

Age Discrimination: Appeals Court Upholds Nurse's Verdict.

The US Court of Appeals for the Third Circuit has upheld the jury's verdict in the nurse's favor in her age discrimination case we reported in March, 2008. See *Post-Mortem Care: Nurse Fired Over Handling Of Miscarriage Wins Discrimination Lawsuit*, (16)3, p.5.

The sixty-one year-old labor and delivery nurse had worked at the hospital nearly forty years, twenty-two years as an RN, with an unblemished employment record.

A patient of hers had a miscarriage while on the toilet. Following instructions from the physician the nurse had the OB tech put the eighteen-week fetus, placenta and cord into a container of formalin.

No Policy In Effect At the Time For Handling of Miscarriage

At the time there was no policy in effect at the hospital for handling the products of conception after a miscarriage. Later the hospital enacted a policy that it is inappropriate to put a miscarried fetus in formalin under twenty-four weeks.

Nurse Was Abruptly Terminated Four Days Later

The OB tech went to the unit manager to complain about being told to put the remains in formalin. After talking to the physicians, but without speaking with the nurse or the patient or reviewing the patient's chart, the unit director and clinical director decided to fire her.

The grounds they gave for termination were failure to adhere to expected standards of practice and behavior inconsistent with customer service expectations.

Stated Reasons For Termination Were Pretext for Age Discrimination

It came to light during the trial that the hospital had no policy telling a nurse what to do in this particular situation until after this incident. The physicians testified the nurse's actions were not inappropriate.

The supervisors reportedly were not even able to articulate a consistent story why they fired her, let alone grounds that would justify what they did. The jury awarded \$273,366.92 to the nurse for loss of income. *Scanlon v. Jeanes Hosp.*, 2009 WL 840553 (3rd Cir., April 1, 2009).

A sixty-one year-old nurse was abruptly fired and her day shift position was given to a newly-hired thirty year-old nurse who wanted to work days.

That alone is enough to create a prima facie case of age discrimination in favor of the fired nurse.

When an employer treats a person in the protected 40-70 year old age bracket adversely compared to a younger person, the employer has the burden of proof. The employer has to prove that some factor other than age bias was the motivation.

The nurse could not have violated hospital policy. There was no policy until after this incident how a labor and delivery nurse was to deal with the products of conception after miscarriage.

The nurse's supervisors also testified the nurse had been bickering with a co-worker but left it up in the air how that would justify firing a long-term employee with an exemplary record and why the much-younger co-worker was not also fired for bickering with her.

The nurse is entitled to the jury's verdict.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT
April 1, 2009