

Disability Discrimination: US Court Sees No Right To Non-Competitive Reassignment.

Due to spinal stenosis which had required surgery, a sixty-two year-old nurse who was morbidly obese was told by her physician that she had to use a cane.

However, on the psychiatric unit where she worked the cane was deemed a safety hazard, as it could be grabbed by a violent patient and used as a weapon.

The nurse was told she had to leave the psychiatric unit but could apply for other hospital positions posted as vacant. She interviewed for positions as educational specialist, home health clinician and care transition coordinator but was not hired as she had no relevant experience.

The nurse eventually found employment elsewhere doing telephone mental health triage, a position she admitted she finds satisfactory.

Nevertheless she sued her former employer for disability discrimination. The US Court of Appeals for the Eleventh Circuit (Florida) dismissed her case.

Nurse Was Disabled

The Court had no doubt the nurse was disabled. She had a significant impairment of the major life activity of being able to walk more than very short distances without the help of a cane. However, she was not a qualified individual with a disability on the psychiatric unit because her cane posed an unreasonable risk of harm.

No Right To

Non-Competitive Reassignment

The nurse's case was taken up by the US Equal Employment Opportunity Commission (EEOC) which tried to set a legal precedent on behalf of disabled employees.

The EEOC's lawyers argued on the nurse's behalf that her right as a disabled person to reasonable accommodation included preferential treatment compared to other applicants for the same positions for which she applied who were more qualified than she and not disabled.

The Court rejected that argument and vindicated the current legal rule that a disabled employee wanting a position more compatible with a disability does not have precedence over other applicants. **EEOC v. St. Joseph's**, ___ F.3d ___, 2016 WL 7131479 (11th Cir., December 7, 2016).

The Americans With Disabilities Act (ADA) does not give a disabled employee the right to reassignment to a vacant position without competition from non-disabled applicants who are seeking the same position and may be more senior or more qualified.

The ADA gives disabled employees the right to reasonable accommodation.

One form of reasonable accommodation is reassignment to a vacant position.

However, it is not reasonable for the employer to have to reassign a disabled employee in preference to those not disabled.

The employer may use its existing policies to select among applicants who want a specific position.

The employer may use seniority as a legitimate basis for selecting a non-disabled individual over a disabled individual who is seeking a transfer as reasonable accommodation.

Or the employer may select a non-disabled over a disabled candidate on the basis of credentials like education and relevant work experience.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
December 7, 2016

Sexual Harassment: Employer Took Corrective Action.

The day after a nursing assistant reported that she was being sexually harassed by a male coworker, the coworker was transferred to a unit of the hospital on the floor above where she worked.

He was told to have no further contact with her unless it was necessary and kept within the bounds of professional conduct.

The nursing assistant later sued her employer for sexual harassment.

An employer must set up a process and inform employees of the process for making a complaint of sexual harassment.

Once such a complaint is received, or a supervisor otherwise finds out what is going on, the employer must take prompt and effective remedial action.

Prompt action starts within a day or two, and it must ultimately stop the harassment completely or it is not considered effective.

UNITED STATES DISTRICT COURT
ALABAMA
December 6, 2016

The US District Court for the Northern District of Alabama dismissed her case.

An employer is guilty of sexual harassment even when the perpetrator is not in a position of authority over the victim if the employer permits harassment to continue once the employer knows about it.

In this case the employer took action the very next day. Although the victim was not happy that the harasser confronted her the same day she reported him and she still saw him in the building, the Court was satisfied with the promptness and effectiveness of the employer's response. **Ike v. US**, 2016 WL 7094707 (N.D. Ala., December 6, 2016).