Sexual Harassment: Court Considers Gay vs. Gay Case.

A gay male nurse had worked for the hospital for more than twenty years.

His job performance was excellent, reflected by the fact he had moved up from staff nurse to charge nurse to a mid-level supervisory position from which he filled in from time to time as house supervisor.

He began to complain to the regular house supervisor that he was being sexually harassed by a *per diem* house supervisor who was also a gay man.

The hospital undertook an investigation which concluded that there was no sexual harassment, in that the *per diem* house supervisor's conduct was not unwelcomed by the alleged victim and that both of them were guilty of flirtatious and lewd conduct in the workplace which justified both of them being terminated.

The supervisory nurse sued the hospital on the grounds that he had the right to complain about sexual harassment and that firing him for such a complaint was illegal retaliation.

An employee's rights are violated by employer retaliation for complaining about sexual harassment on the job, whether or not the complaint is validated by a subsequent investigation or court proceedings.

CALIFORNIA COURT OF APPEAL
January 14, 2014

The California Court of Appeal agreed in principle with the premise of his lawsuit.

However, a jury verdict awarding him $238,000 from the hospital was thrown out based on a technicality and a new trial was ordered. The trial judge erroneously instructed the jury that the nurse only had to prove retaliation was *a factor* rather than *a substantial factor* in his termination. The judge's error was highly prejudicial to the hospital's defense. **Mendoza v. Western Medical, __ Cal. Rptr. 3d __, 2014 WL 12I3I417 (Cal. App., January 14, 2014).**

Pregnancy: Court Says CNA Can Sue For Discrimination.

The nursing home had a practice of treating certain non-pregnant CNAs with similar lifting restrictions more favorably by assigning them to light duty.

Although the other CNAs differed from this CNA because their medical conditions were work-related, they were similarly situated in their ability to work because they were still working with physicians' lifting restrictions of fifty pounds.

The US Pregnancy Discrimination Act prohibits an employer from discriminating against any individual because of pregnancy, childbirth or related medical conditions.

Women affected by pregnancy, childbirth or related medical conditions are to be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.

The nursing home cited financial concerns as its reason for limiting light duty only to employees with work-related conditions, but the evidence points to the CNA being pregnant as the only differentiating factor, which was an illegal discriminatory motivation.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
December 23, 2013

The CNA worked at the nursing home for more than a year with no problems as to her job performance.

When she became pregnant she was asked to get a note from her physician. She continued to work for several months until her physician faxed a note to her employer that she was cleared to work, except for no lifting over fifty pounds.

Her supervisor told her she could not continue working unless her physician removed her lifting restriction or she got a second opinion removing her lifting restriction, because the nursing home was concerned it would be liable if something happened to her baby and because her prior miscarriages meant this pregnancy would probably be high risk.

After becoming pregnant the CNA had passed all the nursing home's physical capacities tests just as she had before.

The CNA sued for pregnancy discrimination. The US Court of Appeals for the Sixth Circuit (Michigan) upheld her right to sue.

CNA Was Treated Differently Than Similar Non-Pregnant Employees

The Court accepted testimony that the nursing home routinely gave light duty to CNAs after on-the-job injuries who were able to work except for physicians' restrictions against lifting over fifty pounds.

The Court concluded that supervisors' judgments about her pregnancy were the only real reason this CNA was forced to resign, which was illegal discrimination.

The Court refused to believe the facility was motivated by legitimate financial concerns to keep some non-pregnant employees with lifting restrictions while terminating this pregnant employee.

Pregnancy is Not a Disability

The Court noted that pregnancy is not a disability for purposes of the US Americans With Disabilities Act.

Whether a pregnant employee can or cannot sue for pregnancy discrimination is not governed by the same legal rules that apply to disability discrimination cases.

The CNA was not allowed to claim that her employer's perception of her likelihood of miscarrying was a disability. **Latowski v. Northwoods Nsg. Ctr., __ Fed. Appx. __, 2013 WL 6727331 (6th Cir., December 23, 2013).**