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醫事法學教室

護理勞動權益: 懷孕女性 無意願配合夜間工作, 該當「不能勝任工作」事由?

Labor Rights of Nursing:

Shall a Pregnant Woman Who Has No Volition Working at Night Be "Incapable and Incompetent"?

邱慧洳 Hui-Ju Chiu*



摘要

懷孕女性絕對禁止夜間工作,乃屬法有明文之強制規定,不容勞雇雙方以契約自由為由規避之。本文將介紹一則護理人員無意願配合夜間工作,遭雇主依勞動基準法第11條第5款「勞工對於所擔任之工作確不能勝任」解僱之判決,本件之爭點涉及何謂「不能勝任」之解釋,本文擬藉此判決探討之,並評析懷孕女性無意願配合夜間工作是否該當「不能勝任工作」事由。

*臺北護理健康大學通識教育中心副教授(Associate Professor, General Education Center, Taipei University of Nursing and Health Sciences)

關鍵詞:女 性 夜 間 工 作(woman working at night)、不 能 勝 任 工 作 (incapability and incompetence)、懷孕(pregnant)、護理人員 (nursing staff)、護理勞動權益(labor right of nursing)

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It is a mandatory that a pregnant woman is forbidden to work at night and there is no any possibility to avoid it by the freedom of the contract between employers and employees. In this article would a case be introduced, in which one of the nursing staff had no volition working at night, but was fired because of "incapability and incompetence" according to paragraph 11 section 5 Labor Standards Act. The legal issue would be the definition about the "incapability and incompetence" in the case and it would be discussed here. Furthermore, it would also be discussed whether a pregnant woman would be "incapable and incompetent," if she has no volition working at night.

膏、案例1

護理人員乙主張其於2009年9月21日受僱於甲診所,並擔任產房及開刀房護士,竟因其懷孕後於2013年4月1日遭甲診所解僱。甲診所主張乙當初應徵之工作為產房護理工作,並表示能遵守輪班制度,和其他同事輪值大小夜班及假日班,乙初期尚能遵守輪班規定,惟之後逐漸表示希望只上白班,造成甲診所排班上之困擾與其他同事諸多不滿,基於門診假日休假不上班,乙遂要求調至門診上班,惟當時門診不缺護理人力,且乙又拒絕上夜間門診的班,故建議乙轉調嬰兒室,但乙表示沒興趣,乙因懷孕對其原本所擔任之產房及開刀房之工作確已無法勝任,且調整乙擔任其他工作,乙仍無法勝任,甲診所遂依據勞動基準法(下稱勞基法)第11條第5款「勞工對於所擔任之工作確不能勝任」事由(下稱「不能勝任工作」事由)解僱

¹ 本件改編自臺灣臺中分院102年度中勞簡字第69號民事判決。