

## Age Discrimination: Nurse's Case Dismissed.

A nurse who had considerable seniority, having worked at the hospital since 1986, was accused by her co-workers of being overly assertive about demonstrating her seniority to them.

The nurse manager counseled her about the need to become a more respectful team player. A "Commitment to Teamwork" statement was circulated which all the nurses were expected to abide by. The nurse manager also had to counsel her about her tardiness.

The nurse was eventually terminated and sued for age discrimination.

***Even if there was actual proof beyond rumors that the hospital actually was forcing out staff nurses with longer seniority who were making higher salaries, and hiring less experienced nurses, that does not prove that the nurse in question was a victim of age discrimination.***

UNITED STATES DISTRICT COURT  
NEW YORK  
November 12, 2013

The US District Court for the Southern District of New York dismissed the case.

An age discrimination case requires proof that age itself was the employer's motivating factor.

Discrimination impacting nurses with more years of service and higher salaries, favoring less experienced nurses making less money, is not an alternate legal theory for an age discrimination lawsuit. It does not necessarily prove age discrimination.

A system-wide pattern of discrimination against older nurses can be the basis of a case, but it requires specific statistical proof taking into consideration age alone. Benyard v. White Plains Hosp., 2013 WL 6003733 (S.D. N.Y., November 12, 2013).

## Employee Assistance: Court Lets Disability Discrimination Case Go Forward.

After a nurse anesthetist was overheard in the lunchroom loudly venting her frustrations to a co-worker about her ongoing divorce proceedings and was seen using a hand gesture resembling pointing a pistol at the co-worker's head, the department chair contacted her and insisted she come in for a psychiatric exam.

The nurse anesthetist protested that she was already seeing a counselor in the hospital's employee assistance program, but nevertheless came in as instructed.

After a complicated scenario involving several different physicians coming up with conflicting opinions and the husband being a nurse manager in the hospital's psych service who could potentially access their reports for ammunition in the divorce, the nurse anesthetist was cleared as fully fit to return to duty.

However, when she returned, her practice location and scheduling had been changed in many respects that were very unfavorable. The nurse anesthetist sued for disability discrimination.

***The US Americans With Disabilities Act and the US Rehabilitation Act prohibit discrimination against individuals who are disabled as well as those who are perceived as being disabled.***

UNITED STATES DISTRICT COURT  
OHIO  
November 8, 2013

The US District Court for the Southern District of Ohio overruled the hospital's objections to the lawsuit and said the nurse anesthetist was entitled to her day in court.

It looked like a case of discrimination against someone who, although not disabled, was perceived by persons in authority as having a disability and was treated unfairly. Barnum v. OSU Med. Ctr., 2013 WL 5969724 (S.D. Ohio, November 8, 2103).

## Insubordination: Court Says Aide's Firing Was Not Justified.

An activity aide in a nursing home was terminated after she refused to recite the Rosary with a resident, an activity that was listed on the day's activity schedule.

There were prior disciplinary write-ups in her file for tardiness, use of a resident's nail polish and false accusations about a co-worker.

***Insubordination can be considered misconduct justifying an employee's termination if there is a continuing intentional refusal to obey a direct order given by a superior with proper authority.***

COURT OF APPEALS OF MISSISSIPPI  
October 29, 2013

The Court of Appeals of Mississippi ruled that the aide was not guilty of misconduct justifying her termination. That is, although her termination would not be reversed, she was entitled to unemployment compensation.

Insubordination can be misconduct justifying termination. However, an isolated incident of refusal to perform a task generally is not considered insubordination. That requires constant and continuing refusal to obey a direct or implied order given by a person with proper authority.

This episode of insubordination was only an isolated incident. Beyond that, it was also inconclusive from the evidence that scheduling the Rosary for the resident in question was a direct or implied order to the aide that came from a person with authority over the aide.

It is not insubordination, the Court said, for an employee to disregard or disobey an order from a co-worker who had no authority within the organizational structure of the institution to give orders to others. Woodland Village v. Dept. of Employment Security, \_\_ So. 3d \_\_, 2013 WL 5788768 (Miss. App., October 29, 2013).