

# Gender Discrimination: Court Weighs Female Patients' Right To Privacy vs. Male Nurses' Right To Equal Employment Opportunity.

A male nurse sued a hospital which declined to offer him employment as a staff nurse in its obstetrical department.

For its ruling the Supreme Court of Appeals of West Virginia researched all the recent pertinent US state and Federal court decisions.

In a nutshell the courts are saying that a blanket prohibition against hiring males for jobs involving intimate personal care of female patients is discriminatory.

However, healthcare employers can hire female staff preferentially on the basis of gender to care for female patients who actually express a preference for female caregivers giving intimate personal care.

## Gender Was the Only Issue

The court looked at the nurse's qualifications at the time he was turned down for the position in obstetrics:

He had been an RN more than nine years. He had held various staff nursing positions at a number of hospitals, some of which involved obstetrical duties. At one hospital he had worked in the delivery room with deliveries of infants he would then care for in the intensive care nursery. He had been trained on the job at another hospital to work in three distinct areas of the hospital's obstetrical service, labor and delivery, postpartum and nursery. He worked part-time for a home health agency that hired him to do post-partum mother/child visits, but actually focused on in-home care of geriatric patients.

The hospital flat-out stated it simply would not consider a male nurse for obstetrics, citing concerns for patient privacy, staffing and quality of care.

## Courts Uphold Patients' Right To Personal Privacy

US court cases state uniformly that patients have the right to ask for and receive care from a same-gender caregiver, but only in intimate personal-care situations. A facility faces liability in a patient's lawsuit for denying such a request.

***It is unlawful to discriminate on the basis of gender unless the employer can show that gender is a bona fide occupational qualification for the job in question.***

***The US Supreme Court has ruled it is indeed a rare instance where gender will be a bona fide occupational qualification for any form of employment.***

***However, one such rare instance is a healthcare facility's obligation to protect the personal privacy rights of patients. Gender can be a bona fide occupational qualification for caregivers, if three conditions are met:***

***1. Not hiring patient care workers of one sex exclusively would undermine the essence of the business operation;***

***2. All or substantially all the members of a particular sex would be unable to perform the job duties of the job in question;***

***3. It is not feasible to assign job responsibilities in a selective manner to satisfy patients' privacy interests and the legal principle of equal employment opportunity.***

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Patients cannot object to caregivers on the basis of gender when intimate personal privacy is not an issue, like when being given oral meds, having a bed made or being ambulated.

## Blanket Prohibition Against Male Nurses Ruled Discriminatory

The hospital's obstetrics nurse manager gave an affidavit setting out the hospital's policy. She went over the obvious facts that all obstetric patients are females and that obstetric care necessarily involves viewing, touching and performing care to the patients' vaginal and perineal areas.

The obstetric nurse manager went on to say, "In my personal experience with male student nurses in the obstetrics department, approximately 80% of patients objected to having a male nurse."

The court found fault with that statement. It was not a valid basis for an all-female policy for obstetrics staff nurses.

## Hospital Must Try To Accommodate Patients' Privacy and Equal Employment Opportunity

A patient cannot be forced to accept an opposite-gender caregiver for care involving intimate personal-privacy.

However, it is also wrong for a health-care facility to have a policy across the board that all female patients will object to a male caregiver.

Healthcare facilities can accommodate patients' expressed wishes for same-gender caregivers for intimate personal care. As needed to care for such patients a facility can preferentially hire one gender over the other on the basis of gender alone without committing discrimination.

However, a facility must offer non-discriminatory employment opportunities to opposite-gender caregivers for patients who do not object. To care for obstetric patients who do not object to a male nurse, male nurses must be considered for employment without regard to gender. Slivka v. Camden-Clark Memorial Hosp., \_\_ S.E. 2d \_\_, 93 Fair Empl. Prac. Cas. (BNA) 471, 2004 WL 323199 (W. Va., February 19, 2004).