No. 31404 - Michael Slivka v. Camden-Clark Memorial Hospital, and Patricia Williams

FILED
March 29, 2004
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, concurring:

It appears from the record that the plaintiff is currently and has been for some time working as an obstetrical nurse in a hospital in Ohio, less than twenty miles away from the Camden-Clark Memorial Hospital – performing the same duties that Camden-Clark says he cannot perform in their hospital.

Ohio is not Denmark. If a nearby hospital can successfully employ the plaintiff as an obstetrical nurse, then it is highly unlikely that Camden-Clark can rebut the weight of that fact – and meet the strict legal test of showing a BFOQ "business necessity" for its gender- discriminatory policy.

To be clear – Camden-Clark can't just say that "we simply choose to handle employment in our obstetrics unit in a gender-discriminatory way." Rather, Camden-Clark has to show that "Gender discrimination is the *only* way we can do it." Such a showing is pretty difficult when someone else in the neighborhood is in fact "doing it" in a non-discriminatory fashion.

Notwithstanding the concurrence by Justice Maynard, few things are more evident and certain than the substantial evolution and change in modern notions of gender roles. Such evolution, thank goodness, has permitted women to conquer stereotypes and

enter into historically all-male bastions like the law. The same is true for professions like nursing. But in this case, it is a man who is challenging a stereotype. (I can see the argument for keeping women out of the practice of law – "male clients just won't trust a woman to have intimate access to the facts of their case." Of course, I think that such a statement is silly.)

Male doctors, of course, have been treating women "intimately" for hundreds of years. Women patients have not blanched at this fact; therefore, it seems fairly clear to me, that they would not have any legally cognizable grounds for opposing similar treatment from other medical professionals like the plaintiff.

On the limited record before us, I have the impression that Camden-Clark should bring in an expert or two from the outside, sit down with the plaintiff and his counsel, adopt a phase-in plan to get their nursing employment policies in line with modern non-discriminatory practices, settle this case, and move forward – and not waste time and good will fighting a historically rear-guard action based on outmoded stereotypes.

Accordingly, I concur.