

## HIV-Positive Employee: Court Upholds Claim Of Harassment.

The US Circuit Court of Appeals for the Fifth Circuit ruled recently that on-the-job harassment of an HIV-positive employee is the same as discrimination for purposes of the Americans With Disabilities Act. That is, it is illegal and the employee has the right to sue.

According to the court, this is the first time a high-level Federal court has recognized this distinction.

**HIV is a disability. The Americans With Disabilities Act (ADA) outlaws discrimination against disabled employees.**

**The ADA also outlaws employer harassment of employees because of their HIV status.**

UNITED STATES COURT OF APPEALS,  
FIFTH CIRCUIT, 2001.

That being said, the court had to decide if the medical assistant in question actually was harassed at the medical clinic where she worked. The court found there was harassment.

### Harassment Defined

Harassment is the same as abuse. The court looks for intimidating or threatening conduct, above and beyond offensive verbal utterances directed at the employee or made in her presence.

This employee's performance appraisals were very good before she was found out to be HIV-positive. Then she was frequently written up and was required to undergo repeated urine drug tests. The court was concerned about a pattern of her supervisors "ambushing" her into frequent unexpected confrontations in closed rooms to discuss her allegedly poor job performance, which was physically threatening. **Flowers v. Southern Regional Physician Services Inc.**, 247 F. 3d 229 (5th Cir., 2001).

## Discrimination: Nurse Can Sue For Retaliation, Testified On Behalf Of Another Nurse.

**The nurse claimed she herself was a victim of race and age discrimination.**

**She was recommended for promotion from Public Health Nurse II to Public Health Nurse III, but was demoted back to level II during her six-month probationary period.**

**The nurse had insufficient evidence that discrimination against her played a part in that decision.**

**Nonetheless, this is a fairly clear-cut employment retaliation case.**

**The nurse showed up to testify at a grievance hearing on behalf of a co-worker who was claiming age and race discrimination.**

**Just five days later her supervisor decided to demote her, even though she did not actually testify because the hearing ended up being postponed for a month.**

**Then just a week after the hearing was actually held and she did actually testify for the other nurse, she was told she had been demoted effective a month earlier, which would have still been within her probationary period.**

UNITED STATES COURT OF APPEALS,  
FIFTH CIRCUIT, 2001.

The US Circuit Court of Appeals for the Fifth Circuit recently made several important points in a nurse's discrimination and retaliation lawsuit against her former employer, a municipal public health department where she had been working as a public health nurse.

### No Discrimination

The nurse did not have proof she herself was targeted for age or race discrimination. True, she was forty-eight years-old, was African American, was qualified for promotion to a higher-level position and was demoted back down.

However, according to the court, the nurse failed to bring in proof the higher-level position later went to a younger or non-minority candidate. To sue for discrimination, the victim not only must be treated adversely but must have proof some other specific person was treated more favorably.

### Retaliation

The Federal anti-discrimination laws as well as many states' laws protect persons from retaliation who assist other persons to come forward with their own complaints of discrimination.

A victim of retaliation, even one who is not a minority or not personally singled out for discrimination, has the same basic right to sue as a victim of discrimination.

### Suspicious Timing of Events

A victim of retaliation must prove cause-and-effect between his or her conduct assisting another and the employer's adverse reaction, the court pointed out. In this case the timing of the decision to demote the nurse back to her former position and the timing of when she was notified was just too suspicious to be ignored, the court ruled.

### Probationary Status

As a general rule, an employee's job or job promotion being only probationary makes no difference in the context of employment discrimination law. **Evans v. City of Houston**, 246 F. 3d 344 (5th Cir., 2001).