



*Residential Services Association of Wisconsin, Inc. advocates and educates for excellence in community residential and related support services*

## Issue 4 – 2010

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## Regional Meeting Recap

by Linda Hoon  
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**O**n the week of October 18, 2010, RSA-WI held a series of Fall Regional Meetings in Milwaukee at Summit Place, Appleton at Agape and Eau Claire at Productive Living Systems.

The topic for these meetings was “Rate Setting Update” and “Election Update.” Fredi-Ellen Bove, the Deputy Administrator for the Division of Long Term Care presented the rate setting update in Milwaukee, while Deb Rathermel, Managed Care Policy Specialist for the Office of Family Care Expansion presented in Eau Claire. Ms. Bove and Ms. Rathermel gave a brief description of the Family Care Residential Rate Setting Methodology Project. They spoke about the conceptual framework for this model, and what the key characteristics were that they would be basing their rate setting on.

Rates will differ based on the characteristics (i.e. acuity) of the member, the type of residential setting and the geographical location. They discussed the room and board methodology. The goal is to create a consistent room and board methodology, create a methodology for establishing a reasonable level of room and board in community substitute care that can be supported by publicly funded programs. They also talked about the implementation issues and the steps that have been taken to ensure a reasonable time frame for implementation. Rate changes



based on the new methodology will go into effect as soon as possible after the first quarter of 2011. Until then, current contracts with MCO’s will remain the same. New contracts will be written after the first quarter of 2011. There was a time for questions and discussion.

RSA-WI’s lobbyist, Forbes McIntosh, presented an election update at all three meetings. Forbes presented a list of the candidates for each of the government offices and gave an overview of the impact of each of those offices based on the results of the election. He noted that the Senate and Wisconsin Assembly have been dominated by Democrats for the last 12 years. There are a number of seats up for grabs and depending on the outcome of the election in November there could be huge changes in the future of Wisconsin Government. This is the year for new districting to be developed and the outcome in the race for the Governors office will have a huge impact on this process. This was a very interesting meeting. It addressed issues that are in the forefront of all of our minds.

**See Prescription Drug Card Benefits on Page 7**

# ALERT: Anti-Discrimination Laws Trump Residents' Racial Preference

by Thomas P. Godar  
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The elderly man with dementia, the woman suffering from a traumatic brain disorder, or just that ornery old coot demands that his or her care in the nursing home or community based residential facility ("CBRF") be provided by a Caucasian. You have heard them spray racial epithets when watching TV and the "N" word is never far from their lips. State law and regulation mandates resident choice, resident privacy, and your own policies instruct your employees that in the nursing home, the CBRF or the adult family home, resident preference is to be regarded. Yet this conflicts with your strong and regularly enforced anti-discrimination provision. Consistent with federal and state anti-discrimination law, your promise to show no preference to employees based on racial or other protected characteristics in the workplace.

The test comes when these two values clash. Can you hire or make assignments that separate the Black employee from the bigoted resident? The answer was an emphatic "no" by the Court of Appeals for the 7<sup>th</sup> Circuit in *Chaney v. Plainfield Healthcare Center, Inc.* (July 20, 2010). In that case, certain nursing home residents made it clear that they would not allow or at least not prefer African-American attendants. Out of deference for resident rights, these resident demands were translated into a prohibition of assigning or even allowing African-American employees to attend those residents.

This policy became part of plaintiff's claim. Ms. Chaney not only described racial epithets directed at her by co-employees, but also this policy of racial preference based on residents' demands. As a result, the court ruled as follows:

It is now widely accepted that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race.

Those charged with the responsibility to care for the frail elderly, those with developmental disabilities or other challenges creating potentially significant behavioral issues, may suggest that such a decision is easy for judges sitting on the bench in Chicago, but difficult when a resident screams racial epithets at the Black, Latino or Asian employee while he or she is merely trying to do their job. The court, apparently not unaware that these are real issues, offered several alternatives which it suggests may be appropriate in that circumstance. Discussing alternatives, the court offered the following instruction:

It can warn residents before admitting them of the facility's non-discrimination policy, securing the resident's consent in writing; it can attempt to reform the resident's behavior after admission; and it can assign staff based on race-neutral criteria that minimize the risk of conflict. [Quotations omitted.] Plainfield [the nursing home] could have, for instance, advised its employees that they could ask for protection from racially harassing residents. And even if all these efforts do not guarantee full racial harmony, they exemplify reasonable measures that an employer can undertake to avoid liability for known workplace harassment.

The court explicitly rejected the argument that other laws or regulations, whether federal or state, providing for resident choice or resident privacy, would justify discrimination in assignment based on racial preference. The court did, however, go out of its way to distinguish the circumstance for which more than gender specific assignments may be justified because of privacy concerns.

Just as the law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race providers.

## What are the lessons of this case?

1. Laws prohibiting discrimination based on race and national origin trump resident preference, even in the face of laws protecting resident choice and privacy.
2. Assignment of an employee to a duty which will include contact with such a bigoted resident will not, in and of itself, be the basis for a harassment claim, if other reasonable steps are taken to alleviate the conflict.
3. In circumstances where such an assignment takes place, and the employee objects, the employer likely has a responsibility to take additional steps to remediate the situation or remove the employee from the racially offensive resident.
4. Privacy concerns prompting gender specific assignment may, in some cases, still be allowed.

As you work your way through this complex thicket of competing laws and regulations, competing values, and sometimes uncertain outcomes, consult your counsel to receive the most recent instructions delivered from the court or enforcement agencies.