a healthcare worker's assigned sex at birth.<sup>2</sup>

"It would likely be discriminatory for the patient to refuse to be treated or cared for by a trans person, unless clear and evidenced clinical harm may result to the patient," officials wrote.

The U.S. Equal Employment Opportunity Commission has not addressed the issue, but Harrington

says he can conceive of difficult circumstances if a patient objects to care from a transgender individual.

It is common for hospitals to accommodate a request from a woman who prefers a female caregiver for intimate care, Harrington notes, but if a patient objects that a transgender caregiver was born male, it might be difficult to satisfy the patient.

"That is the one thing I can think of where it's a complicating factor. If you want a doctor of the same gender for privacy reasons, how does that affect somebody who's trans and whether you view them as the same gender as you or have a different gender than you?" Harrington asks. "But I'm not aware of any changes to the laws that would cover that."

The conservative approach would be to support the caregiver and not comply with the patient's request. "If the hospital accommodates that type of request, I think they potentially have some liability because clearly you're treating a trans female as if she is not really female," Harrington says. "That would expose the hospital to potential liability, or at least to lead to some litigation."

## Policies Needed

Organizational policies and guidelines are necessary for these situations, says **Talya Van Embden**, JD, an attorney with Kaufman Dolowich Voluck in Fort Lauderdale, FL.

Healthcare organizations should ensure a zero-tolerance policy for discrimination, then work to educate its employees as to what a zero-

### EXECUTIVE SUMMARY

Sometimes, patients object to a particular caregiver based on race, gender, or other factors. Employers must respond carefully to avoid discrimination charges.

- Some accommodation is acceptable for modesty concerns.
- Employers are obligated not to restrict assignments based on certain factors.
- Labor laws can be violated even if the employee does not know at the time.

tolerance policy means within the constraints of the duty to provide care. Healthcare entities must ensure their employees are not subjected to discrimination or bias on the job, regardless of the source.

Hospitals should only respond to reasonable requests, such as a female sexual assault victim requesting a female clinician, and deny requests that appear to be based solely on discriminatory means.

“Patient reassignment requests based on bigotry pose an ethical dilemma for healthcare entities that does not lead to black-and-white solutions,” Van Embden says. “When faced with such a demand, healthcare entities should understand that federal law requires employers to protect employees from discrimination regardless of the source — including customers, patients, visitors, or even vendors.”

Van Embden notes that in 2010, the U.S. Court of Appeals for the Seventh Circuit decided the case of *Chaney v. Plainfield*, involving

a Black certified nursing assistant prohibited from caring for a white resident who requested no Black caregivers. The court rejected the nursing home’s assertion its deference to the patient’s expressed preference was “reasonable” and held a patient’s racial or sexual preference is not a defense to treating employees differently.<sup>3</sup>


In 2016, U.S. District Court for the Eastern District of Michigan ruled even a brief abridgment of an employee’s rights is actionable, Van Embden says. This case involved a respiratory therapist who was unable to care for a hospital patient whose record indicated he wanted no Black caregivers. The court held that Section 1982 protects a non-white person’s enjoyment of all benefits, privileges, terms, and conditionals of an employment relationship, and that assignments based on race constitute an adverse employment action because such assignments affect the terms and conditions of employment.<sup>4</sup> ■

## REFERENCES

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## SOURCES

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