

## Discrimination: Race Bias Case Dismissed.

A psychiatric facility serving adolescent girls fired an African-American mental health technician for an ongoing pattern of inappropriate sexual conduct involving his patients.

He sued for race discrimination. The US Circuit Court of Appeals for the Eighth Circuit dismissed his lawsuit.

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***When a minority employee is terminated from a position for which the employee is qualified, the employee has a prima facie case of discrimination.***

***It is then up to the employer to show a legitimate, non-discriminatory reason why the employee was treated as he was.***

***Inappropriate sexual contact with adolescent patients is a legitimate, non-discriminatory reason to terminate an employee.***

UNITED STATES COURT OF APPEALS,  
EIGHTH CIRCUIT, 2002.

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The employee did not deny he had fraternized inappropriately. He argued that two white mental health technicians were disciplined less harshly for inappropriate sexual conduct on the job.

### **Differential Discipline Is Race Bias**

Differential discipline is a legitimate argument in a race discrimination case. Punishment must be the same for the same offense. However, the court ruled the offenses were not the same. A white employee was referred to counseling for sexual harassment of co-workers, considered less vulnerable than adolescent patients, and another was written up after a patient's room door accidentally closed behind him, a minor violation of policy. ***Williams v. Saint Luke's Shawnee Mission Health System, Inc.***, 276 F. 3d 1057 (8th Cir., 2002).

## Home Health Nursing: Court Defines When Nurses Are Entitled To Overtime Pay.

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***The US Fair Labor Standards Act (FLSA) says that employees are entitled to overtime at one and one-half their usual hourly rate for any hours worked over and above forty hours in a seven-day week.***

***A major exception exists for employees in a bona fide professional capacity.***

***The FLSA has its own definition of a professional employee who does not have to be paid overtime:***

***The employee's duties consist of the performance of work requiring advanced knowledge in a field of science or learning; and***

***The work requires the consistent exercise of professional judgment; and***

***The employee is paid on a salary or fee basis and earns more than \$250 per week.***

***A home health nurse is a professional employee under the first two prongs of the test.***

***However, this nurse was not paid strictly on a fee-for-service basis. She was paid partly on an hourly basis. All three prongs of the FLSA's test were not met. She is entitled to overtime.***

UNITED STATES COURT OF APPEALS,  
SIXTH CIRCUIT, 2002.

The United States Circuit Court of Appeals for the Sixth Circuit had to decide if a particular home health nurse was entitled to overtime pay.

The court ruled she was not a professional employee under the US Fair Labor Standards Act's (FLSA) special three-part definition of an exempt professional employee. Not being an exempt professional employee, the nurse was entitled to enforce her judgment from the Federal District Court for back overtime premiums her employer owed her.

### **Flat Fee For Services**

versus

### **Hourly Compensation**

There is no hard-and-fast rule, although most home health nurses probably are exempt professionals who are not entitled to overtime pay.

A court has to look carefully at the particular nurse's compensation plan. Is the nurse paid strictly on a fee-for-service basis, or to any extent on an hourly basis?

In this case the nurse was paid in part on a hourly basis, depending on the time required to perform certain nursing tasks and for her time on an hourly basis for meetings, training and on-call time.

By contrast, the Court of Appeals for the Sixth Circuit admitted it handed down a case in 2000 with the exact opposite result, that home health nurses are exempt professionals who are not entitled to overtime. In that case the home health nurses were paid strictly on a fee-for-service basis regardless of the length of time spent on the nursing task at hand and regardless of other time spent on no-shows, travel time, staff meetings, in-services, etc.

### **Burden of Proof Is On The Employer**

The FLSA puts the burden of proof on the employer. The employer has to convince the court an employee not being paid overtime is an exempt professional. In this case the court believed the employer did not meet that burden of proof. ***Elwell v. University Hospitals Home Care Services***, 276 F. 3d 832 (6th Cir., 2002).