LEGAL EAGLE EYE NEWSLETTER

March 2024 *For the Nursing Profession* Volume 32 Number 3

Nurse As Whistleblower: Court Rules Facts Of This Case Provide No Legal Protection.

A nurse who served as interim patient care manager in the hospital's neonatal intensive care unit was terminated after it was determined she failed to live up to her personal improvement plan for better cooperation and communication with her peers, nursing management and physicians.

After her termination she sued her former employer. She alleged that she had protected legal status under state law as a whistleblower, who was terminated in retaliation for complaints about patient care and safety issues.

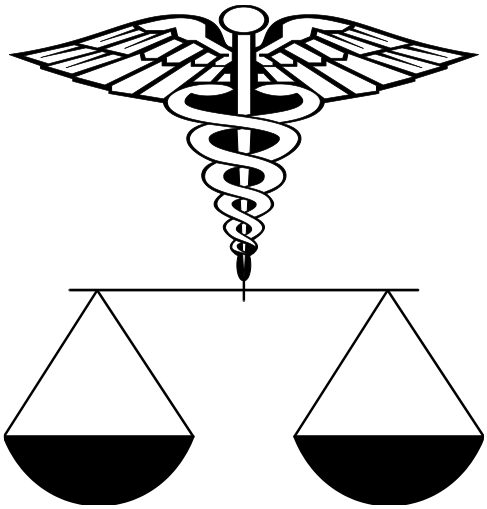
The United States District Court for the Northern District of California upheld a jury verdict in favor of the former employer, to the effect that illegal retaliation was not behind her termination.

The Court's record goes over in detail the issues that the nurse had raised while working in the hospital.

She called out the staff nurses for IV lines that looked like a confusing mess.

She believed the unit should start feeding the newborns with Prolacta, which she ordered from the supplier on her own initiative, then had a heated go-round with the physician who balked at approving the invoice for payment.

At that point the controversy went beyond the issue of the nutritional supplement to a general feeling that nurses like herself were treated dismissively by the physician.



The nurse failed to present evidence that she made a complaint or grievance regarding unsafe patient care or conditions or related to the quality of care, service or conditions.

The nurse does not qualify as a whistleblower under the law and cannot use the whistleblower protection statute as the basis for a lawsuit.

UNITED STATES DISTRICT COURT
CALIFORNIA
February 20, 2024

Then came the issue of use of Aquadex for newborns with renal issues. The nurse felt it was inappropriate due to an alleged shortage of nurses trained to use it, while hospital management allegedly wanted to go forward in order to profit financially from providing it.

A physician backed up the hospital's position on this issue with an email to the effect that the staff nurses were fully capable of handling the patient load.

In sum, the verdict makes the point that a record of a contentious relations with management over patient-care issues does not necessarily add up to grounds to claim legal protection as a whistleblower.

A true whistleblower must be able to point to an established statute law, regulation or publicly recognized standard that is being violated by the employer.

On the other hand, a personal disagreement over the course of patients' care or how things are being managed internally does not add up to grounds for whistleblower protection.

This was a close case, but the Court felt constrained to support the jury, who heard and evaluated all the evidence and ruled against the nurse.

California actually puts the burden on the employer to disprove retaliation, but even under that standard the employer prevailed. **Faulkner v. Hospital, 2024 WL 695396 (N.D. Cal., February 20, 2024).**

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Suicide: Court Will Not Fault Nurse's Triage, Assessment As Legal Cause Of Patient's Death.

The patient had a history of treatment for mental health issues following discharge from military service after a lengthy combat deployment in Iraq.

His issues included PTSD and traumatic brain injury. He was hospitalized in 2008, two years after his military discharge, when his wife found a suicide note he had written. The inpatient psychiatrists diagnosed PTSD and alcohol abuse.

Five years later he presented at the outpatient clinic with paranoid thoughts, depression and hopelessness. He was not considered a suicide risk. He did not follow up with a psychiatrist referral.

After another six years he came to the outpatient clinic for the encounter that immediately preceded his suicide the same day.

A medical assistant obtained a standard patient medical screening and administered a standard suicide screening, which came up completely negative.

The triage nurse spoke with him at length and administered another standard suicide screening instrument, which showed a very low risk for suicide.

The triage nurse expressly broached the subject of suicide thoughts or a suicide plan. The patient denied thoughts or a desire or a plan for suicide.

The nurse got him to agree to get all firearms out of the house, and gave him an appointment with a psychiatrist.

Later that day the patient had his uncle come over and get his firearms. However, the next day the patient was found in his home with a self-inflicted gunshot wound.

Court Rules Nurse Not At Fault

The family's lawsuit rested on the opinion of a nursing expert that the triage nurse should have done a full mental status exam in addition to the standard screening.

However, the US District Court for the District of Arizona was not convinced there was any proof that that would have made any difference.

The clinic nurse did all that was expected for this patient as he presented himself. The nurse was not at fault for her patient's death. **Hager v. US, 2024 WL 728711 (D. Arizona, February 22, 2024).**

The family's nursing expert opined that the standard of care also required a full mental status exam in addition to the standard suicide screening instruments which the medical assistant and the nurse used.

The expert was equivocal as to the rationale for such an exam for this patient. The expert begged off on testifying that all patients who present with mental health issues require a full mental status exam.

The other problem with the family's expert's opinion was that she only stated that a full mental status examination, in addition to the screening tools that were used, "could have" or "might have" avoided this patient's tragic outcome.

Unfortunately, that falls short of the standard of reasonable medical certainty that is required of expert opinions in healthcare malpractice cases linking an alleged breach of the standard of care to the harm that befell the patient.

The nurse obtained valid responses from the patient that showed minimal risk of suicide, which mandated no further involvement than what was given.

UNITED STATES DISTRICT COURT
ARIZONA
February 22, 2024

Hoyer Lift: Court Will Not Blame Patient's Fall On Negligence.

The New York Supreme Court, Appellate Division, had occasion to apply the recognized legal rule that the happening of an accident during the course of patient care does not, in and of itself, prove negligence by the caregiver involved.

The Court can accept testimony from the home health aide involved in the case as an expert witness in her own defense.

According to the aide, it is possible for a patient to slip out of a Hoyer lift sling without any deviation by the operator from normal operating procedure.

The Court will not accept the testimony, based largely on conjecture, from the patient's nursing expert that the aide kept pumping the handle as the patient began slipping out of the sling.

NEW YORK SUPREME COURT
APPELLATE DIVISION
February 20, 2024

The New York Supreme Court, Appellate Division, found the evidence insufficient to hold the home health agency liable for any negligence by the aide.

Nor was the Court persuaded to apply the legal rule of *res ipsa loquitur.*

That rule, if applied by the Court, dispenses with the need for proof of negligence, if what happened in the case can be proven to be something that ordinarily does not happen in the absence of negligence.

The patient did not supply any such proof, and there was no proof, that accidents never happen with a Hoyer lift without a party at fault. **Osorio v. Home Health, __ N.Y.S. 3d __, 2024 WL 675402 (N.Y. App., February 20, 2024).**

Involuntary Psych Medications: Court Reviews Patient's Right To Make Informed Decision.

The patient was committed by a court for six months of involuntary treatment in a psychiatric facility and involuntary medication, on the basis of a diagnosis of a mental illness that posed a danger to self or others.

The patient filed suit to have the commitment order voided in that it provided for involuntary psychiatric medication.

At the hearing the psychiatrist testified he wanted to give the patient Abilify. The psychiatrist stated he attempted to explain the advantages, disadvantages and alternatives to the patient.

The explanation focused on the fact the medication posed only minimal chance of side effects, would be very advantageous and there was no reasonably realistic alternative.

However, the patient refused to participate in the interview for more than a few minutes and became paranoid, agitated and combative.

Medication Order Upheld

The Court of Appeals of Wisconsin upheld the involuntary medication order. From a legal standpoint that was an oddity in that the six month commitment order had expired without renewal by the time the Court of Appeals heard the case. But mootness was not a deterrent to a ruling on the important issues raised in this case.

Even though a patient has been ordered to be held involuntarily for mental health treatment, the patient still has the right to informed consent as to any medications to be administered.

That is true unless the court that committed the patient makes a determination, following a fair hearing, that the patient is not competent to refuse medication or other treatment.

A compelling factor is whether the patient, after the advantages and disadvantages have been explained, is incapable of expressing an understanding of the advantages and disadvantages of medication or other treatment.

The physician did not explain the advantages and disadvantages to the patient of the proposed medication, but other evidence indicated the patient lacked the requisite insight.

COURT OF APPEALS OF WISCONSIN
February 13, 2024

A patient does not lose the right to informed consent, and the right to accept or refuse treatment that is offered, simply because the patient has an involuntary mental health commitment order.

The patient is entitled to the same explanation any other patient would receive from caregivers as to the advantages, disadvantages and alternatives of a proposed course of medication or other treatment.

The explanation must focus on the specific medication or medications caregivers intend to use, as opposed to the advantages and disadvantages of mental health medications in general.

To exercise the right to refuse treatment, the patient must be able to express a cogent understanding of the disadvantage of the proposed treatment that led to the decision to decline it, most typically based on a bad experience with the same medication in the past.

Otherwise, without a demonstrated ability to understand the benefits, risks and side effects, the patient's expressed objection to treatment does not have to be honored by caregivers.

The psychiatrist admitted he failed to get through to the patient with a full explanation of the advantages and disadvantages of the medication he intended to order.

However, according to the Court, the patient's behavior indicated he had no capacity for any real understanding of the process of learning about the medication, and was incapable of making a decision on a rational basis. **Matter of K.A.D., 2024 WL 569783 (Wisc. App., February 13, 2024).**

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Narcotics Diversion: Nurse Not Protected As Whistleblower For Questioning AcuDose Accuracy.

After an extensive investigation by nursing and pharmacy management, a nurse was terminated over forty-seven unexplained discrepancies in her withdrawal of narcotics from the AcuDose equipment on the labor and delivery unit.

The nurse sued her former employer, claiming she was a whistleblower who was illegally subjected to employer retaliation for blowing the whistle on improper action by her former employer.

However, the alleged improper action was the nurse's contention that the AcuDose equipment did not provide accurate data about nurses' withdrawal of narcotics, by allegedly not screening out different nurses' use of others' credentials.

Court Sees No Whistleblowing

The Superior Court of New Jersey, Appellate Division, saw two major flaws in the nurse's case against her former employer.

To be a true whistleblower, the whistleblower must experience adverse retaliatory action from the employer after, not before, blowing the whistle.

The whistleblower cannot wait until after disciplinary action or termination to blow the whistle on some action or inaction by the employer.

Another factor is the requirement that the action or inaction by the employer over which the whistle is blown must be illegal under state or Federal law or a violation of an established public policy.

The Court was not provided with evidence showing that any such law or public policy applies to the correct matching of nurses to drugs accessed by a dispensing system on a hospital unit.

As an aside, the grounds given by the employer for terminating the nurse were that she had practiced outside the scope of her license as a registered nurse.

That is, assuming for the sake of argument she did not steal or ingest the medications in question, but merely administered them to her patients at her own discretion, it would still be substandard and illegal practice to do so without physicians' orders. **Fenyak v. Hospital, 2024 WL 277671 (N.J. App., January 25, 2024).**

The state's conscientious employee protection statue protects healthcare employees from employer retaliation.

To qualify for protection the employee must have a genuine and realistic belief that the employer's action or inaction is a violation of a law, rule, regulation or recognized public policy.

The employee must "blow the whistle" by reporting the employer to pertinent authorities.

The employer must take adverse employment action against the employee, and there must be a viable relationship between the employer's retaliatory conduct and the employee's whistleblowing.

It stands to reason that the employee is not a sincere whistleblower, who waits until after certain adverse action, such as discipline or termination has occurred, to blow the whistle on the employer after the fact.

Another issue here is the fact the nurse cannot identify a law, rule, regulation or public policy to the effect that a hospital's medication dosage equipment must accurately reflect a particular nurse's usage of controlled substances.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
January 25, 2024

Discrimination: Race And Color Are Separate Characteristics.

A patient care assistant applied and was turned down for a vacant position as lead patient care assistant.

The applicant in question describes herself as a dark skinned African-American. Her supervisor describes herself as a light skinned African-American.

The interview and evaluation process involved a panel of three, which included the applicant's supervisor, scoring each applicant for a long list of factors.

Of twenty-eight applicants, the applicant in question scored as number six. The job went to number one who is Caucasian.

The applicant sued alleging discrimination by her supervisor.

Race and color are not the same thing for purposes of antidiscrimination law.

Discrimination is just as illegal based on skin color as it is based on race.

That means it is conceivable for a person of one race to break the law by discriminating against another person of the same race, based on a different skin color.

UNITED STATES DISTRICT COURT
MISSOURI
February 16, 2024

The US District Court for the Western District of Missouri dismissed the case.

First of all, the alleged victim sued for race discrimination, but her case was actually for color discrimination by her supervisor.

Putting that technicality aside, the Court saw no problem with the institution's objective scoring process for rating competing applicants for an open position.

The factors were clearly related to the ability to fit in with the institution and get the job done, and were fairly applied in this case. **Lewis v. McDonough, 2024 WL 665538 (W.D. Mo., February 16, 2024).**

Discrimination: Victim Must Say What Reasonable Accommodation Was Needed.

A licensed practical nurse worked more than fourteen years at an outpatient facility that served the healthcare needs of homeless veterans.

A new manager began to sexually harass the LPN. After he physically groped her she stopped going to work. Human resources contacted her. She indicated she had PTSD from the episode, which she considered to be a disability. Human resources offered to talk with her about a solution but it was unclear from the court record just how that went.

Eventually the LPN was terminated for the fact she never returned to work.

The Court cannot evaluate a claim for disability discrimination without the victim stating what the victim requested by way of reasonable accommodation, the rationale behind it and the basis upon which the employer refused.

True, the victim did have PTSD from an assault at work, but it was not clear what she ever asked her supervisor to do for her.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
February 8, 2024

The US District Court for the Eastern District of Pennsylvania dismissed her disability discrimination case.

Besides demonstrating a disability, a disabled employee must participate meaningfully when the employer reaches out to discuss a reasonable accommodation.

To be able to sue, the employee or former employee must show what was requested as reasonable accommodation, and denied, and how that would have made them qualified to work. **Taylor-Bey v. Clinic, 2024 WL 531258 (E.D. Penna., February 8, 2024).**

Nursing Student: Dismissal For Unsafe Nursing Practice Was Not Arbitrary Or Capricious.

When she enrolled in a private university's nursing program, the student and the university entered into a contract.

The contract required the student to abide by the university's expectations as set forth in the student handbook.

Those expectations included safe nursing practice in all clinical settings.

The contract required the university to provide the student's nursing education, and not to dismiss the student for reasons that were arbitrary or capricious.

If the nursing school's performance of the contract is called into question, the court does not substitute its judgment as to the definition of safe nursing practice or its judgment as to what misfeasance by a student is below the threshold of acceptable practice.

The court sees that the university's sources stand on a rational footing for its standards of conduct for students and its criteria for deeming conduct unacceptable.

There is no evidence of arbitrary or capricious conduct by the university in dismissing this student.

APPELLATE COURT OF ILLINOIS
December 27, 2023

A nursing student was apparently having difficulty adjusting to the demands of having two rather than just one patient to care for on her clinical rounds.

When she realized she would be late with her morning vital signs for one patient, because she spent too much time getting another patient's medications, she simply entered the patient's nurse's vital signs taken more than an hour previously as her vital signs for that hour.

When it was discovered what she had done, she was given a failing grade in this one of her clinical rotations.

However, a failing grade in any one of the core clinical placements meant dismissal, regardless of whether the student succeeded with other aspects of the program.

The student sued the university for breach of contract over her dismissal.

No Arbitrary or Capricious Action
No Breach of Contract

The Appellate Court of Illinois ruled it is not the Court's function to second-guess the judgment of the university nursing faculty as to acceptable versus unacceptable clinical performance by a nursing student.

The only legal issue was breach of contract. Breach of contract by the university could only be established if the university backed off from its contractual obligation to provide a nursing education for arbitrary or capricious reasons.

Standards for safe nursing practice have been established by the state Nurse Practice Act and organizations including the American Nurses' Association.

Again, the issue was not whether the court believed the university's judgment was flawed, only whether it seemed to have a rational rather than arbitrary basis.

The Court also expressly discounted the student's argument as justification, that her action did not harm the patient.

The Court expressly accepted the university's argument that any falsification of patient data by a nursing caregiver has the potential to harm the patient, and that possibility renders it unacceptable unsafe practice, even if no patient was harmed. **Urso v. University, __ N.E. 3d __, 2023 WL 8907655 (Ill. App., December 27, 2023).**

Discrimination: No Disability Until After Termination, Case Dismissed.

A hospital employee was fired immediately after a physical confrontation with a hospital patient who had spit on him and allegedly was targeting him to spit on him again.

He claimed later that as a result of the incident with the patient and his being terminated for it he began to experience emotional distress and depression.

He went on to claim, in a wrongful discharge lawsuit against his former employer, that he was a victim of disability discrimination for the emotional reaction to the incident which he first experienced after the incident.

A victim of disability discrimination must be able to prove that their disability was present before the employer's adverse action toward them.

They must further prove they were a qualified individual with a disability, able to meet the employer's legitimate expectations with or without the assistance of reasonable accommodation that may be necessary.

A disability that arises afterward is not grounds to sue.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
February 15, 2024

The US District Court for the Eastern District of Pennsylvania ruled that a disability that did not exist at the time, but arose after an incident of alleged discrimination, is not grounds for a successful disability discrimination lawsuit.

This employee's case was dismissed, but only without prejudice. **Harrison v Hospital, 2024 WL 665338 (E.D. Penna., February 15, 2024).**

Credit Report: Nursing License Revocation Stays Longer That Seven Years.

A nurse's license was revoked in 2011 for accepting money from an Alzheimer's patient.

In 2020 she found out that her license revocation and disqualification from future patient caregiving employment were still on her credit report.

That became known when she was turned down for employment because of that information on her credit report. It was unclear from the court record whether the employment for which she applied involved healthcare patient caregiving.

She sued the credit reporting agency for violation of the US Federal law that requires adverse information on credit reports be removed after seven years.

The nurse's license being suspended and her name being added to the registry of persons barred from direct patient care occurred more than seven years ago.

However, the fact her license was under suspension and caregiving employment was barred was still current information at the time that her credit report was furnished to a prospective employer.

UNITED STATES DISTRICT COURT
ARIZONA
February 22, 2024

The US District Court for the District of Arizona turned down her lawsuit.

In 2020 when the credit report was prepared, the fact of her nursing license being on suspension and her employment with healthcare clients being barred was still accurate and current information about her, the Court ruled. **Grijalva v. Credit, 2024 WL 728700 (D. Arizona, February 22, 2024).**

Nurse As Expert Witness: Court Does Not Exclude Categorically.

A teenager was admitted from the hospital to skilled nursing for rehab in the form of regular IV antibiotic infusions for mitral valve endocarditis.

The orders indicated specific times of the day when the IV's were supposed to be started, but those orders were routinely ignored by the nurses and started one or more hours late.

Then one day the patient was found dead on the floor more than an hour after a late-started IV antibiotic. The patient had not been checked by a nurse after the IV was first started.

Traditionally the courts have accepted nurses as expert witnesses on the standard of care for nurses implicated in healthcare malpractice cases.

Traditionally the courts have not accepted nurses as expert witness on the medical issue of the causal connection between a violation of the nursing standard of care and the alleged harm to the patient.

UNITES STATES DISTRICT COURT
ARIZONA
January 23, 2024

The case was dismissed by the US District Court for the District of Arizona because the patient's family's nursing expert could not testify that the late IV start times and the failure to monitor actually caused the patient's death.

Arizona is one of the US states that no longer holds nurses categorically unqualified to testify as to medical causation in malpractice cases. However, the nurse would have to have demonstrable knowledge in the field of pharmacokinetics to testify in this case. **Arnold v. Rehab, 2024 WL 244439 (D. Arizona, January 23, 2024).**

Nursing Facility Admit: Patient Denied Chosen Placement.

The patient had surgery in the hospital for an orthopedic problem with his foot.

Then he needed to be transferred from the hospital to a skilled nursing facility for rehabilitative physical therapy that would enable him to ambulate with the aid of a walker.

Several available rehab placements that were suggested during the discharge planning process troubled the patient, due to the fact they did not allow smoking.

However, a representative of one particular facility whom he met at the hospital assured him he would be allowed to smoke if he came to their facility.

He agreed to go and was taken to that facility the very same day he met with the facility's representative.

On arrival at the facility he was admitted to the Alzheimer's unit, even though he did not have Alzheimer's.

One of two problems with that placement was that Alzheimer's unit patients were only able to smoke when staff were up to the task of escorting them outside, which was basically never, as opposed to other units where patients were allowed to go outside to smoke independently ad lib.

The other problem was that patients on the Alzheimer's unit did not get physical therapy, even though the only purpose of this patient's admission was rehabilitation through physical therapy.

Court Sees Grounds For Lawsuit Alleging Fraud

The US District Court for the District of Delaware ruled the patient's case could go forward alleging fraud.

The patient was induced to accept placement at the facility based on a misrepresentation that was critical to his choice of a rehab facility where he was told he could smoke independently ad lib.

The Court was more impressed as grounds for a lawsuit with the denial of physical therapy on the Alzheimer's unit.

That required the patient to stay more than three weeks extra for physical therapy after the matter was finally sorted out that he needed physical therapy which was not available or being provided on the wrong unit. **Lewis v. Rehab Center, 2024 WL 475251 (D. Delaware, February 7, 2024).**

The elements of a civil case alleging fraud include:

A false representation was made by the defendant to the plaintiff;

The falsity of the representation was known to the defendant or the representation was made with reckless disregard for the truth;

The defendant intended to induce or defraud the defendant with the misrepresentation;

The plaintiff justifiably relied on the misrepresentation in making the plaintiff's choice; and

The plaintiff suffered compensable harm resulting from the misrepresentation.

The jury can infer that the offer of a space in a facility to a patient who does not suffer from Alzheimer's would not involve placement in the Alzheimer's unit, where the patient's choice of independent activities would be unnecessarily curtailed.

The fact speaks for itself that the patient was taken to the Alzheimer's unit right away when he arrived.

That tends to indicate that the facility intended from the start to place him in the Alzheimer's unit, which would not be an appropriate placement and not the placement to which the patient agreed.

UNITED STATES DISTRICT COURT
DELAWARE
February 7, 2024

COVID-19: Court Reiterates Principles Of Religious Discrimination.

Employment cases having to do with mandatory COVID-19 vaccination of healthcare employees are slowly working their way through the courts.

A recent case from the US District Court for the District of Oregon reiterates the principles for religious discrimination cases, which were recognized before COVID-19 and will likely survive after.

Eight nurses jointly sued their employer. Only one case has survived.

Title VII of the US Civil Rights Act does not protect medical, economic, social or political preferences or beliefs.

Protection exists only for sincerely held religious beliefs, as the law defines a religious belief.

UNITED STATES DISTRICT COURT
OREGON
February 21, 2024

Seven of the nurses claimed exemption to vaccination based on their religious beliefs. They said they were Christians and one claimed more specifically to be a practicing Catholic.

The eighth nurse is a member of the Mormon faith. What made that different from the others, according to the Court, was that the Mormon faith, as the nurse understands it, expressly does not approve of medical experimentation or products that come from use of fetal stem cells.

The legal distinction is that one nurse's faith has specific tenets that apply to vaccination with a product that was developed or produced with use of fetal stem cells, while the other nurses' faiths have no specific tenets on the subject of vaccination or vaccines, however derived. **Burns v. Healthcare, 2024 WL 712610 (D. Oregon, February 21, 2024).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

In Vitro Fertilization: Alabama Recognizes Not Yet Implanted Embryos As Children.

Media attention has been focused on a recent ruling of the Supreme Court of Alabama concerning the legal status of embryos that were fertilized in vitro and stored cryogenically.

A hospital patient wandered in through an unlocked door to the room with the cryogenic chambers that held the embryos. She reached in and took several, but the very low temperature burned her hand, causing her to drop them on the floor.

The lawsuit by the persons associated with the embryos alleged negligence by the hospital in allowing unsecured access to the room.

The legal issue is whether the embryos were the plaintiffs' children, for whom a wrongful death lawsuit could result in a significant financial award, as opposed to personal property with no pecuniary value the law would recognize or compensate.

Relying solely on Alabama statutes and Alabama case precedents, the Alabama court ruled the embryos were children, the same as a live child or unborn fetus in the womb. **LePage v. Center, __ So. 3d __, 2024 WL 656591 (Ala., February 16, 2024).**

Emergency Room: Nurse Offered Patient Clothes To Detective, No Rights Violation.

A police detective came to the hospital to question a gunshot victim.

It was not clear to the detective whether the man was the victim or the perpetrator of a crime, or whether the gunshot was self inflicted or accidental.

The detective was about to go out to the parking lot to look in the patient's car, not having gotten any meaningful information from the interview, when an emergency department nurse offered the detective the bloody clothes that had been cut off the patient in the course of medical treatment.

When the detective got back to the station he went through the clothes and found narcotics in one of the pockets.

According to the Court of Appeals of Virginia, the patient's rights were not violated by the nurse offering his clothes to the police, but if the police had asked for the clothes, the nurse would have been acting on behalf of the police, and could not give up the clothes without search warrant. **Defendant v. Commonwealth, 2024 WL 330504 (Va. App., January 30, 2024).**

Workers Compensation: Discrimination Is Not Allowed Toward An Employee Who Filed A Claim.

While the director of nursing was out due to complications for a work related back injury, the facility was hit with a citation for patient care deficiencies.

The citation focused on a plan for correction of deficiencies. The plan had been put into place following a department audit about one year earlier.

At the time of the earlier audit the current director of nursing was director of nursing whose responsibility it had been to see that the plan of correction was fulfilled.

The new chief operating officer was unhappy that the earlier plan of correction had not been fulfilled, and spoke with human resources about removing the director of nursing or at least cutting back the scope of her responsibilities.

The director was terminated as part of a plan to eliminate employees out on workers compensation.

It is rare in this day and age for a victim to have overt direct evidence of discrimination that will support a lawsuit.

Cases usually have to be made from circumstantial evidence that is open to dispute or rebuttal.

The new nurse manager asked human resources for a list of all the nurses out on workers compensation, for the express purpose of getting rid of them.

UNITED STATES DISTRICT COURT
VIRGINIA
February 13, 2024

The US District Court for the Western District of Virginia saw two prongs for the fired director's case against her former employer.

Disability discrimination was one possibility, but it had to be based on circumstantial evidence and was subject to rebuttal if the jury believed the unresolved plan of correction was a legitimate basis for the director's termination.

More promising for the director's legal position would be a case based on the ironclad rule that an employer cannot retaliate against an employee who elects to pursue their right to workers compensation for an on the job injury.

The chief operating officer expressly admitted to human relations that it was her intent to promote efficiency by eliminating all those out on workers comp. **Boelte v. Hospital, 2024 WL 578577 (W.D. Va., February 13, 2024).**