

# Don't Drop a Vein: Sixth Circuit Affirms Dismissal of Surgical Assistant's Age Suit

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Employment lawyers always win war story contests at cocktail parties. Facts like the ones in [\*Davis v. ULP\*](#) provide ample fodder for those type of conversations.

## Performance Problems or Age Discrimination?

The University of Louisville Physicians (ULP) hired Frank Davis as a surgical assistant. After 10 months on the job, Davis's supervisor, Lisa Motley, met with him and put him on a Performance Improvement Plan (PIP) due to problems such as not helping out in procedures and insubordination. Davis alleged that during that meeting, his supervisor commented on his gray hair (he was 59) and said that "as people get older, things become more difficult to do." Davis promptly filed complaints of age discrimination and retaliation. In response to the complaints, the chair of the department replaced his supervisor.

## Continued Mistakes

After the meeting, even though he was told that his failure to improve could cost him his job, Davis continued to make serious mistakes. He accidentally cut into a patient's endotracheal tube. He also incorrectly handled a vein in the operating room, and *it fell on the floor*. After those two incidents, the department chair fired Davis.

## The Court Looks to the Decision-Maker

Davis sued ULP for age discrimination and retaliation. He claimed that his supervisor's comments during the PIP meeting were direct evidence of age discrimination. He also alleged that there was indirect evidence of age discrimination and retaliation. The district court granted summary judgment in favor of ULP.

Davis appealed to the Sixth Circuit, who had little sympathy for his arguments. With regard to the supervisor's comments, the Sixth Circuit noted that the supervisor who put him on the PIP was not the decision-maker who terminated his employment. Although Davis tried to link the supervisor to the

termination, the court found no evidence to show that was the case. The court's opinion also found that there was no evidence that the supervisor targeted Davis because of his age, as opposed to his poor performance.

The Sixth Circuit also made quick work of Davis's indirect evidence claims on age discrimination and retaliation. On the age claim, the court pointed out that ULP's reason for terminating Davis was "patient safety" and was supported with documentation of his continued errors (including slicing a patient's throat and dropping a vein on the floor). Davis did not present any evidence that ULP's reason was "so unreasonable to be a pretext for discrimination."

With regard to the retaliation claim, the Sixth Circuit held that by the time Davis filed any complaints, ULP had already told him he was doing a bad job and that he might be terminated. Again, the court turned to Davis's poor performance in the operating room as being a non-retaliatory reason for his termination.

## **What Do We Learn from This?**

Aside from inciting fear in anyone who may have to go under the knife, one of the keys to this decision was the fact that the employer was deliberate in placing an employee on a PIP and then following up when the employee met the PIP's terms. A PIP requires the employer to continue to monitor the employee's performance. If you don't follow up, the PIP loses its power to protect your decision. Another key to this case was the good documentation about very bad job performance. Although you don't want to laser focus on every minor misstep, employers do not need to be afraid of honest, straightforward reviews of performance. Not only does that give an employee the opportunity to improve, in the end, it may help justify an adverse employment decision and win a lawsuit.

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