

Transgender Employee: Gender vs. Sexual Orientation Bias.

A transgender male CNA who is undergoing hormone replacement therapy in preparation for sexual reassignment surgery was turned down for employment in a hospital.

She was told someone with more experience was being hired.

That happened after two positive interviews with department managers resulted in a third interview where she met with other CNAs on the unit, who openly ridiculed her and harassed her about her status as a transsexual.

Title VII of the US Civil Rights Act and some state anti-discrimination statutes do not prohibit employment discrimination based on sexual orientation.

A transgender male who identifies with the female gender may face legal issues of gender discrimination, which is separate from sexual orientation.

UNITED STATES DISTRICT COURT
NORTH CAROLINA
January 15, 2015

The US District Court for the Eastern District of North Carolina issued an opinion to clarify the legal issues, but has not ruled on the actual facts of this case.

The CNA is in error to believe that the US Equal Employment Opportunity Commission's investigator's findings are admissible evidence in a court of law.

The hospital is also in error, the Court said, to believe it cannot be held liable because Federal law in the US does not outlaw sexual orientation discrimination.

Gender identity, according to the Court, is not sexual orientation. Gender identity can lead to gender discrimination which is, in fact, illegal under US law. Lewis v. High Point, ___ F. Supp. 3d ___, 2015 WL 221615 (E.D.N.C., January 15, 2015).

Drug/Alcohol Policy: Court Sees Retaliation In Nurse's Treatment.

An employer's failure to follow the employer's own internal disciplinary procedures with a particular employee can be taken by a court as evidence of discrimination or evidence of a retaliatory motive behind an employee's termination.

The facility's drug and alcohol testing procedure's purpose, set out in the employee handbook, was to protect employees' rights.

The test procedure called for designation of a medical review officer, a licensed physician, to check whether there was a medically valid explanation for the presence of the substance in the employee's system.

A second test was required to confirm a positive first test result, using a different method than used in the first test. Presumably that would mean drawing blood for the lab after a positive breathalyzer result the first time around.

The physician medical review officer was also responsible for contacting the employee for the employee's input to explain the positive result.

None of these procedures were followed. The nurse was summarily fired after the breath test.

UNITED STATES DISTRICT COURT
OHIO
January 2, 2015

After twenty-seven years at the same job a nurse began taking frequent days off, scheduled in advance, to take her husband who had congestive heart failure to his medical appointments.

She also had to take time off for herself because of a back injury she sustained off the job lifting her husband.

The nurse and her employer met the eligibility requirements of the US Family and Medical Leave Act (FMLA).

The nurse was meeting all the FMLA's requirements as to requesting leave properly in advance, documenting as requested by her employer the need for leave and not using up the number of days to which she was entitled.

When she was out, her employer, a nursing home, had to bring in a replacement nurse from an agency.

Nurse Asked to Take Alcohol Breath Test

One day, shortly after she requested yet another day off two days later, the nurse was asked to report to an off-site testing vendor for an alcohol breath test, as someone at work had allegedly smelled alcohol on her breath.

She went there, was given one breathalyzer test by the tech on duty, which was not repeated, and the tech told her not to worry because everything was fine. She actually agreed to carry the test result printout back to her employer.

When she returned to the nursing home she was fired on the spot for a .018 breath alcohol, which violated the facility's new zero-tolerance rule which had recently replaced a .04 tolerance limit for alcohol.

Court Sees Grounds for Retaliation Suit

The US District Court for the Southern District of Ohio saw grounds for the nurse's lawsuit alleging that the facility's motivation in firing her was illegal retaliation for using her FMLA leave to which she was rightfully entitled.

Because the facility failed to follow its own internal policy for drug or alcohol testing of an employee suspected of on-the-job intoxication, the breath alcohol result could well have been only a flimsy pretext behind an illegal motivation. Meents v. Beechwood, 2015 WL 51776 (E.D. Ohio, January 2, 2015).