LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

September 2024 Volume 32 Number 9

Physician vs. Nurse Confrontation: Nurse's Discrimination Lawsuit Dismissed By Court.

The pediatric emergency room patient needed to be transferred to another facility for a higher level of care than what was available at the facility.

The emergency physician decided the child should be transported to the other facility by ambulance.

The child's mother was quick to voice her disagreement with the physician. She insisted she be allowed to drive her child to the other facility in her own car, believing that would be quicker than waiting for an ambulance.

The emergency physician became very irate with the mother for questioning his judgment as to her child's treatment.

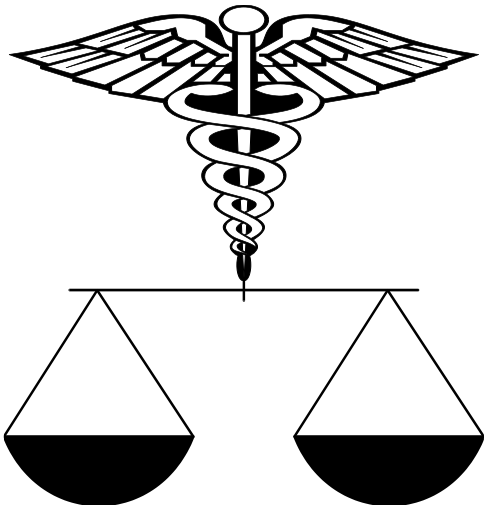
The physician began arguing loudly with the mother and then started shouting obscenities at her.

The emergency department nurse could see what was going on, and stepped in to take the mother's side in the heated exchange with the physician.

The physician began shouting obscenities at the nurse and threw a punch at him, which did not land.

Afterward the nurse became upset that the hospital was not responding to his satisfaction to his complaints against the physician. He believed he was a victim of discrimination based on being a male nurse who was fifty-eight at the time.

He quit his job and sued for discrimination.



The alleged victim is a male nurse over forty years of age who has sued for gender and age discrimination.

The problem with his case is that there is nothing in the nurse's rendition of the incident, or the physician's, or another nurse's or the hospital's investigation that implicates the nurse's gender or age as a factor in what transpired.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
July 31, 2024

The US District Court for the Middle District of Pennsylvania dismissed the nurse's gender and age discrimination lawsuit that he filed against the physician and the hospital.

The nurse could muster no proof that his gender or age was a factor in the way the physician acted out toward him, or in the way the hospital handled, that is, basically ignored his complaint against the physician afterward.

Discrimination must be based on adverse treatment that was motivated by the victim's gender, age, color, disability, etc., or the alleged victim has no legal case.

Persons with protected characteristics, like male nurses and older employees are regularly turned away by the courts when they allege only that they have a legally protected characteristic and have been treated by their employer in a manner they find objectionable.

There must be proof that the employer or other alleged source of discrimination not only took adverse action, but took adverse action because of the alleged victim's legally protected characteristic.

In some circumstances the alleged victim will have the benefit of a legal presumption in their favor, but that presumption can be rebutted with proof of a nondiscriminatory justification. **Bonna v. Hospital, 2024 WL 3605957 (M.D. Penna., July 31, 2024).**

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Nurse Left Patient On Bedside Commode: No Negligence Seen.

The patient had surgery for kidney stones, a possible cortical mass and placement of a ureteral stent.

Her initial nursing fall-risk assessment after her surgery found her fully capable of independent use of the restroom.

Then a change was ordered in her medications that the nurses believed made her a significant fall risk which ruled out independent ambulation.

On the morning in question the patient rang for assistance to get up to urinate. A nurse came to the room, assisted her to pivot to the bedside commode, verified that she had her call button with her on the commode and knew to use it to get help, and then left the room.

Two versions of the incident diverge as to what happened next.

The patient later claimed the bedside commode broke while she was sitting on it and she fell on the floor sustaining multiple injuries to her spine, shoulder and ankle.

An unnamed eyewitness verified that the bedside commode broke, but the patient remained seated.

The former patient sued for negligence. The hospital countersued for insurance fraud.

No Evidence of Nursing Negligence

The Superior Court of Pennsylvania ruled in favor of the hospital and the nurse.

The simple fact the patient fell, in and of itself, if that really happened, did not prove the patient's nurse was guilty of negligence.

The former patient testified that earlier in her hospital stay, when she rang her call bell two nurses came to the room, helped her stand and walk to the bathroom, then waited for her in the bathroom, then walked her back and put her to bed.

However, there was no evidence that the nursing standard of care required that level of personal attention.

There was no evidence of substandard nursing judgment in the decision to use and leave the patient on the bedside commode.

There was a correct nursing judgment that ambulation to the restroom was not indicated due to the change in the patient's medication after her initial nursing fall-risk assessment. **Wandell v. Hospital, 2024 WL 3697497 (Penna. Super., August 7, 2024).**

The patient's lawsuit claims incorrectly that a case of negligence can be presumed from the fact the patient's nurse left the patient alone on the bedside commode while the nurse left the room.

On the contrary, the patient has to prove there was a departure from the nursing standard of care, which the patient has failed to do.

The first issue is the appropriateness of choosing the bedside commode rather than two-person hands-on assistance to ambulate to the bathroom.

Other issues are whether it was appropriate to leave this patient on the commode, whether the patient had been instructed and understood she was to use the call bell to summon someone before trying to arise from the commode and whether she did so.

As to the patient's claim that the commode broke while she was sitting on it, even if that actually happened, there must be evidence from the patient explaining how that happened, evidence of standards for maintenance of hospital bedside commodes, and proof of the foreseeability of such an accident if the standards were not observed.

SUPERIOR COURT OF PENNSYLVANIA
August 7, 2024

Wound Care: No Negligence Based On Lapse In Documentation.

The administrator of the deceased resident's probate estate sued the nursing home where she passed, alleging substandard care for a pressure wound on her leg.

The estate's lawsuit recited legal authority to the effect that a nursing home is required by Federal law to formulate an appropriate plan of care and maintain adequate records of care in compliance with the plan of care.

Specifically, there was a four-day interval for which no wound assessment or care was documented. The court record does not indicate how close in time that was to her passing.

To prove a violation of the resident's rights, the estate must prove there was an alteration of the status of her wound during the four day interval for which documentation was absent.

The facility's policy was to document wound assessment only if there was a change in the status of the wound.

UNITED STATES COURT OF APPEAL
THIRD CIRCUIT
August 15, 2024

The US Court of Appeals for the Third Circuit (Pennsylvania) upheld the facility's practice of documenting wound assessments only with a change in status.

Only with proof of a change in wound status during the four days in question, would there be a need for documentation and a violation of the resident's rights due to inadequate documentation.

The Court discounted the opinions of the estate's nursing expert that there were such changes in status during the four days in question. The expert did not participate in the resident's care and did not confer with any of the caregivers who did. **Williams v. County, 2024 WL 3824643 (3rd Cir., August 15, 2024).**

Suicidal Patient: Court Backs Nurse's Right To Use Nurse's Independent Nursing Judgment.

A patient was admitted to the hospital for mental health treatment following a suicide attempt.

The court record is silent as to how the patient got to the hospital and was admitted, whether the admission was voluntary or involuntary or whether at the time of the incident the patient was under a court order or just being held in an emergency.

Presumably those issues were omitted from the court's discussion because they are not relevant to the central issue in the case, the propriety or impropriety of the nurse's actions and his legal exposure or lack thereof for using his own nursing judgment in guiding his actions.

After leaving the hospital the patient filed a complaint with the state agency and eventually a civil lawsuit for assault and battery against the registered nurse who physically restrained her during the initial nursing assessment.

Also named as a defendant in the lawsuit was the nurse's employer the hospital.

The lawsuit alleged the nurse used unnecessary and excessive force in his interaction with her.

The court record is also silent as to whether the patient was injured or was merely seeking vindication. Note that the common law does not require actual physical injury to sue for assault and battery.

The nurse and the hospital that employed the nurse are entitled to a summary judgment of dismissal of the former patient's lawsuit.

Dismissal of the patient's case is supported by the affidavit of the treating physician, a second nurse's incident report and the State's investigation.

The physician fully supported the nurse's decision and actions in physically restraining the patient for about two minutes until she calmed down.

The patient was belligerent and combative toward hospital staff.

Another nurse noted in the incident report that the patient was agitated, refused treatment, kicked and tried to bite staff members.

State regulations expressly allow a patient to be restrained physically who is acting out in a violent or destructive manner.

COURT OF APPEALS OF MICHIGAN
August 22, 2024

The Court of Appeals of Michigan upheld the circuit court's grant of a summary judgment to the nurse and the hospital and dismissal of the patient's case.

The basis for the dismissal is that this is a case of professional malpractice, not common law assault and battery.

There was a professional relationship between the patient receiving healthcare treatment in a healthcare facility, and the nurse, an employee of a healthcare facility, rendering such care.

The nurse was insisting the patient remove a necklace she was wearing, which was a legitimate aspect of the nursing admission process. That is when the patient became combative, belligerent and started acting out aggressively.

The nurse's actions in insisting she remove the necklace, and then restraining her on the floor when she went off and lost control of herself, were an exercise of professional judgment.

An exercise of professional judgment by a nurse or other healthcare professional is judged by the standard of care for the professional.

That must be proven with expert testimony as to a violation of the standard of care. No such testimony was provided by the patient in support of her case, beyond the bare fact the nurse held her down on the floor for two minutes.

The nurse's judgment and actions were fully supported by his peers who were present at the time, and by State investigators who looked back after the fact. **Yerkovich v. Hospital, 2024 WL 3912551 (Mich. App., August 22, 2024).**

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Conflicting Physician Orders And Hospital Protocols: Nurse's License Restored By Court.

The seventy-two year-old patient was admitted to the hospital with acute gastrointestinal bleeding.

His physicians were not ready to perform an endoscopy as to the bleeding until his cardiac function could be verified as sufficiently stable to tolerate the procedure.

He was sent to the hospital's cardiac telemetry unit for monitoring.

He died four days later in the hospital's ICU after a myocardial infarction in the telemetry unit.

His nurse on duty in the telemetry unit at the time of the infarction was reported to the Board of Registered Nursing, which revoked her license.

She appealed her licensing case to the California Court of Appeal, which restored her license.

Allegations of Substandard Care

The nurse was accused of failing to follow a hospital protocol calling for a 12-lead EKG for a patient with an O_2 sat less than 93%.

However, the Court saw no evidence that a 12-lead EKG as opposed to the telemetry monitor the patient was already wearing would have made any difference in the final outcome.

It was a hospital standing protocol that vital signs be taken every five minutes for a patient with chest pains.

However, the Court noted that vital signs were taken frequently during the time interval in question, and the Court saw no evidence that five-minute vital signs would have made a difference.

Orders from one physician were that the physician was to be contacted if the patient did not respond to sublingual nitroglycerine. Another physician ordered topical nitroglycerine, but did not mention contacting the physician.

Again, there was no evidence presented against the nurse in the form of expert testimony from a cardiologist that a cardiologist would have pursued a specific medical intervention that would have saved the patient from his fate, had the nurse contacted either physician. **Nurse v. Board, 2024 WL 3822357 (Cal. App, August 15, 2024).**

The nurse had several potentially conflicting sources from which to take direction in the care of her patient.

Those sources included inconsistent orders from two physicians, the hospital's standing nursing protocols and the nurse's own judgment as an experienced advanced cardiovascular life support certificate holder.

The hospital's standing nursing protocols were also a problematic source for guidance, being somewhat inconsistent internally as to the extent a nurse with advanced practice certification could depart from the hospital's standing protocols and use independent nursing judgment.

In the final analysis it is not possible to determine that any of the alleged shortcomings attributed to the nurse can be directly linked to the ultimate outcome, the patient's death.

By law, an isolated incident of substandard nursing care, as opposed to an ongoing pattern of incompetence, can result in a nurse's license revocation only with solid evidence that the isolated incident of substandard care directly threatened the patient's life.

CALIFORNIA COURT OF APPEAL
August 15, 2024

Delayed Cancer Diagnosis: Court Rules Case Not Proven Against Nurse Practitioner.

His first appointment with the nurse practitioner was for the patient's problem with frequent urination with a weak urine stream, and lower back pain he said he believed came from his kidneys.

The nurse practitioner prescribed medication for benign enlargement of the prostate, and told him to return in four weeks.

Eight months later he came back and reported his urinary problems were gone. Labs showed normal kidney function.

Six months later kidney cancer was diagnosed from which he died.

The patient's estate cannot prove that the tests the nurse practitioner should have run would have led to an earlier diagnosis of kidney cancer.

The best they can say is that lab values that would have come back indeterminate would have prompted a referral to a urologist, who would have made the timely diagnosis.

That is too speculative as grounds for a healthcare malpractice lawsuit.

UNITED STATES DISTRICT COURT
ILLINOIS
August 21, 2024

The US District Court for the Northern District of Illinois dismissed a highly speculative lawsuit filed by the patient's probate estate alleging that tests that were not ordered at the second visit would not have pointed in a useful direction for definitive diagnosis, which should have prompted the nurse practitioner to send the patient to a urologist for definitive follow-up.

The reverse logic of the estate's theory was too speculative to stand up in court. **Sanchez v. US, 2024 WL 3888878 (N.D. Ill., August 21, 2024).**

Power Point: Court Says Presentation Is Peer Review Privileged.

The patient was admitted to the hospital through the emergency department for what was described as a non-healing perineal wound.

As an inpatient he had a protracted surgical course and then was discharged to a long term care facility.

Somehow the lawyers representing him in his and his wife's lawsuit against the hospital got wind that the hospital's medical dermatology service had put together a PowerPoint slide presentation about his particular case, to use in grand rounds with treatment team members.

The lawyers filed a formal discovery request for the PowerPoint presentation. The hospital declined on the basis of the peer review privilege.

The hospital's dermatology medical service created a PowerPoint presentation specifically about this plaintiff patient's care, for use in a grand rounds presentation to physicians and other healthcare team members.

Creation of the Power Point slides clearly was an aspect of peer review, aimed at candid appraisal and improvement of the quality of patient care.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
August 22, 2024

The US District Court for the Middle District of Pennsylvania upheld the hospital's claim of peer-review privilege.

This patient's hospital course had been particularly challenging, requiring multiple complicated surgeries and an end diagnosis of pyoderma gangrenosum.

The PowerPoint was made not for general educational purposes, but to aid the quality review committee in learning what it could from this difficult case. **Patient v. Med. Ctr., 2024 WL 3891110 (M.D. Penna., August 22, 2024).**

Transgender Nurse: Court Upholds Right To Complain Of Discriminatory Treatment.

An employee's right to complain about discriminatory treatment on the job without fear of employer retaliation does not hinge on the employee having a valid case of discrimination.

For a valid case of discrimination due to a hostile work environment the law sets the bar very high.

Mistreatment must be so severe and pervasive that it impairs an employee's ability to work at their job.

It is not enough that coworkers made inappropriate remarks or asked provocative questions or teased a transgender coworker about her new body or the details of her intimate personal life.

Harassment on the basis of gender, gender identity or another protected characteristic must rise to the level of physical bullying or outright intimidation to be grounds for a lawsuit.

However, an employee's complaints about what the employee considers to be a violation of the employee's rights cannot lead to the employee being the victim of employer retaliation.

The nurse was fired citing an incident months earlier, days after she complained to human resources.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
August 9, 2024

A transgender nurse was hired as a care coordinator for a home health agency.

Her tenure was problematic from the start. Corporate higher-ups were not pleased with her handling of regulatory and compliance issues, and she was not pleased with some management practices.

The nurse also had issues, but waited to complain about what she considered harassment by rank and file nurses and managers on her same level directed at her unmistakably based on her male-to-female transgender status.

The alleged harassment consisted of inappropriate and demeaning comments about her and taunts directed to her about the new details of her intimate life.

Nurse Was Fired Within Days Of Human Resources Receiving Complaint Of Transgender Status Harassment

The nurse had a multi-year history of conflict with corporate management over regulatory and compliance issues.

However, she was promptly fired only within days after she finally got around to mentioning that she was being ridiculed for her transgender status.

The alleged reason that was given to her for her termination was something that happened months earlier.

The US District Court for the Western District of Pennsylvania ruled the nurse has a valid case against her former employer of employer retaliation.

The Court did not find that the nurse's treatment on the job rose to the level of a hostile work environment.

Nor did the Court believe that the nurse was a victim of unequal discriminatory treatment by her employer.

The Court looked only at the fact the nurse was ostensibly fired as quick retaliation for complaining about harassment.

Even if there was no hostile environment directed at her because of her gender identity, or discriminatory treatment that affected her, her right to complain about what she genuinely believed to be inappropriate treatment had to be vindicated by the Court. **Ignjatovic v. Agency, 2024 WL 3746266 (M.D. Penna., August 9, 2024).**

Tourette's Syndrome: Court Turns Down Nurse's Disability Discrimination Lawsuit.

A registered nurse was referred to employee assistance at his previous job after coworkers saw him talking either to himself or to non-existent third persons.

He explained to employee assistance that he suffers from Tourette's Syndrome which accounted for his unusual behavior.

He asked that his employer accommodate his Tourette's as a disability. He was given an accommodation that was not specified in the court record. He worked for two years without further incident until he voluntarily resigned.

After his voluntary resignation he applied at another hospital that was affiliated with the same corporate parent as his former employer and got a bedside nursing position in neuro intensive care.

At his new job he quickly ran into headwinds over violations of patient safety. Those violations were the reason given to him when he was terminated.

After his termination he sued the more recent employer for disability discrimination. He claimed discrimination based on his diagnosis of Tourette's and also claimed that his most recent employer failed to give him reasonable accommodation for his Tourette's as a disability.

However, before filing suit he never informed the more recent employer of his diagnosis or requested accommodation.

The US District Court for the District of Rhode Island dismissed his case.

The Court ruled expressly that having notified his previous employer of his disability and having requested reasonable accommodation did not carry over to his more recent employer who terminated him.

That was true even though both hospital employers were part of the same corporate structure.

An employer has no legal duty to go back to previous employers listed in a job application or on a resume to see if the employee claimed a disability or requested reasonable accommodation, or if so, what accommodation was requested.

The first predicate for an employee's successful disability discrimination case is that the employee at the right time and through the right channels notified the employer of the disability and of the fact an accommodation was believed needed.

At that point, but not until that point, the employer must reach out and communicate with the employee as to what sort of accommodation is needed, what would be acceptable and what the employer is in a position to offer.

In this case the nurse had never said anything to anyone at his most recent employer that he even had a disability. **Nozick v. Hospital, 2024 WL 3598982 (D. Rhode Island, July 31, 2024).**

An employer does not commit disability discrimination if the employer does not know the employee claims to have a disability.

An employer is not required to contact a previous employer listed on an employee's job application or resume to see if the employee revealed a disability to that employer.

That is true even if the former employer is under the same corporate umbrella as the current employer.

The employee must trigger discussion of reasonable accommodation by disclosing the disability appropriately and requesting an accommodation.

It is not up to the employer to ferret out an employee's disability and guess at what sort of reasonable accommodation is needed.

UNITED STATES DISTRICT COURT
RHODE ISLAND
July 31, 2024

Patient Abuse: DON Will Not Testify As An Expert.

After redirecting a memory-care resident back to his own room from another resident's room, an aide positioned him in front of his chair and then pushed him back into his chair.

Unknown to the aide, the resident's daughter had installed a motion activated camera with audio capability in the room.

The daughter witnessed the incident remotely and then emailed a clip of the incident to the memory care facility's director of nursing.

The director notified the police and the aide was arrested and charged with bodily injury to an elderly person.

If the director of nursing was going to testify as an expert on the standard of care for care of caregivers on a memory-care unit, the director had to be designated as an expert and the defense had to be given a chance to obtain an expert of their own.

However, the director only testified as to what she saw on the video, without offering an expert opinion.

COURT OF APPEALS OF TEXAS
July 25, 2024

The Court of Appeals of Texas allowed the aide's conviction and sentence to community service to stand, over the aide's objection as to the director of nursing being able to testify as an expert without being designated as an expert.

According to the Court, a person who would be qualified to testify as an expert does not testify as an expert if they merely testify as to what they observed, without offering an opinion as to the propriety or legality of what they observed. That was true of the director in this case. **Aide v. State, 2024 WL 3544825 (Tex. App., July 25, 2024).**

Skin Care: Expert's Opinion Failed To Identify How Outcome Would Have Been Improved.

The elderly resident was admitted to the nursing home with a history of falls at home.

Her medical diagnoses included Alzheimer's disease, Type II diabetes, osteoporosis, osteoarthritis, anemia, chronic gingivitis, encephalopathy, cataracts, generalized muscle weakness and unspecified dementia without behavioral disturbance.

She was in and out of the hospital several times over a period of eighteen months for treatment of skin integrity issues involving lesions on her right hand, coccyx and buttocks and sepsis from the lesions.

She finally expired in the hospital due to complications of COVID.

After her passing the focus of the family's legal battle seeking compensation from the nursing home was a degloving condition in her right hand which led to systemic sepsis and to gangrene in the fingers. The hand had to be amputated.

The family contended that the condition with her hand was a contributing factor in her death.

For their lawsuit, the family submitted a report to the court containing a physician's expert opinion criticizing the nursing assessment and care at the nursing home prior to her passing.

The Court of Appeals of Texas reiterated the report in detail, for its obvious value in setting out the nursing standard of care for patients with skin integrity issues.

In the end, however, the Court found the opinions expressed in the report insufficient to support a lawsuit against the nursing home in this case.

The three elements of a successful negligence case are proof of a departure from the standard of care, proof of harm to the alleged injured party and proof of a causal link between the departure from the standard of care and the harm suffered.

No matter how strong the proof is of two of the three essential elements of a negligence case, the case is subject to dismissal with prejudice if all three elements are not proven to the satisfaction of the judge or jury hearing the case.

That was the case in this case. The family's case was dismissed.

The resident's family's expert physician's opinion provides an excellent discussion of the nursing standard of care as to a patient's skin integrity.

However, the family's expert's opinion falls flat when it comes to establishing a direct link between a departure from the nursing standard of care and the harm suffered by the patient.

The expert indicated that more competent and diligent nursing assessment, accompanied by more attentive communication with the resident's physician could have resulted in the resident being transferred out of the nursing home to a setting with a higher level of care.

That being said, the family's expert's opinion fails to elaborate on what the expert meant by a higher level of care.

The expert's opinion is blank as to what measures could and would have been employed in the higher-level facility and how that would have prevented or at least forestalled the ultimate outcome.

The family's case deserves an A for effort, but it is insufficient to impose liability on the nursing home for nursing negligence.

COURT OF APPEALS OF TEXAS
July 24, 2024

Nursing Standard of Care
Skin Integrity Issues

Early intervention is vital to prevention of degloving in ensuring that early intervention is available through several options including skin grafting.

The standard of care requires nursing staff to perform daily to monitor progression of wounds and for early detection of infection or necrosis.

Nurses are required to monitor IV sites to ensure that they are patent and that the skin and circulation are not compromised.

When this patient got to the hospital there were no radial or ulnar pulses in the right hand and the hand was black.

The nurses at the nursing home should have been monitoring capillary refill, a basis nursing function that assesses circulation. Capillary refill should have been monitored in this patient at least once per shift.

Cyanotic nail beds and the hand turning black should have been reported by the nurses to the resident's physician.

In addition, the resident's care plan at the nursing home should have included attention to her nutrition and hydration.

That meant close monitoring and careful documentation of her food and fluid intake.

Proper nursing assessment would have alerted the nurses to the necessity of transferring the resident to a higher level of care, according to the family's expert.

Causation Not Proven

For the Court, it was insufficient from a legal perspective for the family's expert simply to state that the resident could have been transferred to a higher level of care, if the nursing home nurses had done their job better monitoring their patient and communicating to the physician.

The Court was left only to speculate what higher level of care was indicated, what would be done at the higher level of care and how that would have made a difference in the ultimate outcome.

An essential element was missing from the family's case, and the nursing home was entitled to dismissal. **Butler v. Nursing Home, 2024 WL 3533079 (Tex. App., July 24, 2024).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Service Dog: Student Nurse Not Permitted To Work Without Her Service Animal.

A nursing student suffers from postural orthostatic tachycardia syndrome. She is prone to spells of dizziness, lightheadedness, weakness, anxiety and difficulty concentrating.

She has a service dog trained to recognize that its handler is about to have one of the spells and to alert the handler to lie down until the spell passes.

The nursing student requested her nursing program accommodate her disability by allowing her service dog to accompany her during her clinicals.

The nursing program agreed. Not only was she allowed but she was expected to have her dog with her during clinicals.

Problems came up with the health of the service dog itself, which created issues with the student's clinicals when her dog was out sick. She wanted shortened clinical days without her dog when the dog was sick, but the program would not agree.

The US District Court for the District of Utah saw no requirement of reasonable accommodation to let her do clinicals without her dog. **Thomson v. College, 2024 WL 3850014 (D. Utah, August 16, 2024).**

EMTALA: Law Does Not Apply To Patient Admitted As Inpatient.

The US Emergency Medical Treatment and Active Labor Act (EMTALA) imposes a wide range of expectations on hospitals' treatment of emergency patients in hospitals' emergency departments.

Any patient who presents and requests treatment must be given an appropriate medical screening examination that is the same as any other patient would receive for the same presenting complaints, signs and symptoms.

Patients cannot be discharged in unstable condition unless EMTALA's criteria have been met and documented for transfer to another facility for a higher level of care.

However, as recently pointed out by the US Court of Appeals for the Ninth Circuit (California), the EMTALA does not apply to a patient who is admitted to the hospital as an inpatient.

The EMTALA also does not apply to a patient who came in as an emergency patient, but was later admitted in good faith for inpatient treatment. **Dalavai v. Hospital, 2024 WL 3842100 (9th Cir., August 16, 2024).**

Recent Clinical Experience Required: Court Sees No Employment Discrimination Against Nurse.

The US Court of Appeals for the Third Circuit has upheld a ruling of the US District Court for the Eastern District of Pennsylvania we reported in November 2022.

See *Age Discrimination: Court Rules That Recent Experience Can Support Employer's Choice*. (30)11 Nov. '22 p.8.

A registered nurse worked as an infection control nurse in the same facility from 1981 until 1993. In 1993 she was removed from the position for deficient job performance and was reassigned as a quality management specialist.

She continued to apply unsuccessfully for open infection control nursing positions at the facility until 2017 and then retired in 2018.

After her retirement she continued with her lawsuit against her former employer alleging age discrimination.

There are two levels of legal analysis in this case, both of which lead to a ruling in the employer's favor.

Current or recent clinical experience in the practice area is a legitimate factor for hiring or promotion.

The nurse being turned down for lack of recent experience shows that that, and not discrimination, was the reason for not offering the job, regardless of the wisdom of the decision.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT
August 21, 2024

The reason given to the nurse each time she was turned down was that she did not have current or recent clinical experience in the last two years in infection control nursing in a tertiary facility.

The Court noted that the candidates selected for the position each time the nurse's application failed did in fact have current or recent experience in infection control in a tertiary facility.

A criterion which an employer uses to turn down a candidate for hiring or promotion must be observed in actual practice, or having it as a stated job requirement that is not actually followed in practice can look like a set-up for illegal discrimination.

The Court does not sit in judgment of the employer's decision from a personnel management perspective, if the employer's decision, prudent or not, is not based on discrimination. **Finzie v. Secretary, 2024 WL 3887725 (3rd Cir., August 21, 2024).**