



## LITIGATOR OF THE MONTH

*Ellen S. Simon, The Simon Law Firm, Cleveland*

## Proving a plaintiff's vitality and winning \$30M to boot

**CASE:** *Fredrickson v. Olsten Health Services Inc.*, No. 98CV1937 (Cl. Com. Pleas, Mahoning Co., Ohio)

**OUTCOME:** A jury award of \$30.675 million—including \$30 million in punitive damages—to a 68-year-old former branch manager of a home health care agency. The jury concluded that Olsten Health Services Inc. discriminated against Donna Fredrickson because of her age when it told her to retire or be fired after 13 years with the agency. The plaintiff's job was eliminated in 1997 when two branches merged. Defendants Olsten Health Services, now Gentiva Health Services, deny the allegations. The company plans to appeal [NLJ, Dec. 11].

**What was the key factor in winning?** I don't really know. I don't know how you ever know. In Cleveland, lawyers are not permitted to talk to jurors unless the judge gives you particular permission. Donna Fredrickson is a great woman. She is very likeable. She was on the stand for cross-examination for three days. I think in retrospect that the fact that she was physically and mentally able to withstand cross-examination for three days would help prove she was able to work....[The defense tried to portray her as] a mediocre employee at best...slow, a page behind, inflexible. But she won the highest award in the company. They said she was good at making cookies and buying doughnuts, which I thought was offensive age stereotyping....They were looking for an after-the-fact justification. I think when you get to the issue of

punitive damages, there was a lot of evidence to support an award....Olsten had \$1.7 billion in sales in 1997.

**What was the most difficult hurdle?** Her age. I had to prove that the plaintiff was this vital person who wanted to work and had a desire to work in the future. She's very well-dressed, a very attractive woman and has a very attractive personality.

**What is the worst moment of your career?** The worst moment has been being abused by a judge. It's totally abusive, particularly when it's gender related. It causes your client to not get a fair trial. You can do little about it. It's really close to impossible to overcome it.

**What is the high point of your career?** Winning my first jury trial 20 years ago. It was a car accident case. Trying a case alone and winning a case that the people in my firm said could not be won. I also handled a first-impression case in 1994 where a patient was denied admission to a hospital because he had AIDS. I took the case pro bono with the American Civil Liberties Union. We would have settled for \$2,000, but at trial got a \$560,000 verdict.

**What tip do you have generally for dealing with a jury?** Be honest and prepared and organized.

**What's ahead?** A variety of whistleblower cases and civil rights trials involving race and gender discrimination.

—Emily Heller