Discrimination: Nurse Did Not Prove Non-Minority Was Similar In All Relevant Respects.

A minority advanced practice nurse practitioner was one of two advanced practice nurse practitioners working at the hospital. The other was a non-minority.

The minority nurse practitioner had a stroke that went undiagnosed until she started having lapses in her mental functioning.

She took almost a month off and weeks later had to leave work again to be hospitalized. She never let the hospital know when she would be able to return and never provided documentation from her physician that she was fit to return.

She was terminated during her absence on the grounds that multiple episodes of altered mental status that impaired her cognitive functioning raised significant concerns for patient safety.

Her lawsuit against the hospital for race discrimination pointed to the non-minority advanced practice nurse practitioner who had been diagnosed with multiple sclerosis but never was subjected to any disciplinary action from the hospital.

No Discrimination

Minority Nurse's Case Dismissed

The US District Court for the Middle District of Tennessee ruled the minority nurse's co-worker was not a valid basis of comparison.

The hospital was not aware of the non-minority nurse's condition because she never missed work because of it and had no history of lapses in her job performance or disciplinary write-ups.

The minority nurse practitioner, on the other hand, had a condition which raised serious questions about her ability to do her job, for which she was required to miss substantial periods of time without a prediction when she could return to work and for which she never requested, and therefore was never denied, any form of reasonable accommodation.

The lapses in the minority nurse's cognitive functioning, the Court believed, were a legitimate non-discriminatory reason to terminate her employment in direct patient care. **Grimes v. Middle Tenn. Hosp., 2013 WL 6497962 (M.D. Tenn., December 11, 2013).**

One method a minority employee can use to prove discrimination is to show that he or she was treated differently than a non-minority employee who was similar in all respects.

To be considered similar in all relevant respects the individual or individuals with whom the minority employee wants to be compared must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without differentiating or mitigating circumstances in their conduct or their employer's treatment of it.

The minority who suffered consequences and the non-minority who did not must have engaged in acts of comparable seriousness for the non-minority's dissimilar treatment to be considered evidence of discrimination in a human rights lawsuit.

The hospital had a legitimate non-discriminatory reason to treat the minority differently than the non-minority. Both had medical issues but the non-minority's job was not affected.

UNITED STATES DISTRICT COURT
TENNESSEE
December 11, 2013

Racial Bias: Court Turns Down Tech's Lawsuit.

A minority operating room technician left her job at the hospital after almost ten years and filed a lawsuit for race discrimination in the form of an allegedly racially hostile work environment which she claimed forced her to quit.

The US District Court for the Western District of Pennsylvania looked carefully at the incidents of alleged harassment claimed in the lawsuit.

The Court ruled that all but one of the incidents were not serious enough to create a racially hostile work environment.

One of the incidents, however, did rise to the level of illegal harassment. However, as the Court explained, it was harassment of the tech by someone who was not in a supervisory capacity over her.

The hospital itself did take prompt and appropriate remedial action through the actions of management-level individuals in authority when they learned of the problem, which meant the hospital itself was not responsible for what happened and was entitled to dismissal of the tech's lawsuit.

Incidents Which Were

Not Serious Enough for a Lawsuit

The tech overheard a co-worker on the phone say that she was not so-and-so's "N-word," meaning that the person referred to had no right to treat her disrespectfully.

The Court pointed out that the "N-word" is highly charged racially and any use of it in the workplace is likely to become legally problematic. However, in this case it was not said to the tech or said about the tech or meant to be overheard by her at all. Under the circumstances it did not give the tech grounds for a lawsuit.

Another incident was an argument between the tech and a non-minority anesthesiologist who wanted the volume on the radio turned up so that the music could be heard over the sound of suctioning. According to the Court, this incident involved no overt, covert or implicit racial overtones and so it also was not grounds to claim a racially hostile work environment.

The tech also alleged in general terms she was treated disrespectfully by others, but, again, without any racial innuendo.

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Racial Bias: Court Turns Down Tech's Lawsuit (Cont.)

Continued from previous page.

Racially Charged Incident

When the song "Lady Marmalade" played on the O.R. sound system an independent contractor physician with staff privileges at the hospital sang along highlighting the lyric "soul sista" to mock the tech while dancing like a gorilla.

The Court ruled this was unacceptable conduct in the workplace. However, that in and of itself did not make the hospital automatically liable.

According to the Court, the anti-discrimination laws differentiate the conduct of supervisors, non-supervisory co-workers and non-employees.

When the harasser is a supervisor the employer is strictly liable for the consequences. The actions of a supervisor toward a subordinate are essentially the actions of the employer itself.

If the alleged harasser is the victim's co-worker or other non-supervisor, the employer will be held liable only if the employer was negligent in its control of working conditions.

To sue for a racially hostile environment created by a co-worker or other non-supervisory individual the victim must show that the employer failed to provide a reasonable avenue to handle complaints or that the employer was aware of the harassment and nevertheless declined to take appropriate remedial action.

Hospital Stopped the Offensive Conduct

The courts have ruled that any remedial action by the employer which effectively stops the offending non-supervisory person from harassing the victim is considered an adequate defense to a lawsuit.

After the tech complained to her supervisor about the incident all further inappropriate conduct by the physician ceased, presumably because someone in authority spoke to him and told him to stop.

According to the Court, there is no hard and fast rule that defines exactly what an employer is expected to do when it learns an employee has been or is being harassed. The employer is judged instead by the results of its corrective measures. **Ryliskis v. Uniontown Area Hosp., 2013 WL 6328733 (W.D. Pa., December 5, 2013).**

Whistleblower Law: Court Turns Down LPN's Retaliation Lawsuit.

The state's Whistleblower Law provides that no employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or an appropriate authority an instance of wrongdoing.

The word "wrongdoing" refers to a violation of a Federal or State statute or regulation or a code of conduct or ethics designed to protect the interests of the public or the employer.

Federal law provides that methadone may only be administered or dispensed by a licensed practitioner, such as a physician, registered nurse or licensed practical nurse.

Federal law was not violated by the conduct the LPN complained about.

The program director, not a licensed practitioner, went to a registered nurse, a licensed practitioner, who dispensed the medication based on her own assessment of the patient.

COMMONWEALTH COURT
OF PENNSYLVANIA
December 4, 2013

An LPN worked as medication nurse in the hospital's maternal addiction treatment program where she dispensed methadone to the program's clients.

The LPN's performance reviews were consistently above average as to her clinical competence but consistently called for improvement in the attitude and tone she brought to interactions with her patients.

An incident occurred in which she refused to dispense methadone to a patient she believed was intoxicated on drugs. Instead, the LPN insisted the patient give a urine sample for a drug screen.

The patient went to the program director. The program director told the LPN to give her her methadone. The LPN refused. The program director went to another nurse, an RN, and the RN assessed the patient, did not believe she was intoxicated and gave the patient her methadone.

The LPN reported to their nursing supervisor what had happened. The parties held a meeting where the program director and the registered nurse who gave the methadone said they did not believe the patient was intoxicated and that it was not inappropriate to give her her methadone. They brought up the patient's complaint that the LPN was prejudiced against her because she was a minority and an addict.

Patient complaints continued against the LPN, along with disciplinary write-ups and poor performance reviews.

Eventually the LPN was terminated after a battle she waged by email with a newly-hired addiction counselor over the way the counselor was doing his job.

The LPN's termination occurred several months after the incident with the methadone.

Program Director's Action Was Not Illegal
No Whistleblower Lawsuit

The Pennsylvania Commonwealth Court ruled the LPN did not have grounds to sue under the state's whistleblower law because the issue she complained about was not a violation of any law.

The methadone was given by a licensed registered nurse based on that nurse's assessment of the patient as appropriate to receive the medication. **Evans v. Thomas Jefferson Univ., __ A. 3d __, 6244607 (Pa. Cmwlth., December 4, 2013).**