



# **Naughty Neonatal Nurse Nixed After Nineteen Years; Hospital Wins Age Discrimination Lawsuit**

Insights

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A veteran neonatal nurse practitioner who was fired after one too many acts of misconduct could not prove age discrimination, a federal appeals court recently confirmed. The case presents healthcare employers with a good reminder that well-documented and well-founded disciplinary action is the key to avoiding liability when you need to take adverse action against an employee who is a member of a protected class.

## **Three Strikes And She's Out**

Catherine Willis was employed by UPMC Children's Hospital of Pittsburgh as a Neonatal Nurse Practitioner (NNP) from 1993 until the Hospital terminated her employment in 2012 at the age of 61. From 2001 through 2011, she served as co-lead NNP, before her first act of misconduct cost her that position.

In mid-August 2011, Willis received a call that she was needed in the room of a patient who had recently undergone surgery necessitating an endotracheal tube. In the hallway on her way to assist the patient, Willis remarked to a nurse she passed along the way, "that f----- tube better not be out, I'll f----- kill someone." The patient's father was in the room at the time but luckily did not hear her statement. Management issued Willis a written warning and instructed her to step down from her role as co-lead NNP, which she did.

The second disciplinary incident took place in early January 2012. One evening, another nurse indicated that she was looking for someone to help start an intravenous line on a patient. Willis believed that nurse was inexperienced and grew frustrated at the situation. Concerned that there was not enough time to look for someone else, Willis started the line herself.

Afterward, Willis approached the Department's leadership and expressed her concerns about the inexperience of some of the nursing staff in a voice loud enough for others to hear. One of the supervisors reported the matter to human resources, indicating that Willis had been yelling and that others had been offended by Willis' remarks. When confronted about the incident and asked if she thought she could have communicated her concerns without yelling, Willis denied yelling but otherwise agreed with the characterization of events. She stormed out of the room saying "never mind, I'm always wrong."

The final straw occurred the following week when Willis was working on one of the NICU nursing teams. She received a patient but did not perform a history and physical or complete admission orders as required. When later confronted about the situation, Willis contended that another nurse who was assigned to another NICU team was responsible for those tasks.

The supervisor conducted an investigation wherein Willis first gave inconsistent answers about what care she had provided to the patient and, when pressed, admitted that it was a “very busy” night and she really could not remember. Two days later, the Hospital terminated her employment.

Willis responded by filing an Age Discrimination in Employment Act (ADEA) lawsuit, claiming that her termination was motivated by her age. The trial court dismissed her case in early 2015, leading Willis to file an appeal with the 3rd Circuit Court of Appeals (which hears federal cases covering Pennsylvania, New Jersey, and Delaware).

### **Three Arguments Rejected By 3rd Circuit**

On December 22, 2015, the court of appeals agreed that Willis could not prove a case of age discrimination and ruled for the Hospital. Willis hinged her case on three arguments, all of which were rejected by the court.

First, Willis argued that the Hospital treated similarly situated, but substantially younger, individuals more favorably. In support of her argument, however, she could not point to any younger individuals who had engaged in the same or similar conduct and had not been disciplined. Thus, the 3rd Circuit rejected Willis’ argument as illogical. The Court emphasized that a lack of evidence that others had behaved inappropriately actually undercut, rather than supported, Willis’ arguments.

Second, Willis testified that she had once told a supervisor that she planned to work until age 65. Even if this was true, the appeals court found that such a statement made in passing did not give rise to any inference of age discrimination, because there was no evidence that the employer used that information when making the decision to terminate.

Third, Willis argued that she “believed” that she had suffered discrimination on account of her age. However, the court noted that a plaintiff’s purely subjective belief that she was the victim of discrimination was never enough to satisfy her burden.

### **Three Reasons The Employer Won**

Instead, the court of appeals was swayed by three factors that led it to conclude that the Hospital should claim victory in the case. First, the court found that the employer proved that its supervisors actually relied on Willis’ conduct, not her age, as the basis for its decision (i.e., her use of profanity, her yelling, and the patient care breach). A critical factor was that Willis’ acts of misconduct were well-documented and that she had received warnings for her behavior.

Second, the court emphasized that it was not enough for Willis to show that the Hospital might not have made the best or even a sound business decision. Instead, a plaintiff must introduce evidence

showing that the real reason for the challenged action was age discrimination. In this case, Willis conceded that her supervisors never said anything to her that would suggest an age bias in general, or specifically with respect to her. Thus, it was important that the employer enforced policies ensuring a workplace free of harassment and discriminatory conduct.

Third, the court failed to credit Willis' secondhand testimony about possible "scuttlebutt" she had heard involving a younger nurse who had engaged in abrupt, sarcastic behavior but who had not been terminated. The court noted that these were just rumors, and that even if there was substance to them, they did not rise to the same level of the misconduct Willis was found to have committed. Therefore, the court found it critical that the employer demonstrated consistency in its disciplinary process.

## **Conclusion**

Obtaining pretrial victories in discrimination cases such as these, where issues of intent and motive are often subject to disputes of fact, can be challenging. The *Willis* case, however, shows that employers who take reasonable, well-founded disciplinary action, and who are careful to enforce their policies consistently, while properly documenting violations, can prevail against subjective allegations by a plaintiff that the employer's motives were discriminatory.

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