LEGAL EAGLE EYE NEWSLETTER

February 2002 *For the Nursing Profession* Volume 10 Number 2

Side Effects Of Meds: Motorist Injured In Accident With Patient Can Sue Hospital.

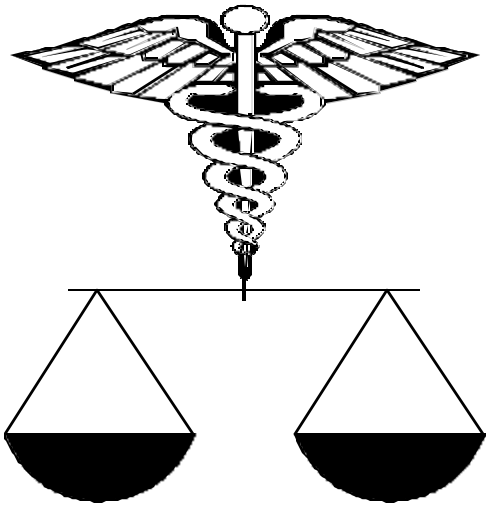
A patient came to the hospital's emergency department complaining of a headache.

According to the Supreme Court of Missouri, after an initial assessment the patient was given an intravenous dose of five milligrams of Compazine, a non-narcotic medication commonly used to treat nausea.

Soon afterward she left the emergency department without telling anyone and without anyone noticing she was leaving. Consequently she was not given an appropriate discharge assessment or warnings that Compazine is commonly known to cause drowsiness, dizziness and hypotension.

On the way home her vehicle crossed the centerline of a state highway and struck another vehicle head-on causing injuries to the driver of the other vehicle. The driver of the other vehicle sued the hospital.

The court ruled in general terms there are grounds for a lawsuit in this situation. Medical personnel can have legal responsibilities to persons other than their own patients. Emergency room physicians and nurses have a legal duty to inform, assess, monitor and supervise their patients. That is a legal duty they owe not just to their patients but to others as well.



A motorist was injured in a motor vehicle collision with a patient who was on her way home from the hospital's emergency department.

The motorist's lawsuit alleged medical malpractice by the hospital's emergency room staff in failing to inform the patient of possible side effects, failing to assess her, monitor her and keep her from leaving prematurely.

SUPREME COURT OF MISSOURI, 2001.

At the same time the court ruled that a third party injured by a patient has to prove in more than general terms that the patient's caregivers were negligent. Their errors and omissions have to be proven as the specific cause of harm to the injured party.

In this case a civil jury was unable to reach a verdict one way or the other whether the hospital's emergency room staff were negligent or whether their negligence caused the accident.

Then, however, rather than declaring a mistrial and ordering a new trial, the judge threw out the case on the basis of the statute of limitations. That is, assuming it was a case of medical malpractice, or the injured party at least was claiming medical malpractice, the lawsuit was filed after the two-year statute of limitations in Missouri had elapsed.

The Supreme Court of Missouri agreed. In general terms there are grounds for a lawsuit by a third party injured as the result of a patient's caregivers' neglect, if cause and effect can be proven. The flip side is that neglect by caregivers is medical malpractice, for which most states' statute of limitations is shorter than for ordinary negligence. **Robinson v. Health Midwest Development Group, 58 S.W. 3d 519 (Mo., 2001).**

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Patient With Violent History Committed To Assisted Outpatient Care.

The local county court refused to order the patient into an assisted outpatient setting where he could demonstrate compliance with his anti-psychotic medications as an alternative to being sent to a psychiatric hospital.

This patient's need for assisted outpatient treatment is established by clear and convincing evidence.

He had a history of "cheeking" his medication while in the psychiatric hospital and boasted he would not take his medication once freed. He decompensated when not on his medication.

There were two prior violent events, both while not taking his medication. He stabbed a hospital employee in 1997 and assaulted his sister in 1999.

NEW YORK SUPREME COURT, APPELLATE DIVISION, 2001.

On appeal, the New York Supreme Court, Appellate Division, ordered him into the assisted outpatient setting.

There was a documented history of gamesmanship to avoid taking his meds and decompensation. There were two serious acts of violence while off his medications. Clear and convincing evidence established that the patient was a danger to others, the court ruled. **Weinstock v. Hector A., 733 N.Y.S.2d 243 (N.Y. App., 2001).**

Psychotic Patient: Court Says An Overt Act Is Needed To Prove The Patient Is A Danger To Self.

A psychiatric patient had been living in a group home but unexpectedly walked away one day for no apparent reason.

It was not clear who reported her to the police, but they found her, picked her up and took her to a hospital. She was discharged from the hospital and traveled by train and bus to her daughter's home. Her daughter took her back to the hospital and initiated proceedings for a long-term mental health commitment. The patient was being held in a state psychiatric hospital when her case went to court.

The Court of Appeals of Texas ruled there were not sufficient grounds to hold her and ordered her released.

The lower court's order to keep her locked up was based on a physician's testimony that focused on three areas: nutrition, wandering and medication.

Less Than Optimal Nutrition

The patient had paranoid psychotic delusions she was to subsist on nothing but chicken nuggets and cookies. While absent from the group home she ate only that for nearly four weeks before she was placed in the state hospital.

The Court of Appeals ruled that less than optimal nutritional choices are not sufficient evidence of the likelihood of self-harm to justify a psych commitment.

Wandering from Group Home

For this patient, wandering away from the group home and trying to live on her own, although highly inadvisable, was not actually harmful. It went against her caregivers' best judgments for her welfare but did not fall within the legal definition of harm to self to justify a psychiatric commitment.

Medication Noncompliance

The patient was not consistently taking her medications while living in the group home. However, the doctor who testified in favor of involuntarily committing her was unable to state what medications she was supposed to be taking, what her meds were indicated for, what they did for her and what specifically would happen if she stopped taking them.

True, the court said, when a patient deteriorates from non-compliance with anti-psychotic medications there can be grounds for involuntary commitment, but the caregiver who testifies in court must do his or her homework to be able to specify what exactly will happen without them.

Overt Act Is Necessary

As a general rule the courts have to hear testimony about an overt act of actual or attempted self-harm to be satisfied that future acts of self-harm are probable without involuntary mental health treatment. Mere predictions of self-harm from mental-health examiners or caregivers, without actual examples, are not enough to justify holding a person against his or her will, the court ruled. **D.J. v. State of Texas, 59 S.W. 3d 352 (Tex. App., 2001).**

Expert psychiatric testimony confirming a diagnosis of mental illness, in and of itself, is not enough to justify holding and treating a patient involuntarily.

In addition to a diagnosis of mental illness there must be clear and convincing evidence the patient is a danger to self or to others.

Danger to self or to others must be proven on the basis of a recent overt act or a continuing pattern of behavior that confirms that self-harm is probable without mental health treatment.

COURT OF APPEALS OF TEXAS, 2001.

Schizophrenic Patient: Court Rules That Episodes Of Decompression Are Grounds To Continue Involuntary Mental Health Commitment.

The patient was forty-one years old. He suffered from bipolar disorder and schizophrenia. He had been hospitalized more than twenty times for his illnesses.

For more than two months he was living in a group home, taking his medications and getting along well with other residents and his caregivers. Then over a three-day period, for no apparent reason, he became angry and agitated. He went around kicking things and throwing his fists and he could not sleep.

He walked to a nearby store. While gone he missed his morning medications. That was uncharacteristic for him. He phoned the home and asked for a ride back but was told no one was free to come and get him. At this point he became very angry. He threatened to kill the caregiver he was speaking with on the phone, steal her car and drive to the city nearby.

She called the police. They went looking for him. They found him sitting in a restaurant and took him to the hospital. He was kept at the hospital on a short-term mental health hold while proceedings were started for a long term commitment and involuntary medication.

A nurse who had cared for the patient during four previous hospitalizations testified the patient was subject to bouts of decompression where he became highly impulsive and could strike out violently at others.

Ordinarily the patient was compliant with his meds and was quite pleasant and cooperative when his meds were working for him.

But there were times when internal metabolic variances in his medication levels and external stressors made him quite fragile, when he would sleep less, have highly disorganized thoughts and become irritable and impulsive.

The nurse testified he was in her opinion a danger to himself and probably to others. The court did not follow the nurse's recommendation he be sent back to the intermediate residential facility.

COURT OF APPEALS OF OREGON, 2001.

Threat of Violence As Grounds for Commitment

In general terms the law says there must be clear and convincing evidence the person poses a danger to self or others for involuntary mental-health commitment to be court-ordered.

The Court of Appeals of Oregon stated there is clear and convincing evidence of a danger to others when a mentally-ill person who has carried out at least one violent act in the past makes a present threat of violence.

On the other hand, if a mentally-ill person makes a present threat of violence but has never followed through and has never committed a violent act, the evidence is not clear and convincing of danger to others, the court pointed out.

Nurse's Testimony

A nurse who had cared for the patient in the past testified at the patient's commitment hearing. She said it was not his pattern to threaten violence and then follow through. Rather, it was his past pattern to act out and strike out impulsively when having a decompressive episode.

The court said that in itself was enough. He was mentally ill, he had acted out violently in the past and he had recently made threats of violence toward his caregiver in the group home.

The court did not believe it was appropriate to send him to an intermediate care facility where his medications could be closely monitored. For the time being he belonged in a psychiatric hospital. **State v. King, 34 P. 3d 739 (Or. App., 2001).**

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Retaliation: Nurse Refused To Sign Backdated Medicare Form, Termination Upheld.

The US Circuit Court of Appeals for the Eighth Circuit reviewed the circumstances that led up to a home-health registered nurse's termination and subsequent lawsuit for employer retaliation.

Employer's Side of the Story

According to her employer the nurse was terminated for behavioral problems, fourteen alleged documented instances of unprofessional conduct toward patients in the field and with co-workers in the office.

The nurse also refused to sign and back-date a Medicare Form 485 needed for her employer to receive payment for home visits the nurse had in fact made over a two-month period to a patient who was in fact certified by a physician for home health care.

Employee's Side of the Story

The nurse stated she had been instructed the form has to be signed either on or before the first day of the certification period indicated. She also stated she believed it was illegal to place a handwritten date next to her signature that was not the date she actually signed.

The nurse also indicated she believed it was wrong for her agency to instruct her to make home-health visits to patients she herself had determined were not homebound as defined by Medicare regulations.

The Court's Ruling

Signing a back-dated form is not, in and of itself, an illegal act. In the ordinary course of business forms cannot always be prepared and signed on the due date.

It would be illegal to sign a reimbursement form to obtain payment for services not rendered as indicated, but that was not what happened.

An employee can sue after being terminated as retaliation for refusing to perform an illegal or fraudulent act. But in this case the employee was not asked to do anything illegal. Her belief it was illegal was not relevant, the court said in throwing out her retaliation claim. **Callantine v. Staff Builders, Inc., 271 F. 3d 1124 (8th Cir., 2001).**

The general rule is that an employee who has no written employment contract and is not working under a collective bargaining agreement is considered a common-law employee at will.

An employee at will can quit at any time and can be terminated at any time at the employer's discretion.

There are major exceptions to the general rule, such as Federal and state anti-discrimination laws.

Most US state courts have also ruled that at-will employees cannot be terminated for reasons that violate public policy.

At-will employees can sue for retaliation for being terminated for refusing to violate the law, for reporting violations of the law by their employers or by fellow employees and for asserting other recognized legal rights.

That being said, there is no violation of the law involved in signing a backdated Form 485 for Medicare, assuming the home health nurse has made the indicated home visits and the physician had certified those visits as necessary.

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT, 2001.

Absenteeism: Arbitrator's Decision Upheld.

A hospital employee was terminated for excessive absenteeism and overall poor productivity. Her union filed a grievance, requested arbitration and asked that she be reinstated.

The employee had Hepatitis C and claimed disability discrimination.

The arbitrator ruled for the hospital, stating only that there was no basis to see the dismissal as unfair or discriminatory. The union filed suit in Federal court to set aside the arbitrator's decision.

When both sides have bargained for arbitration as the means to resolve their disputes, their disputes will be resolved by arbitration and not by going to court.

Arbitration is informal, flexible, expeditious and relatively inexpensive.

Unlike judges in court, arbitrators have no duty to provide the reasons for their decisions, as their decisions are not meant to be appealed.

UNITED STATES DISTRICT COURT, PUERTO RICO, 2001.

The US District Court for the District of Puerto Rico upheld the arbitrator. In labor law there is a strong policy in favor of arbitration and against the courts second-guessing arbitrators' decisions.

Unless the union contract says so, arbitrators are not required to state the reasons for their decisions. An arbitrator's decision is not subject to attack because the reasons are not spelled out. **Unidad Laboral v. Hospital De Damas, Inc., 171 F. Supp. 2d 38 (D. Puerto Rico, 2001).**

Labor Relations: Medicaid Reimbursement To Nursing Homes For Strike-Related Expenses Does Not Violate NLRA, Federal Court Says.

The US District Court for the District of Connecticut ruled recently that the State of Connecticut did not violate the US National Labor Relations Act (NLRA) by its response to strike action by a labor organization representing private-sector nursing home employees.

The same union represented approximately seven thousand employees at seventy-one privately-owned nursing homes in Connecticut, registered nurses, licensed practical nurses, nurses' aides, housekeepers and some maintenance and clerical employees.

Two years ago negotiations with forty-seven nursing homes went down to the wire and a few of the homes were struck. Afterward the state made funding available for additional labor costs, which included retrospective reimbursement for some strike-related costs such as hiring replacement workers.

Contract negotiations heated up again in late 2000. Anticipating possible strikes early in 2001, state officials began contingency planning. The governor, state legislators and Medicaid officials worked to together to allocate funding for training of replacement workers, transportation for replacement workers, premium pay for agency employees, etc., as well as use of the state police and National Guard to protect replacement workers and other measures for the health and safety of nursing home residents.

As the threatened strike deadline approached, union officials went to Federal court seeking an order barring state officials from intervening in the course of events.

The US District Court for the District of Connecticut refused the union's request for a preliminary injunction, ruling that the union's legal position was not meritorious.

Background

During the New Deal in the 1930's the NLRA was the culmination of an effort by labor organizations on the national level to put the Federal government strictly in charge of setting standards for private-sector labor dispute resolution and to keep state officials strictly out of that process.

In private-sector labor disputes, state government is not allowed to use the state's power or resources to influence the outcome of the collective-bargaining process.

The US Constitution gives supremacy to Federal law over state law in the area of interstate commerce. Federal labor law is based on the exclusive authority of the US Congress to regulate interstate commerce.

Labor-policy objectives established by Congress and implemented by the National Labor Relations Act (NLRA) are paramount over the labor-policy objectives of state authorities.

However, state government can use Medicaid reimbursement to compensate nursing homes, before or after the fact, for strike-related expenses like hiring and pre-training replacement workers, paying premium wages to agency personnel, etc.

State government has the right and the obligation to protect the health and safety of nursing home residents, and that is supported by Federal law.

UNITED STATES DISTRICT COURT, CONNECTICUT, 2001.

The NLRA prohibits state officials from using state power and state resources to shift the balance one way or the other in private-sector labor disputes. This principle takes many forms.

For example, picketing is a legitimate form of union activity, to inform the public a labor dispute is in progress, to urge employees to join the strike and to urge employees of other companies like delivery drivers not to cross the picket lines.

Regardless of how state law defines criminal trespass and the powers vested in the local police to deal with criminal trespass, picketing must be allowed.

Another example is that pro-union state legislatures are not allowed to extend unemployment benefits to workers while they are on strike, even to workers in the bargaining unit who do not agree to be represented by the union or with the union's decision to strike.

Residents' Health and Safety Is The Most Important Consideration

The bottom line was that state officials, in the court's judgment, from the governor all the way down the line, were not acting with the intent to shift the balance of power in the labor dispute between the nursing homes and the union.

State officials were acting with the primary intent to protect the health and safety of the nursing homes' residents. Federal law and national policies place a strong burden of responsibility on state officials to protect this vulnerable population. Medicaid statutes and regulations give a sizeable margin of discretion and flexibility to state officials to use available resources as they deem necessary. **New England Health Care Employees Union District 1199, SEIU/AFL-CIO, 170 F. Supp. 2d 199 (D. Conn., 2001).**

Assault By CNA: Nursing Home Ruled Liable, Knew Of Prior Violent Behavior.

A resident's son filed a civil lawsuit for assault and battery on his mother's behalf against a certified nursing assistant (CNA) and the nursing home.

The jury made two separate awards of damages, $25,000 against the CNA and $40,000 against the nursing home. The local trial judge threw out the jury's award against the nursing home and dismissed the nursing home from the case.

The Supreme Court of Tennessee reversed, holding the nursing home responsible to pay civil damages.

The Supreme Court also ruled it was erroneous to split fault between the employer and the employee. That ruling effectively made the nursing home responsible to pay the entire amount.

Prior Assault Was the Key

The key to liability was not the incident with this resident but one with another resident eighteen days earlier that was not handled appropriately by management. If that incident had been handled properly, the second incident would not have occurred, the court concluded.

A resident's daughter-in-law had reported to the director of nursing that the CNA physically corrected her mother-in-law. The director of nursing wrote up the incident for the administrator and included statements from the CNA's co-workers that she was known to be overly harsh and impatient with residents.

The administrator filed the report away and did nothing, even though it was the policy that when such an incident was substantiated by witnesses the employee was to be sent home and the incident reported to the state. Only if the state's investigation cleared the employee could the employee return to work.

This CNA would not have returned and the second incident would not have happened if procedures had been followed, the court believed. **Limbaugh v. Coffee Medical Center, 59 S.W. 3d 73 (Tenn., 2001).**

An employer has no liability when an employee unexpectedly assaults a patron.

However, an employer has liability when an assault is a foreseeable result of the employer's failure to take reasonable precautions to protect patrons from the risk of abuse posed by an aggressive employee.

The nursing home had a standard policy for dealing with caregivers who exhibited violent behavior toward residents.

The incident was to be reported to the state within twenty-four hours.

The offender was to be sent home promptly and placed on administrative leave within the same twenty-four-hour period to await the results of the state's investigation.

The nursing home negligently failed to follow its own policy guidelines.

The employee in question was not disciplined for an incident just eighteen days earlier where she bent back another resident's finger and dug in her nails to correct the resident for pointing her finger in her face.

SUPREME COURT OF TENNESSEE, 2001.

Nurse Reported Threat: Suit Dismissed Over Confidentiality.

A college student was receiving mental health treatment at a mental health clinic and at a psychiatric center.

His parents phoned the nurse who ran a parents' group at the psychiatric center and also spoke in group about statements from their son that he might act out violently at the college's graduation ceremony. The nurse reported this to the local mental-health authorities, who relayed the information to the local police. College officials questioned the young man but let him participate in the graduation ceremony and nothing unusual happened.

The patient claimed the nurse released confidential information from his mental health treatment records.

That is not what happened. The patient's parents talked to the nurse, who called the mental-health crisis team to report what the parents told her. The crisis team called the town police, who called the campus police.

There is no issue of medical confidentiality here.

NEW YORK SUPREME COURT, APPELLATE DIVISION, 2001.

The New York Supreme Court, Appellate Division, threw out the lawsuit. The nurse may have had justification to release confidential information, but that did not actually happen. The parents' statements about the patient's statements were not part of the patient's treatment records, so there was no breach of medical confidentiality. **Godinez v. Siena College, 733 N.Y. S.2d 262 (N.Y. App., 2001).**

E.R. Nurse Negligent, Failed To Do EKG.

The jury found the emergency room nurse negligent for failing to do an EKG and for failing to summon the emergency room physician promptly.

The patient had severe angina pain and called 911 believing she was having a heart attack.

When she arrived at the emergency room the triage nurse put her on O_2 and connected a heart monitor and left her alone in an examination room with the curtain drawn.

An EKG machine was close by and not in use, but the nurse did not obtain an EKG strip.

The patient was not seen by a physician until almost an hour after she arrived.

She survived, with irreversible cardiac damage.

SUPREME JUDICIAL COURT
OF MASSACHUSETTS, 2001.

The only question for the Supreme Judicial Court of Massachusetts was who was responsible for the nurse's errors and omissions, the city that owned the hospital and/or a management consulting firm.

The management consulting firm only provided administrative and financial-management support, and the court dismissed it from the case because it did not directly supervise the hospital's clinical staff, particularly the nurse working in the emergency room late at night. **Hohenleitner v. Quorum Health Resources, Inc., 758 N.E. 2d 616 (Mass., 2001).**

Dehiscence: Case Dismissed Against Nurse.

A cancer patient was already debilitated from chemotherapy when he had surgery to remove his colon.

The surgeon erroneously removed the ascending and transverse colons and sutured him up, then realized his error and three days later re-opened him and took out the descending colon.

Post-operatively the nurses noted the wound had re-opened. The patient actually died from a pulmonary embolism traced to the stress of having two surgeries, one being unnecessary. The Superior Court of New Jersey, Appellate Division, let stand the jury's verdict exonerating the perioperative nurse. **Holdsworth v. Galler, 783 A. 2d 25 (N.J. App., 2001).**

When a surgical wound is reopened and re-sutured there is increased risk of dehiscence.

The nurses noted after the second surgery that the wound was opening and bowel was leaking through.

The question was whether the first surgery, which was done negligently and which necessitated the second surgery, which was done correctly in all respects, increased the risk of dehiscence after the second surgery.

The jury could find nothing that the nurse did wrong and she was dismissed from the case.

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION, 2001.

Suctioning: CNA Fired, Did Procedure Against Nursing Home's Rules.

A certified nursing assistant explained that the patient brought back memories of her father who lingered for years with a severe cough.

The CNA tried to suction the patient with a plastic tube from a nebulizer, seriously traumatizing the patient. The CNA had been told that this patient did not need suctioning and, in any event, suctioning was only to be done by a licensed nurse after getting orders from the physician.

The CNA was fired and was reported to the state for patient abuse.

An employee's subjective intentions are not relevant.

This employee knowingly disregarded the nursing home's procedures and disobeyed her supervisor's express orders. Her conduct was clearly adverse to her employer's interests and could have had serious consequences.

This was not mere carelessness, it was willful misconduct justifying termination for cause.

NEW YORK SUPREME COURT,
APPELLATE DIVISION, 2001.

The New York Supreme Court, Appellate Division, sided with the nursing home's director of nursing.

Intentional violation of the employer's policies that are known to the employee or going against direct orders from a supervisor is willful misconduct justifying termination. **Claim of Heintzleman, 732 N.Y.S.2d 490 (N.Y. App., 2001).**

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O.R. Patient Falls From Table: Doctors, Nurses Held Liable.

The New York Supreme Court, Appellate Division, ruled that the surgeon and two operating room nurses were liable, as a matter of law, for a patient falling from the table in the operating room. Ruling as a matter of law meant the court did not look at the circumstances beyond the basic fact the patient fell. They have a strict legal duty to secure an unconscious patient, the court said. **Schallert v. Mercy Hospital of Buffalo, 722 N.Y.S.2d 668 (N.Y. App., 2001).**

Unlicensed Medicine: Nurse Convicted.

A certified registered nurse anesthetist practiced on the side at her own hypnotherapy and pain-management clinic. She was an advanced nurse practitioner and a graduate of a Mexican medical school but was not licensed as a physician anywhere in the US.

Her Yellow Pages ad and office shingle claiming she was "Dr. ...." prompted a detective to go in wearing a wire posing as a patient. The Court of Appeals of Texas upheld her conviction for practicing medicine without a license. **Weyandt v. State, 35 S.W. 3d 144 (Tex. App., 2001).**

Computer Access: Employee Fired.

The New York Supreme Court, Appellate Division, ruled a pharmacist has no business letting a friend come behind the counter to look up a patient's address for personal reasons and can be fired for misconduct for doing so. **Claim of Columbo, 725 N.Y.S.2d 429 (N.Y. App., 2001).**

Broken Wheelchair: Expert Needed.

The Supreme Court of Appeals of West Virginia ruled a patient needed an expert witness to prove in court a certain wheelchair was in need of repair and a medical expert as to the nature and extent of the injuries from falling when the chair broke. **Daniel v. Charleston Area Medical Center, Inc., 544 S.E. 2d 905 (W. Va., 2001).**

Discrimination: Physician Shareholders Are Employees For Purposes Of Civil Rights Laws.

As a general rule Federal civil rights laws in the US which outlaw employment discrimination simply do not apply to employers with fewer than fifteen employees. There must be fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year.

That does not stop state legislatures from making their state anti-discrimination laws applicable to smaller employers, but that varies widely from state to state.

An employee of an outpatient gastroenterology clinic sued for disability discrimination after she was terminated. The Federal District Court threw out the case because the clinic apparently had only twelve employees.

The US Circuit Court of Appeals for the Ninth Circuit agreed with the District Court that the Americans With Disabilities Act and other Federal employment anti-discrimination laws apply only to employers with fifteen or more employees.

An employer must have fifteen or more employees or the US Americans With Disabilities Act and other Federal employment-related anti-discrimination laws do not apply.

Four physician shareholders actively engaged in conducting the business of a health clinic corporation should be considered employees for purposes of the Federal civil rights laws.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, 2001.

However, the statutory definition of an employee is very vague. The Circuit Court concluded that four physician shareholders of the corporation who were actively involved in managing the clinic should be considered employees in this context, even though they might not be seen as employees in other contexts like income tax or worker's compensation. The clinic had more than fifteen employees by the Circuit Court's reckoning. **Wells v. Clackamas Gastroenterology Associates, P.C., 271 F. 3d 903 (9th Cir., 2001).**