

## Age Bias: Court Sees Grounds For CNA's Lawsuit.

An Hispanic CNA in her mid-fifties had consistently positive performance reviews and was rewarded with pay raises for more than sixteen years and was recognized for her service by being selected for the Resident Care Specialist Leadership Council at the nursing home.

Then a new director of nursing took over. A few months later the CNA was suspended and then fired over an incident involving alleged substandard care of a total-care patient.

The CNA sued for race and age discrimination.

**A discriminatory motive can be seen in the DON's derogatory remarks about the CNA's age.**

**These remarks raise serious questions whether the patient-care incident was merely a pretext to move the CNA out because of her age.**

UNITED STATES DISTRICT COURT  
COLORADO  
December 17, 2012

The US District Court for the District of Colorado found evidence to support the allegations of age discrimination.

As soon as she came on board as interim DON the person who would eventually become the new permanent DON started making remarks to the CNA pointing out that she was the oldest CNA in the facility and was "as old as the wood-works," asking her when she was going to retire, telling her that she was too old for her job and telling her that she was "like an old penny that keeps coming back."

As interim DON she also reportedly threatened the CNA that she was going to be watching her closely and would fire her as soon as she became permanent DON. The CNA was told this well before the occurrence of the patient-care incident that was used ostensibly to justify her firing. **Alfonso v. SCC Pueblo**, 2012 WL 6568468 (D. Colo., December 17, 2012).

## Race Discrimination: Nurses Did Not Prove Their Case.

**The alleged victims contend that the Court can infer racial bias from the fact that their employer did not respond to their complaints as they would have liked.**

**The fact that someone disagrees with you or declines to take your advice, without anything more, does not suggest that they are discriminating against you.**

**All of the supervisors' criticisms used non-racial language and there was nothing in the context to suggest the criticisms were racially motivated.**

**Perhaps their supervisors' criticisms were unfair, but there is no evidence that the criticisms were motivated by race.**

**The civil rights laws protect against discrimination, not personal animosity or juvenile behavior.**

**Over a two-year period the alleged victims made numerous complaints to management, some involving racial issues and others involving general workplace disputes.**

**The complaints were investigated. Action was taken on some of them and declined as to others. The alleged "harassment" was only negative feedback about lack of teamwork.**

UNITED STATES COURT OF APPEALS  
SEVENTH CIRCUIT  
November 21, 2012

After complaining about various aspects of their working conditions over a span of several years, two minority nurses sued their employer for race discrimination.

The lawsuit alleged they were victims of discrimination as well as victims of retaliation for their complaints about what they considered to be discrimination.

The US Court of Appeals for the Seventh Circuit (Illinois) dismissed their case.

**More Favorable Treatment Alleged For Non-Minority Nurses**

The two African-American nurses, before filing their lawsuit, had delivered a written petition to human resources at the hospital complaining that Filipino nurses were being given easier assignments, more training and more leadership opportunities.

These allegations were apparently investigated by human resources and dismissed as unfounded.

The Court said that these allegations, if they could be proven, would certainly be adequate grounds for a civil rights lawsuit. However, a lawsuit cannot be based simply on vague assertions and innuendo.

For a successful discrimination lawsuit the alleged victim must identify a specific person or persons who were treated more favorably, specify the manner in which they were treated more favorably and show that they were similar to the victim in all relevant respects except for not being a racial minority. There was no specific person or persons identified for purposes of comparison in the nurses' lawsuit.

**Alleged Harassment Was Not Racially Motivated**

The two nurses were criticized and given negative performance evaluations for lack of teamwork. One of them was called a "trouble maker," a "cry baby" and a "spoiled child" in one particular meeting with a supervisor and had to leave the meeting in tears.

Even if all this was true, the Court was not able to find any discriminatory racial motivation behind the nurses' supervisors' actions, which is a necessary element for them to be able to go forward with a civil rights lawsuit against their employer. **Brown v. Advocate**, \_\_ F. 3d \_\_, 2012 WL 5870725 (7th Cir., November 21, 2012).