Abuse Reports, Age Discrimination: Court Dismisses LPN's Lawsuit.

An LPN charge nurse sued her former employer, a nursing facility, for age discrimination after she was fired for non-compliance with the facility's policy for reporting abuse and neglect of residents.

The US Court of Appeals for the Sixth Circuit dismissed her case.

Nursing Facility's Policy Mandated Reporting of Known or Suspected Abuse or Neglect

The nursing home's written policy required any employee who witnessed or suspected abuse or neglect of a resident or misappropriation of a resident's property to report it immediately to the employee's own supervisor.

Supervisors, in turn, were required to inform the nursing home administrator immediately so that the situation could be promptly investigated.

Failure to report known or suspected mistreatment of a resident was grounds for disciplinary action, up to and including termination.

An aide heard another aide use a "hateful" tone telling a resident she could not come back to her room and feed her until she collected all of the other breakfast trays. Later that morning she heard the same aide yelling at a resident who asked her for more ice water, telling him she had brought him some earlier that morning and might not bring him any more until tomorrow if he kept pestering her.

The aide waited a while, then told the LPN charge nurse what she heard. The LPN charge nurse, however, did not relay it to the administrator. She decided instead to monitor the situation and see whether or not the problem persisted.

The next day the aide told the facility's QI director, who told the administrator, who interviewed both of the aides, two other aides and the LPN charge nurse and fired the first aide for verbal abuse of a resident and the LPN charge nurse for violation of the facility's mandatory reporting policy. The aide who went to the QI director was written up but was not fired because she did report what she heard, albeit later than she should have.

After her termination the LPN charge nurse, fifty-five years of age at the time, sued for age discrimination.

Age discrimination occurs when a forty-plus year-old is subjected to discipline not visited upon younger persons or replaced by a significantly younger person, unless the employer is able to show a legitimate, non-discriminatory reason.

Failure to follow a facility's legitimate policy for reporting of known or suspected abuse is a justifiable reason for termination.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
December 21, 2011

No Age Discrimination Found

The Court conceded the LPN charge nurse had a *prima facie* case of age discrimination simply because she was fired at age fifty-five and her former position was filled by a much younger person. That did not nail down her discrimination case but it did force the facility to come forward with a legitimate, non-discriminatory reason for her termination.

The Court found a legitimate, non-discriminatory reason for her termination in the fact she violated the facility's legitimate reporting policy that left no discretion to her to decide if the incident squarely fit the definition of abuse or whether it should be reported to the administrator.

Her supervisory responsibility was to report known or suspected abuse or neglect to the administrator. Other employees who were aware of the situation but did not go to the administrator were not supervisors and did not have the same responsibilities.

Moreover, the Court ruled it was not relevant to the charge nurse's duty to report known or suspected abuse that the first aide's actions were eventually determined not to have fit the definition of abuse, but merely displayed a "bad attitude" toward persons under her care which nonetheless justified her termination. **Rutherford v. Britthaven, Inc., 2011 WL 6415109 (6th Cir., December 21, 2011).**

Abuse: Facility Can Require Internal Reporting, Court Says.

A supervisor in a group home was fired for failing to report physical and verbal abuse of a resident to the long-term care ombudsman as required by state law.

In fact, she had hired the individual and let him start work before a background check was completed as required by state law and let him continue working after the incidents of mistreatment occurred.

The facility's policy is legitimate to require internal reporting of known or suspected abuse before reporting to outside agencies.

It is not meant to prevent mandatory reporters from fulfilling their legal obligations or to cover up incidents of abuse or neglect.

Management needs to take action immediately and cannot wait to hear from the ombudsman's office while abuse or neglect could be ongoing.

CALIFORNIA COURT OF APPEAL
January 11, 2012

In passing, the California Court of Appeal pointed out that the group home had a legitimate need for a policy which required employees to report known or suspected abuse internally before going to outside agencies.

The group home's policy was not intended to prevent mandatory reporters from doing their legal duty or designed to cover up alleged mistreatment. The policy was intended only to provide the means to correct the problem as quickly as possible.

Among other things, the abuse in question included a photograph being taken of a resident without written consent from the resident's guardian. **Swindle v. Res-Care, 2012 WL 86406 (Cal. App., January 11, 2012).**