LEGAL EAGLE EYE NEWSLETTER

April 2024 *For the Nursing Profession* Volume 32 Number 4

Diversion, Addiction: Board Ordered To Issue Probationary License To Rehabilitated Nurse.

A registered nurse developed a serious problem with controlled substances she was routinely diverting and self-medicating on the job.

She committed typical behaviors of impaired healthcare workers. She injected herself with the remnants left in syringes she had given to patients, refilled syringes with other liquid before asking colleagues to witness wasting and took used syringes out of refuse containers.

After she was caught going through a trash receptacle looking for syringes, and suspended, hospital security documented numerous attempts to reenter the hospital premises from which she was barred, presumably to look for drugs.

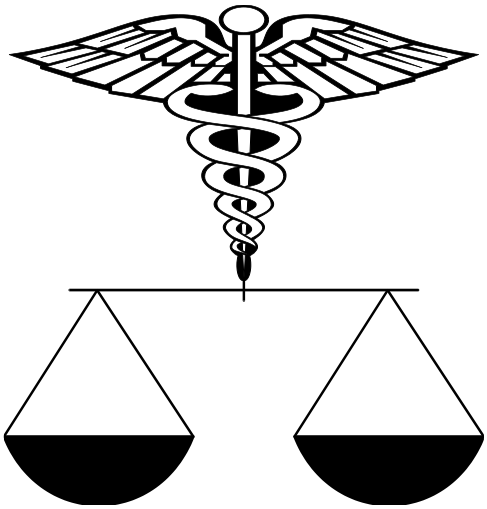
Evidence of Rehabilitation

The nurse agreed to get help. The Missouri Court of Appeals reviewed a long list of positive measures she pursued for her own sake and for the sake of her nursing license and career.

She went to intensive outpatient treatment for six months, all the time agreeing to narcotic agonist medication. She also went extensively to individual therapy sessions.

All of her sixty-plus urine screens were negative except for the very first one.

She consented to hair-sample analysis which proved she had not used the eleven controlled substances that were tested for, going back several months.



The Board of Nursing has no legal authority to punish a nurse for past misconduct, even if that misconduct was very serious.

Instead, the Board must confine itself to protecting the public from incompetent or impaired professionals.

The Board cannot disregard the substantial and uncontroverted evidence of this nurse's rehabilitation.

MISSOURI COURT OF APPEALS
March 12, 2024

Nevertheless, shortly after she accepted an offer to work in a dialysis center that did not stock narcotics, the State Board of Nursing revoked her license.

Nursing License Ordered Restored

The Court ruled the Board had no legal authority to take a punitive approach to a nurse's past misconduct, even in a case like this where the nurse's past misconduct was very serious.

Instead, the Board is required by law and limited by law to evaluating a nurse's present fitness to practice, only with a view toward protecting the public from an incompetent or impaired professional.

The gravity of the underlying offense is not relevant. The only appropriate consideration is the nurse's present ability to practice safe and effective care without repeating the same past misconduct.

The evidence is overwhelming and uncontradicted that this nurse has undergone successful rehabilitation, and would pose no threat to the public if given a probationary license to work at her specific new job in a narcotics-free environment.

It was arbitrary and capricious for the Board to ignore the clear evidence of rehabilitation. Arbitrary and capricious action by a government agency can be considered a violation of a citizen's basic right to fair and impartial treatment. **Nurse v. State Board, __ S.W. 3d __, 2024 WL 1057025 (Mo. App., March 12, 2024).**

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ICU Nursing: Court Applies Rule Of Res Ipsa Loquitur To Patient's Unexplained Fractures.

The thirty-six year-old patient took an overdose of four different prescription medications as a suicide attempt. Then he changed his mind and called 911.

Paramedics came and took him to the emergency room. Still conscious, he got an extensive physical exam that showed no musculoskeletal trauma to his lower extremities. Then he was started on an extensive psychiatric workup.

Four hours into his stay he became unresponsive. He was sent to the ICU, where he was restrained x4. Eventually his restraints were removed as he came out of his coma and was extubated.

However, when moved to a bedside chair he began to complain of pain in his legs. A bedside x-ray showed bilateral hip fractures for which surgery was done.

Court Applies Legal Rule Of Res Ipsa Loquitur

The District Court of Appeal of Florida ruled this patient is entitled to go forward with his case by relying on the legal rule of res ipsa loquitur.

The hospital had complete control of the patient and the patient's environment while he was in a coma in the ICU.

The patient had expert testimony from a physician that a patient does not ordinarily develop bilateral hip fractures while receiving care in a hospital ICU.

No Unwitnessed Seizure

The hospital tried to argue, for what it was worth, that the patient must have had an unwitnessed seizure.

The Court agreed in principle that a medical defendant in a putative res ipsa loquitur case is allowed to rebut the presumption of negligence, if the defendant has a legitimate explanation.

In this case the theory of an unwitnessed seizure was ruled pure speculation by the Court, and disallowed.

The Court pointed out there would have been data recorded on the ICU monitors of metabolic distress in the patient during a seizure, but no such concrete evidence was offered to rebut the presumption of some sort of negligence by the hospital.

Barber v. Mem. Hosp., __ So. 3d __, 2024 WL 1221193 (Fla. App., March 22, 2024).

The legal rule of res ipsa loquitur translates from the Latin as, "It speaks for itself."

The rule is expressly intended to aid a party in going forward with an injury case when the party has no direct knowledge and can gather no direct evidence of the facts as to how the injury occurred, but still may be entitled to compensation.

A classic example is an unconscious hospital patient who wakes up to find he or she has been injured while unconscious, but, having been unconscious, has no idea how.

One requirement is that the circumstances be entirely under the control of the party against whom the rule is sought to be used.

Another requirement is that the injury is of a type that ordinarily would not be expected to occur without negligence by the party in control of the situation.

The defendant is entitled to rebut the inference created by res ipsa loquitur that negligence has occurred.

However, the defendant must have a cogent argument that goes beyond idle speculation.

There is no proof here of an unwitnessed seizure.

DISTRICT COURT OF APPEAL
OF FLORIDA
March 22, 2024

Medical Records: Nursing Home's Policy Violated Federal Regs.

Federal Medicare and Medicaid conditions of participation require long term care facilities to supply a resident with copies of the resident's medical records if the resident requests them.

Records must be provided withing two business days of the resident's request.

Further, a long term care facility must have a policy in effect that such records requests be honored within two days.

The facility is entitled to some mitigation of fault.

The daughter who asked for the resident's records holds a general power of attorney, while it is the other daughter who holds the health care power of attorney.

Nevertheless, the facility's policies and procedures came to light that call for resident medical records requests to be honored within ten business days.

The facility's policies and procedures are completely at odds with the Federal standard that requires a two-business-day turnaround.

NEW YORK SUPREME COURT
APPELLATE DIVISION
March 7, 2024

The New York Supreme Court, Appellate Division, found that the facility's policy and procedure for ten-day turnaround on medical records requests violated the Federal two-day standard and had the potential to harm residents.

It was not the central issue in this case whether the daughter who asked for the records was or was not the proper party to do so on the resident's behalf.

Memorial v. Commissioner, __ N.Y.S. 3d __, 2024 WL 968529 (N.Y. App., March 7, 2024).

Psychiatric Patient Elopes, Drowns: Negligence Not Proven.

The teenage mental health patient had an extensive history of noncompliance with medication and other treatment and elopements from psychiatric care settings.

Several days after his last elopement from a mental health facility he was found dead from drowning in a lake near the facility.

The parents sued the facility for negligence in failing to prevent their son's elopement.

The Court of Appeals of Georgia pointed out that a negligence lawsuit has three necessary elements.

Those elements are a breach of the standard of care, harm to the victim and causation linking the breach of the standard of care to the harm.

The Court could not find any evidence that the patient's demise was anything but an unfortunate but accidental drowning of an individual who decided to take a swim in a lake on a hot day.

There was no proof that accidental drowning was a hazard related specifically to a psychiatric condition which the facility failed to treat by not preventing the elopement. **Ferguson v. Bowers, __ S.E. 2d __, 2024 WL 1130326 (Ga. App., March 15, 2024).**

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Statute Of Limitations: Patient Cannot Sue For Spoliation.

This case arises out of medical treatment to the patient.

The emergency room physician directed that the patient be seated in a wheelchair and that a nurse accompany the patient to the parking lot and assist in her transfer to her daughter's automobile.

Transport and transfer of this patient was an aspect of her diagnosis and treatment by the hospital.

Transport and transfer by the nurse involved a professional assessment of this patient's special needs and professional skill in meeting those needs.

The location of the injury is not relevant, the hospital parking lot rather than inside the building.

Whether the patient had or had not been formally discharged by the hospital before the injury occurred is also irrelevant.

COURT OF APPEALS OF OHIO
March 19, 2024

The patient came to the emergency room for pain in her right leg. The diagnosis was a flareup of a chronic pain condition, with no recent trauma.

When her daughter came to pick her up, a nurse wheeled the patient out to the daughter's car in the parking lot.

In the process of transferring the patient to the car, her right femur was fractured. That required transfer to another hospital where surgery was performed.

The mother's lawsuit against the hospital was filed more than one year after the incident, one year being the statute of limitations for healthcare malpractice in Ohio.

The Court of Appeals of Ohio ruled that helping a patient into a car who has difficulty with ambulation involves professional judgment by a nurse in the patient's assessment and in a safe transfer itself.

The upshot is that this patient's case against the hospital cannot go forward. If it were a case of ordinary garden variety negligence the statute of limitations would have been met, but as a professional medical case the statute of limitations had passed before the case was filed.

No Spoliation of the Evidence

Ordinarily a patient with a healthcare negligence case can support or actually win a case based on the provider's willful hiding or destruction of critical evidence needed by the patient for the case.

However, according to the Court, spoliation could not have affected the outcome of this case, even if it did happen, because it was dismissed based on the statute of limitations. **Norris v. Hospital, 2024 WL 1174640 (Ohio App., March 19, 2024).**

Racially Hostile Workplace: Proof Not Needed That Hostility Was Directed At Victim.

Nine African-American women who worked as registered nurses or nurses aides in the same healthcare facility sued the agency that employed them for work at the facility and the facility itself.

The lawsuit alleged their white supervisors and coworkers created a racially hostile working environment in violation of their rights guaranteed by Title VII of the US Civil Rights Act.

Central to their case were allegations of widespread use of racially hostile and offensive language in the workplace.

Central to the defense of the case was the argument from the facility that there was no proof that any of the alleged racially offensive language was directed at any specific person or at one of the specific nine individuals who had filed the case.

Court Upholds Allegation Of Racially Hostile Workplace

The US District Court for the Middle District of Alabama ruled the facility's argument was irrelevant that the victims could not proceed with their case without proof that any specific racial utterance was directed at one of them personally.

The Court did not rule definitively in the victims' favor. The Court only denied the facility's motion for summary judgment of dismissal. The case will go forward.

The Court ruled expressly that when a minority employee overhears racially offensive talk in the workplace, that can create a racially hostile work environment for which the minority can sue.

The minority does not have to witness or overhear the racist language being directed at them or any other specific minority employee.

Evidence of Retaliation

The case also alleged retaliation by white supervisors against the minority nurses who spoke up about the situation.

Even if a person does not have a valid complaint, a supervisor cannot retaliate against them for voicing what they sincerely believe to be a violation of their or other persons' rights. **Thomas v. Management, 2024 WL 1054567 (M.D. Ala., March 11, 2024).**

The fact that racial epithets were not directed at the victims who filed suit does not determine the validity of their lawsuit.

The mere utterance of a racial epithet, even one directed at the alleged victim, is not enough for a lawsuit.

However, if the prevalence of racial remarks so heavily pollutes the working environment with discrimination so as to destroy the emotional and psychological stability of minority workers, that can create a level of hostility that can affect minority workers who were not directly subject to racist remarks.

The victim must be aware of the presence of offensive racist language, perhaps by overhearing it, even if it was not meant specifically for the victim's ears.

A legal claim for a racially hostile work environment requires that the victim subjectively believe the environment is so hostile as to alter the terms and conditions of employment.

There must also be proof that the environment is not only subjectively, but objectively hostile, permeated with racial hostility that any reasonable person would consider unacceptable.

UNITED STATES DISTRICT COURT
ALABAMA
March 11, 2024

FMLA: Minimal Contacts While On Leave Do Not Violate Rights.

While the director of nursing was out on Family and Medical Leave Act (FMLA) leave from her job, she was contacted several times by the persons filling in for her during her absence.

They discussed employee scheduling. There was also a request for help filling out a form. One person called for assistance logging on to the computer system, and another person wanted the passwords to log on herself.

However, it was also discovered during the director's absence that a significant amount of paperwork that was the director's responsibility had been ignored before she left.

The director was fired on her return.

The right to Family and Medical Leave Act (FMLA) leave is not violated by short phone calls or infrequent emails from the person or persons filling in for the employee on leave.

Expecting an employee to work extensively while nominally on FMLA leave would be a violation of the employee's right to take leave from work.

UNITED STATES DISTRICT COURT
ARKANSAS
February 23, 2024

The US District Court for the Western District of Arkansas turned down the director's lawsuit against her former employer that claimed interference with her right to medical leave by forcing her to work instead of being on leave.

The Court ruled that the right to leave, that is, not to work, is not violated by minimally disruptive contacts from the place of employment for tidbits of information to which the employee on leave can answer without inordinate effort or difficulty. **Glover v. Nursing Home, 2024 WL 759299 (W.D. Ark., February 23, 2024).**

Nursing Home Negligence: Court Will Not Approve Class Action.

The personal representative of the estate of a now-deceased nursing home resident sued the nursing home, and then petitioned the court to certify the case as a class action on behalf of current and former residents of the nursing home.

The lawsuit raised very general allegations that the nursing home was understaffed and that understaffing led to less than optimal care for the mother of the personal representative who filed the suit and various unspecified individuals.

In order to consider certification of an individual's lawsuit as a class action on behalf of a class of alleged victims, the court must be provided with concrete evidence of the harm suffered by the party who filed or for whom the lawsuit was filed, and concrete evidence of the harm suffered by others, to determine if the type and manner of the harm is sufficiently similar for class action resolution.

UNITED STATES DISTRICT COURT
KENTUCKY
March 19, 2024

The US District Court for the Eastern District of Kentucky denied class action certification. The problem was that it was unclear how the alleged understaffing at the defendant facility led directly to a definable harm to the now-deceased resident.

That left the Court with no basis to evaluate how the other intended class members were harmed and how the harm to them was similar to the resident in question and between themselves.

The Court has no jurisdiction to issue a broad policy statement about the nursing facility's practices. **Tessner v. Nursing Home, 2024 WL 1180951 (E.D. Ky., March 19, 2024).**

Compensation Dispute: Court Approves Joining Nurses' Cases Into One Class Action.

The US Fair Labor Standards Act authorizes collective action by employees against the employer accused of violating the Act.

To determine whether a class action is appropriate, the Court looks at whether other employees desire to have their cases joined, and whether the other employees are similarly situated with regard to their legal claim against the employer as to their job requirements and pay provisions.

The Court will strictly supervise who can be invited to join and under what conditions.

Only nurses who were already employed when the nurse's case was filed can join. Nurses who signed on with the company later cannot join.

The class will be limited to nurses residing within the geographical boundaries of the Court's jurisdiction.

Nurses who signed the same contract but reside outside the Court's jurisdiction are excluded.

All legal notices to prospective class members must be reviewed and approved by the Court before being sent out, and may not imply Court approval of the merits of the case.

UNITED STATES DISTRICT COURT
FLORIDA
March 13, 2024

A number of nurses accepted employment as staff nurses with a healthcare corporation with a promise of in-service training on the job.

The give-back to the corporation was a promise contained in the nurses' contract that they will work for two years under the terms of the contract.

Any nurse who signed the contract, and then quit or was separated prior to two years, was obligated by the contract to reimburse $5000 to the employer as the stipulated value of the in-service training.

A nurse who quit before the two year commitment found that her last paycheck had been debited more than $800 that was not paid to her, as partial repayment of her alleged $5000 debt to her employer.

Her counter argument was that reimbursing the $5000 was a separate contractual matter, and that payment of all of her wages was required by the US Fair Labor Standards Act, and could not be withheld for a contractual dispute.

Court Approves Class Action

The US District Court for the Middle District of Florida certified the nurse's case as a class action. Certain other nurses will be given the opportunity to join in the case, which will go forward with one set of attorneys and one trial on the merits.

It is imperative to realize that class certification only defines who can be members of the class, if they opt in, and validates their right to proceed as a group.

Class certification does not imply the Court endorses the merits of the case. That must be stressed in the paperwork that the nurse's attorneys will use to attempt to get other nurses to join in.

One important point is that the Court will let nurses come into the class action if they signed the same contract for repayment of $5000 for in-services.

It will not be required that a class member actually quit or was separated or wanted to quit before two years and was actually required to pay or had payment withheld from wages that had accrued at the time of separation. **McFalls v. Healthcare, 2024 WL 1095939 (M.D. Fla., March 13, 2024).**

EMTALA: Chronic Pain Was Present Before, And After, Visit To The E.R.

The patient came to the hospital's emergency department with complaints of pain that were not set out in the court record.

The patient asked to be transferred to a hospital with specialized expertise. That hospital was contacted, but no space was available.

According to the US Court of Appeals for the Ninth Circuit (California), so called "reverse dumping," a hospital not transferring a patient to a specialized hospital, does not occur when the other hospital has no bed available to accept a transfer and so informs the first hospital.

The patient's lawsuit also alleged a violation of the Emergency Medical Treatment and Active Labor Act's (EMTALA) stabilization requirement.

The patient's chronic pain had been stable for more than two months preceding her visit to the emergency department.

Nevertheless the patient was given extensive tests in the emergency department with negative results.

It is unclear how the patient's condition would be expected to deteriorate without treatment for the complaints the hospital was aware of.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
March 18, 2024

The Court ruled that a chronic pain condition, the emergency patient's presenting complaint, which was stable when she came in, and was still stable when she was discharged, will not lead to an EMTALA violation if testing but no treatment was offered to her. **Pauly v. Healthcare, 2024 WL 1155454 (9th Cir., March 18, 2024).**

Pro Se Litigant: Nurse Practitioner Runs Afoul Of Court Rules.

A fully licensed and board certified advanced registered nurse practitioner was put on notice by the corporate office of a major national drugstore chain that its pharmacists had been alerted to watch for excessive prescriptions for controlled substances from the nurse practitioner's office.

Then without warning the corporate office ordered its pharmacists to stop filling the nurse practitioner's prescriptions, reporting falsely that the nurse practitioner was not licensed for controlled substances.

Most courts now require lawsuit documents to be filed electronically.

Self-represented litigants are often allowed a dispensation from electronic filing.

A self-represented litigant who agrees to file electronically must follow the instructions provided by the court for electronic filing.

The court can dismiss a case outright for no other reason than noncompliance with the instructions.

UNITED STATES DISTRICT COURT
NEVADA
March 11, 2024

Without looking at the undeniable merits of the case, the US District Court for the District of Nevada dismissed the nurse practitioner's lawsuit against the drugstore corporation.

The nurse practitioner, who sued without a lawyer, was eligible to file his court papers on paper, but agreed to file electronically. Having agreed, he was bound to follow the court's instructions.

A major problem was emailing his documents to the court's general email rather than the email for his case. It was impossible for the judge, the judge's clerk and opposing counsel to know what was going on. **Sharon v. Pharmacy, 2024 WL 1054443 (D. Nevada, March 11, 2024).**

ICU: Visitor Fell, Foot Caught In Tubes And Cords At Bedside.

A visitor was injured when her foot became entangled in tubes or cords attached to medical equipment while visiting her son in the neurological intensive care unit at the hospital.

The owner of business premises is not liable for an injury caused by an open and obvious condition that is not inherently dangerous.

A condition is open and obvious if it is readily observable by persons employing a reasonable use of their personal senses.

Whether something is open and obvious is a question of fact.

NEW YORK SUPREME COURT
APPELLATE DIVISION
March 13, 2024

The New York Supreme Court, Appellate Division, overruled dismissal of the case by a lower court.

According to the Appellate Division, a hazard presented by an open and obvious condition of business premises is not something for which a business patron can sue if the patron is injured.

However, a judge cannot form an impression out of thin air whether something is or is not an open and obvious condition of the premises that should be apparent to a patron visiting on the premises.

Instead, it is for the owner of the premises to come forward with affirmative evidence to establish that the condition which caused the particular visitor's injuries was open and obvious.

A statement from a knowledgeable person who inspected the area shortly after the incident might have carried the day, rather than assuming the court would form a favorable impression from no actual evidence. **Butler v. Hospital, __ N.Y.S. 3d __, 2024 WL 1081097 (N.Y. App., March 13, 2024).**

Deaf Patient: Court Looks At Right To Compensation For Discrimination.

In a recent decision, the US District Court for the Eastern District of Michigan vindicated the rights of a deaf hospital patient, and at the same time placed significant limitations on those rights.

For a deaf patient to sue a caregiver for discrimination, the patient must show deliberate indifference to the patient's needs.

That means a caregiver who could provide a particular auxiliary aid to communication knew it was needed, but decided not to provide it.

The nurses who conducted the pre-surgery education class could see that the patient was having difficulty understanding, but they did nothing for her.

UNITED STATES DISTRICT COURT
MICHIGAN
March 21, 2024

Only intentional discrimination can be the basis for a lawsuit by a deaf patient to vindicate rights under the Americans With Disabilities Act.

Intentional discrimination can be committed by personnel at any level of institutional authority, if they have the authority to provide what a deaf person needs as an auxiliary aid to communication, and do not act on the deaf patient's behalf.

That being said, if a deaf person sues a healthcare provider for discrimination, the deaf person is entitled to compensatory damages only but not damages for emotional distress, according to the Court.

The deaf person must prove actual harm due to ineffective communication. **Sparks v. Health, 2024 WL 1228965 (E.D. Mich., March 21, 2024).**

Court Appointed Guardians: Can One Decide Independently?

Two brothers were appointed as their mother's co-guardians by the local probate court when their mother entered a nursing home due to dementia.

After their mother's passing, one of them became probate administrator. As co-guardian he decided to agree to arbitration of the estate's negligence lawsuit against the nursing home.

Predictably, the other brother/son/co-guardian disagreed.

The answer varies from state to state whether one of multiple guardians for the same person can make a decision unilaterally, or must arrive at a joint consensus with another person or persons also appointed as guardians by the court.

Here the court's guardianship order was silent on that point.

Many state legislatures have copied the Uniform Guardianship and Protective Procedures Act, which requires joint agreement of multiple co-guardians, but Alabama has not.

SUPREME COURT OF ALABAMA
March 22,, 2024

The Supreme Court of Alabama ruled that, under Alabama law, which differs from other states, one court-appointed co-guardian can make decisions unilaterally without agreement from the other co-guardian or guardians.

That is true unless the court's order appointing the co-guardians expressly calls for mutual agreement.

Local legal counsel must be consulted if a dispute arises on this issue. **Rehab Ctr. v. Davis, __ So. 3d __, 2024 WL 1223694 (Ala., March 22, 2024).**

Frivolous Lawsuit: Court Can Award Attorney Fees, Costs Of Case.

A patient began treatment in 2010 with a pain clinic for an industrial accident that occurred that year.

In 2021 he sued the owner of the clinic, and shortly thereafter amended the case to include as defendants the physician and nurse practitioner who treated him.

The patient filed the lawsuit without a lawyer.

The allegation in the case was that the physician and nurse practitioner committed malpractice treating him during the years 2015 and 2016.

The court rules allow the judge to award reasonable expenses from a party who files a lawsuit or court papers that are frivolous or filed for the purpose of delay or harassment.

In petitioning for dismissal the defendants should have included an itemized statement of their attorney fees and costs to date.

COURT OF APPEALS OF MISSISSIPPI
March 19, 2024

The Court of Appeals of Mississippi agreed with the defendants that the case against them was obviously invalid due to the passage of the statute of limitations.

Further, it was or should have been obvious to the former patient who filed the lawsuit that the case was invalid.

As such it would be considered a frivolous lawsuit presumed to have been filed to harass someone for whom the patient bore a grudge, or to force out a nuisance value settlement.

The Court of Appeals agreed the defendants would be entitled to reimbursement of their attorney's fees and costs, if they had filed an itemized statement with the lower court, which they did not. **Rogers v. Clinic, __ So. 3d __, 2024 WL 1166947 (Miss. App., March 19, 2024).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Forensic Nursing: Nurse Practitioner Did Not Violate Criminal Defendant's Right To Medical Confidentiality.

A four-year-old was taken by her mother to their pediatrician because the girl said it hurt to go to the bathroom. The child was found to be positive for chlamydia.

The police investigation got nothing but the girl's report that her six year-old cousin had touched her in a bad way. The investigation was dropped.

Three years later the girl again tested positive for chlamydia.

Child protective services insisted the mother's live-in boyfriend be tested.

The mother's boyfriend tested positive. A criminal prosecution was set in motion that resulted in a fifty-five year sentence for the boyfriend.

An appeal was filed by the boyfriend, on the grounds that a nurse practitioner who saw the girl the second time around violated his right to medical confidentiality by testifying as to his positive chlamydia test.

The Supreme Court of Illinois saw multiple grounds to deny the boyfriend's appeal and let his conviction and prison sentence stand.

A healthcare provider has a strict duty to preserve medical confidences obtained in the process of treating a patient.

However, at the time the nurse practitioner became aware of the boyfriend's test result, the girl was her patient and the boyfriend was not.

The test result was given to the nurse practitioner by child protective services to aid in the nurse practitioner's evaluation and treatment of the child, not to treat the boyfriend.

A second factor was that the boyfriend consented to a demand from child protective services that he get tested. That demand was for the purpose of forensic evaluation and not for the purpose of medical treatment of the boyfriend.

The boyfriend could not claim ineffective assistance of his legal counsel who did not object at trial to the nurse practitioner's testimony. That objection, had it been made, would have been overruled rather than sustained, with no effect on the eventual legal outcome. **People v. Defendant, __ N.E. 3d __, 2024 WL 1204050 (Ill., March 21, 2024).**

Labor Union: Court Finds No Breach Of Duty Of Fair Representation Of Member's Grievance.

A nurses aide was terminated for numerous violations of her employer's policies that were deemed to have negatively impacted patient care.

She sued her former employer for disability discrimination and her union for breach of the duty of fair representation.

It was taken for granted she had a disability, but her employer nevertheless had legitimate nondiscriminatory reasons to terminate her employment.

She was unable to point to any inconsistency or implausibility in the employer's logic that would prove pretext.

The US Court of Appeals for the Ninth Circuit (California) also dismissed the case against her union.

The allegation was that the union owed her, as part of its duty of fair representation, a duty to pursue her case all the way to the end through arbitration.

A union's decision not to pursue arbitration of a member's grievance is not necessarily a breach of the duty of fair representation.

A labor union breaches the duty of fair representation only if it exercises its judgment in bad faith or in a discriminatory manner.

To establish bad faith, the union member must prove substantial evidence of fraud, deceitful action or dishonest conduct.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
March 18, 2024

The Court ruled instead that the union was entitled to use good faith judgment as to the likelihood of success in making a decision as to arbitration.

The Court pointed out that a union representative was present for all of the aide's disciplinary hearings, listened to her and argued on her behalf using all the lines of reasoning that she suggested.

The aide had basically admitted to the union representative that she was guilty of the infractions charged, but the union stuck with her through the process until the decision not to go forward with arbitration.

The Court pointed out that in a case alleging breach of the duty of fair representation, the affected employee has the burden of proof that a breach occurred. The union is not required to prove its own good faith. **Abdul-Haqq v. Medical, 2024 WL 1155449 (9th Cir., March 18, 2024).**