LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Age Discrimination: Nurse Affected By Staff Reassignments.

A licensed vocational nurse was fifty-eight years of age when he left his employment at a nursing home, allegedly because members of his support staff were reassigned to other areas of the facility, which increased his own workload and overtime requirements.

The US District Court for the Eastern District of Texas pointed out that discrimination cases usually involve employee terminations, demotions, refusals to hire, refusals to promote, disciplinary reprimands and pay and benefit cuts.

However, there is no reason why the allegations raised in this case could not support a lawsuit for discrimination, assuming the nurse has proof that reductions in his support staff made his job objectively worse, the Court said.

Even when an employee actually resigns, the courts interpret the anti-discrimination laws to allow room for constructive discharge, a situation where an employee is treated as having been terminated whose employer made working conditions so intolerable that the employee was forced to quit. **Frances v. Nexion, 2014 WL 2757680 (E.D. Tex., June 17, 2014).**

IV Pole Topples Over: Patient Can Sue For Ordinary Negligence.

An eighty-four year-old nursing home resident was injured when an IV pole fell on him while he was lying in bed. The patient suffered blunt trauma to his head, a broken nose and cuts and contusions. He died of unrelated causes several weeks later in another nursing home.

A lawsuit was filed by the patient's estate within the statute of limitations for medical malpractice but then was voluntarily dismissed and then re-filed after the statute of limitations had passed, even taking into account the extra grace period granted by North Carolina law for re-filing a voluntarily dismissed civil case.

The Court of Appeals of North Carolina ruled a case could still be filed for ordinary negligence, as opposed to healthcare malpractice. Ordinary negligence has a longer statute of limitations and the patient's estate will not need expert medical or nursing testimony.

The incident involved only simple manual dexterity in hanging his IV and did not involve any exercise of specialized professional judgment by the facility's caregivers, the Court said. **Goodman v. Living Centers, __ S.E. 2d __, 2014 WL 2724848 (N.C. App., June 17, 2014).**

Packing Left In Surgical Wound: Court Turns Down Estate's Request For *Res Ipsa Loquitur.*

An old piece of gauze used to pack the patient's surgical wound was discovered a year after her hemicolectomy surgery.

The patient's estate sued the surgeon, the hospital, the rehab facility where she went after surgery and the visiting nurse agency whose employees cared for her in her home after she left the rehab facility.

Each of the defendants' attorneys submitted expert witness affidavits to the court stating that the patient's treatment by their client met the applicable standard of care in all respects.

The patient's estate's attorneys were unable to provide anything from a medical or nursing expert directly linking any particular defendant to the packing being left in the wound or linking that to the patient's death.

The patient was treated in three different places at three different times, in the hospital, in the rehab facility and in her home by the visiting nurses agency.

None of the three caregiving settings had exclusive control of the factors which led to the injury for which the patient's probate estate sued, an old piece of packing negligently left in her surgical wound.

NEW YORK SUPREME COURT
APPELLATE DIVISION
June 4, 2014

The New York Supreme Court, Appellate Division, ruled that the patient's estate was not entitled to rely on the legal rule of *res ipsa loquitur* under the circumstances of the case and, therefore, the case had to be dismissed for lack of evidence.

Res ipsa loquitur is Latin for "The thing speaks for itself." It is a legal rule that sometimes can be used by the injured victim in a healthcare or other civil negligence case were the defendant or defendants had exclusive control of the factors which led to the victim's injury, and the manner of injury was something that ordinarily does not occur in the absence of negligence.

Here, however, the defendants at no time ever shared control over her care and so the rule did not apply. **Bucsko v. Gordon , __ N.Y.S.2d __, 2014 WL 2504687 (N.Y. App., June 4, 2014).**

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