

Age Discrimination: Court Lets Nurse's Case Go Forward.

No sooner than the fifty-four year-old nurse's first day on the job her supervisor began making her age an issue.

The supervisor reportedly said, "Just how old are you? We need someone who isn't as old as you are, you weren't interviewed by us and they couldn't ask you during the interview. Just because you have experience doesn't mean you can do this job. It's pretty physical. Hope you can keep up. I don't know why hired you. You're pretty old to be a part of this team, and we needed someone younger."

Some days later, after the supervisor told her she was looking old and gray, the nurse complained to the clinical director who was the supervisor's supervisor. The nurse was told she just had to get to know her supervisor better.

At her sixty-day review the nurse was given positive performance appraisals as to her nursing skills, but was cautioned not to "stir the pot" with any more complaints about her supervisor's attitude and the remarks about her age.

At the end of her ninety-day probationary period the nurse was terminated.

Court Sees Grounds For Age Discrimination Lawsuit

Finding grounds for the nurse's case to go forward, the US District Court for the Southern District of Mississippi declined the hospital's request for a summary judgment of dismissal.

Discrimination can be proven either by circumstantial or by direct evidence.

In most discrimination cases the victim has only circumstantial evidence, belonging to a protected category like age over forty and being treated adversely compared with others. Often the employer can win a purely circumstantial case nevertheless by showing a legitimate non-discriminatory justification from the employee's own misconduct or incompetence.

However, the victim in this case had direct evidence of discrimination, which is more powerful and persuasive, in the form of the disparaging age-related remarks about her from her supervisor, a person in a position of authority who could or actually did make the decision not to continue her employment. **Vaughan v. Med. Ctr.**, 2018 WL 4840614 (S.D. Miss., October 4, 2018).

Disparaging age-related remarks can be used to prove that age discrimination was the motivating factor behind discipline or other adverse employment action, if certain conditions are met.

The remarks must clearly pertain to the victim and must clearly disparage the victim because of his or her age.

The remarks must have been made by a person with the authority to take disciplinary or other adverse action against the victim.

The most convincing case for the victim is when the person who made the disparaging age-related remarks is the exact same person who took disciplinary or other adverse action against the victim.

As a general rule, age-related remarks by coworkers who are not in any position of authority over the victim are not a sufficient basis for a successful age-discrimination case.

A victim may also have the right to sue if there has been retaliation for complaints about conduct, such as disparaging remarks, that the victim sincerely believed violated his or her legal rights.

UNITED STATES DISTRICT COURT
MISSISSIPPI
October 4, 2018

Contaminated Medication: Court Upholds Discipline Against Nurses.

During a routine inventory of medications on hand in a prison infirmary a nurse accidentally tipped over a bottle of sofosbuvir and spilled about a dozen pills on the floor. The nurse reflexively picked up the pills from the floor and threw them in the trash.

When they contacted the prison pharmacy the nurses learned how expensive the pills are and that a mountain of paperwork was needed to obtain more. Sofosbuvir is a medication for Hepatitis C that reportedly costs \$1,000 per pill and is sold only in lots of twenty-eight.

After consulting with a pharmacist and a physician the nurses decided to retrieve the pills from the trash. The pills were given to inmate patients with no ill effects.

The high cost of replacing the pills was the nurses' motivation for retrieving them from the trash and giving them to patients, not any concern for patients' welfare or safety.

SUPREME COURT OF DELAWARE
October 2, 2018

The Supreme Court of Delaware upheld the nurses' ninety day license probations and mandatory continuing education classes on medication administration.

The Court rejected the nurses' argument they used the tainted pills out of concern for their patients because the pills might not be replaced in time due to protracted bureaucratic red tape.

Potential for harm to a patient, with or without actual harm, is the standard for finding a nurse guilty of unprofessional conduct. Whatever guidance the nurses claimed they got from the pharmacist or the physician was irrelevant to their own unprofessional conduct as nurses

The cost of the pills was no excuse for using them after they had been on the floor. **Board of Nursing v. Francis**, ___ A. 3d ___, 2018 WL 4705512 (Del., October 2, 2018).