Employment Edge 115th Edition—
Customers' Discriminatory Requests May Run Employers Into Legal Trouble

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Most employers are well aware that it is not lawful for them to discriminate on the basis of race, gender, or other protected class status. But what about when a customer demands service on a discriminatory basis? A recent case shows how even an employer with the best of intentions can run afoul of the law in such a circumstance.

Employers may be familiar with the "customer preference" line of cases decided in the '60s and '70s soon after the passage of Title VII. In those cases, employers argued that white customers' preference for white servers at lunch counters, males' preference for pretty young women as flight attendants, and similar discriminatory attitudes justified decisions to employ or assign workers of a particular race or gender. The courts disagreed and held that customer preference could not justify discrimination on the basis of protected class status.

While these cases may seem like relics of a bygone era, issues of customer, client, or patient preference still arise. For example, health care providers risk liability under discrimination laws if they allow their patients' racial biases to determine the persons tasked with the their care. The United States Seventh Circuit Court of Appeals recently held in *Chaney v. Plainfield Healthcare Center* that a nursing home's policy of complying with residents' racial biases in assigning nurses could support a claim for a racially hostile work environment under Title VII of the 1964 Civil Rights Act. Although the court acknowledged that state and federal statutes and regulations recognize residents' privacy interests and autonomy in choosing providers, it determined that those conflicting laws could not supply a defense for employers who violate Title VII, and that such laws did not authorize discrimination on the basis of patients' racial preference. The court found that the only recognized privacy interest for patients was the right to be attended by a person of the same gender in situations requiring the patient to undress in front of the employee.

Customer preference issues are not limited to restaurants, airlines, or health care providers. The following examples illustrate other circumstances in which they may arise:

- **So-called "reverse discrimination" cases.** Employers may wish to participate, or may be asked by their clients to participate, in programs that seek to enhance opportunities for diverse employees. In some instances, these affirmative action initiatives may go beyond what is lawful. For example, an employer might seek or be asked to maintain specific quotas of employees of a particular race, or to provide diverse employees to work on clients' projects. While the goals of such programs may be as laudable, as discussed in our Employment Edge 102nd Edition, the Supreme Court's recent decision in *Ricci v. DeStefano* reaffirmed that employers cannot take race into account even for seemingly benevolent reasons. Although affirmative action remains permissible in certain limited instances, customer preference, even in the form of diversity initiatives, does not create an exception to the mandates of Title VII and similar anti-discrimination laws.

- **Artistic license.** Advertisers and producers of theatre, movies, and commercials frequently make very conscious casting decisions on the basis of protected class status, with the explicit aim of "authenticity," or to appeal to customer preferences of a particular demographic. Although such decisions may seem to be a part of the artistic

process, Title VII provides no exception to its mandates for artistic activities. Title VII regulations state only that *gender* may be a bona fide occupational qualification (BFOQ) where "necessary for the purpose of authenticity or genuineness." No BFOQ exception exists for race or other protected class status. Therefore, choosing or refusing to choose an actor or model because of his or her race or ethnicity risks violating federal and state anti-discrimination laws.

Discrimination laws forbid employers from taking into account an applicant's or employee's protected class status in making employment decisions, including work assignments, and the exceptions are very limited and difficult to prove. Employers should think twice—and seek counsel—if any proposed employment action does otherwise.

The attorneys of Gray Plant Mooty's Employment and Labor practice group are available to assist employers with workplace training and compliance, as well as litigation and dispute resolution. If you have questions about handling discriminatory customer requests or other workplace issues, please email or call Mark Mathison (mark.mathison@gpmlaw.com, 612.632.3247) or Bryan Seiler (bryan.seiler@gpmlaw.com, 612.632.3396).