

Nursing Assistant Assaults Patient: Court Upholds Native American Aide's Discrimination Lawsuit.

A nursing assistant employed in a nursing home struck and injured a patient. The incident was reported by a co-worker. The charge nurse conducted an investigation, by examining the patient and going over his medical records. The nursing assistant did not deny she had struck the patient, but insisted that her striking the patient was not what caused a tear in the skin on his arm.

The incident resulted in the nursing assistant being discharged from her employment. She filed suit against her former employer alleging discrimination. The jury awarded \$32,000 in damages in her favor against the nursing home. The Supreme Court of Appeals of West Virginia upheld the jury's verdict, ruling that there was a valid case of employment discrimination stated in this suit.

The court first had to explain the analytical framework under which this case would be considered. Although West Virginia has its own state statute against job discrimination, the method of analysis used by the state courts was virtually the same as that used by Federal courts in deciding employment discrimination cases brought under Title VII and other Federal laws. This is true in many U.S. jurisdictions, that is, that state laws in each of the states are interpreted by the courts along the lines of a consistent body of Federal case precedents.

The nursing assistant filed suit, alleging she was discharged because she was female, over forty years old and a Native American.

Other employees who had struck patients were not immediately discharged as she was. This supported a charge of employment discrimination.

The nursing home's personnel manual stated the first-offense penalty, for abuse of a resident, use of obscene or abusive language, striking, threatening or harassing a resident, is immediate discharge.

The nursing assistant's personnel file contained a signed receipt acknowledging that she had received a copy of the personnel manual, and had read and understood it.

SUPREME COURT OF APPEALS
OF WEST VIRGINIA, 1995.

The person alleging employment discrimination must first show that he or she is a member of a protected class of persons. In this case the nursing assistant was a Native American. She also demonstrated that, except for this incident, she had provided competent and loyal service to her employer. She was discharged and replaced with a person who was not a member of the protected class. These facts alone amounted to a *prima facie* case of employment discrimination.

The employer, however, can step in with evidence to show a legitimate, non-discriminatory justification for its actions. In this case the employer pointed to the incident where a patient was struck, which was a clear violation of policy at the nursing home.

The employee can then attempt to carry the day by proving that the employer's alleged legitimate, non-discriminatory reason is itself only a "pretext" for discriminatory action. Here the former employee could show that there was not evenhanded application of the rules against striking patients. Non-minority employees had not been fired for striking patients. Without evenhanded application of the rules, when a minority group member is disciplined or fired, the employer will be hard pressed to offer a non-discriminatory reason. **Barefoot vs. Sundale Nursing Home, 457 S.E. 2d 152 (W.Va., 1995).**