LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

February 2009 Volume 17 Number 2

Chemical Sensitivity: Court Finds Support For Nurse's Disability Discrimination Case.

After she was hired but before she started to work at the hospital a registered nurse completed a human-resources intake form revealing that she was allergic to amylcinnamaldehyde, a chemical found in some perfumes and household cleaning products.

She did not, however, obtain and turn in a letter from her physician corroborating that she had the condition or explaining its seriousness.

After suffering through four separate allergic reactions on the job she was able to trace the source to a detergent occasionally used to wash linens.

Doing the laundry was not her job but the nurse at times did have to go to the laundry room to wash items she needed right away like slings, compression hose and lifts. It made no difference which detergent she used; if the noxious chemical was anywhere in the laundry room it set off her allergy.

She finally got a letter from her physician and asked the hospital to change to another detergent and to remove this one from the laundry room.

The hospital declined her requested accommodation. She was terminated at the end of her new-hire probationary period.

She filed suit against the hospital for disability discrimination.

Unless her employer is willing to accommodate her chemical sensitivity this nurse cannot work as a nurse or, for that matter, in any other job.

Her allergy is a significant impairment of a major life activity, that is, it is a disability as disability is defined for purposes of the US Americans With Disabilities Act (ADA).

UNITED STATES DISTRICT COURT
VIRGINIA
December 29, 2008

The US District Court for the Eastern District of Virginia found grounds for a disability-discrimination lawsuit.

Her condition was a disability as contemplated by the Americans With Disabilities Act (ADA) because she was flatly unable to work anywhere at all without risking major respiratory problems unless her employer accommodated her sensitivity to the particular chemical.

Disabled, But Able To Work With Reasonable Accommodation

After she left the hospital her subsequent hospital employers were willing to do as she asked. They removed products containing the substance or strictly limited it to areas she did not have to access. She was then able to work without any problem.

In the legal analysis that proved the nurse was a qualified individual with a disability. A qualified individual with a disability is able to work despite the disability, with or without reasonable accommodation, and is fully protected by the ADA.

She could not work without reasonable accommodation from her employer, reasonable accommodation being changing to a different cleaning product and keeping the noxious product completely out of her work area. But with reasonable accommodation she could work effectively. **Bridges v. Reinhard, 2008 WL 5412843 (E.D. Va., December 29, 2009).**

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Morphine Toxicity: Elderly Patient Died From Overdose, Not From Underlying Illnesses.

After the elderly patient's passing the family filed a wrongful-death lawsuit against the physician, five LPN's who cared for him during his last days in the nursing facility and the facility itself.

The patient had multiple problems including diabetes, coronary artery disease and Parkinson's.

When he fell and broke his hip the doctors decided he was not a candidate for surgical repair. He was transferred from the hospital to the nursing facility ostensibly for non-surgical rehab. His health began to decline rapidly and he soon died.

On admission to the nursing facility he was alert and oriented. He was considered a full-code patient because he never signed paperwork indicating another preference.

As his health status declined, his wife, whom he had earlier named in a durable power of attorney, also without dealing squarely with the code vs. no-code issue, refused to allow him to be sent back to the hospital to undergo additional medical procedures and consented to p.o. morphine for pain management.

Court Sees Evidence Of Professional Malpractice

The court expressly ruled out any intentional action taken by the caregivers to hasten the inevitable result. It was therefore a non-issue whether the wife did not did not exercise her authority under the durable power of attorney to consent to an "angel of death" scenario.

Instead, the court saw it as a case of straightforward professional malpractice by the physician and nurses who cared for the patient in his final days.

The patient was certainly close to the end when he was sent to the nursing facility with no realistic hope that any further medical intervention could or would cure him. However, even in his perilous state the law can still recognize him as a victim of malpractice if an overdose of medication was the cause of his death, the court ruled. **May v. Mercy Memorial, 2009 WL 131699 (Mich. App., January 20, 2009).**

The family's medical expert testified that two blood samples taken five days after death had morphine concentrations five times the accepted therapeutic level.

True, post-mortem redistribution and pooling of blood in the corpse can skew a toxicology reading, and it was not known how or where on the body the blood was drawn.

Yet microscope slides prepared from samples of heart, lung, kidney and liver tissue taken during the autopsy reveal only long-term changes, i.e., mild emphysema in the lungs and mild arteriosclerosis in the kidneys.

It certainly possible to question the exactness of the morphine toxicology results.

The bottom line, however, is there is no solid evidence to explain why this patient died how and when he did other than morphine intoxication from negligent overadministration of morphine by his caregivers in his last days.

There is no evidence of an intentional act by an "angel of death."

COURT OF APPEALS OF MICHIGAN
January 20, 2009

O.R.: Infection Had To Have Been Caused By Break In Sterile Technique.

After an earlier diskectomy the patient had to undergo an extensive cervical fusion surgery due to an infection which her physicians determined originated in the C4-C5 intervertebral space.

The MRI established that the patient's post-operative infection originated at C4-C5.

The only possible explanation is that a needle inserted during the procedure as a marker at C4-C5 was contaminated.

NEW YORK SUPREME COURT
APPELLATE DIVISION
January 20, 2009

The New York Supreme Court, Appellate Division, accepted medical testimony that the only possible cause for the infection was that a contaminated needle was used as a marker at that location.

Patient Does Not Have To Prove How It Happened

The court went over the testimony of hospital personnel how non-sterile packaging is opened by the circulating nurse who delivers the instrument to the sterile scrub nurse who opens the sterile packaging inside and places the instrument on the sterile table for use by the surgeon.

There was nothing in that testimony even suggesting how this needle could have become contaminated.

However, the crucial point of evidence was expert medical testimony that there was no other explanation beside contamination to account for the result. **Antoniato v. Long Island Jewish Med. Ctr., __ N.Y.S. 2d __, 2009 WL 146581 (N.Y. App., January 20, 2009).**

Retaliatory Discharge: Nurse Practitioner Not Protected As Whistleblower, Court Says.

A nurse practitioner signed on as the employee of a staffing agency. The staffing agency placed her in a long-term full-time position in the emergency room at a local hospital.

Eventually hospital management, weary of conflicting with the nurse practitioner, exercised its rights under its contract with the staffing agency by asking that she no longer be scheduled at the hospital. The agency complied and promptly terminated the nurse practitioner

The nurse practitioner turned around and sued the hospital and the staffing agency for retaliatory discharge.

Disagreement With Institutional Policies No Protection As Whistleblower

The crux of the matter was this: the hospital reportedly instituted a policy that nurse practitioners in the emergency department were not to contact the patients' own physicians but were to refer such contacts to the emergency room physician so that the emergency room physician could make such contacts.

The nurse practitioner objected on the grounds that the policy created potential danger to her patients stemming from the time delay needed for the emergency room physician to get around to it.

The nurse practitioner asserted in her lawsuit that she was fired because she refused to remain silent about an illegal and ill-advised policy at the facility where she was placed and called the matter to the attention of facility management.

However, to claim protection as a whistleblower and to sue for wrongful discharge there must be evidence to back up such an assertion.

The nurse practitioner offered the court no proof the facility's policy was illegal or that it violated an established public policy.

A dispute between an employee and the employer over workplace policies and procedures is not enough to sue for retaliatory discharge.

COURT OF APPEALS OF TENNESSEE
January 14, 2009

The problem, from the standpoint of assessing the situation as the basis for an employment-law case, was that the nurse practitioner could point to no state or Federal statute or regulation, accreditation standard, etc., that forbade the hospital's policy, as the court pointed out.

As a general rule, an employee qualifies as a whistleblower and, if retaliated against, can sue for wrongful discharge, only if the crux of the matter is clear-cut illegality committed by the employer.

Mere differences of opinion on matters of policy and procedure between an employee and employer, the courts have repeatedly said, do not qualify the employee as a whistleblower, no matter how badly the difference of opinion turns out.

Employees may have rights under employment contracts or collective bargaining agreements, but the whistleblower laws themselves do not give any particular right to champion mere differences of opinion.

Further, an employee anticipating he or she might some day need legal protection as a whistleblower should expect to have to provide documentation proving that illegal activity was reported to specific persons up the institutional chain of command and to governmental regulatory authorities, with express references to the policies, procedures or conduct in question and citations to the laws, regulations, published standards, etc., allegedly being violated. **Gager v. River Park Hosp., 2009 WL 112544 (Tenn. App., January 14, 2009).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession
ISSN 1085-4924

Indexed in
Cumulative Index to Nursing & Allied Health Literature™

Published monthly, twelve times per year.
Mailed First Class Mail at Seattle, WA.

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Fragrance Allergy: Court Approves Worker's Comp Claim.

The sixty-four year-old LPN already had significant COPD from four decades of cigarette smoking before she came to work part time in the nursing home.

On one particular day one of the aides sprayed some perfume in the air. The LPN started to have significant breathing problems just as she first smelled the perfume. She had to sit down for the last four hours of her shift and could barely make it out to her car at quitting time.

The next morning she had to be taken to an acute care hospital for respiratory problems. She was transferred to rehab for two weeks, then sent home.

She has been oxygen-dependent and unable to work since the incident.

A medical condition is covered as an occupational disease under worker's compensation only if it arises out of employment.

Exposure to fragrances can occur on and off the job, but in this case it happened on the job.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
January 9, 2009

The Superior Court of New Jersey, Appellate Division, had to agree with the employer that an adverse reaction to fragrance exposure is not the typical industrial injury seen in worker's comp cases and that it can occur just as likely off the job as on.

However, in this case a major exacerbation of preexisting COPD did occur on the job and did render a formerly able person completely unable to work. **Sexton v. Cumberland Manor, __ A. 2d __, 2009 WL 63050 (N.J. App., January 9, 2009).**

Discrimination: Employer Took Prompt Action, Lawsuit Dismissed.

The African-American director of nursing at a rehab facility claimed he was subjected to racial harassment from the facility's director of quality management.

In three of twelve highly charged personal confrontations the alleged perpetrator used racial epithets in speaking to him.

When the director of nursing handed in a written complaint about the incidents the facility's director of human resources immediately assigned an investigator who was told to look into the situation and help the parties resolve their differences.

However, the director of nursing quit abruptly one week later without responding to an e mail informing him what management was doing about his complaint.

A supervisor's intervention into an employee conflict adds up to the prompt and effective remedial action that is required by the US Civil Rights Act.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
January 7, 2009

The US Court of Appeals for the Fifth Circuit ruled that the facility was not liable for racial discrimination.

The facility fulfilled its legal duty to take prompt and effective remedial action as soon as the facility became aware of the problem through the director of nursing's written complaint.

Further, an alleged victim of discrimination is required to take advantage of all reasonable corrective opportunities that are offered by his or her employer, at least to remain eligible to file a discrimination lawsuit against the employer. **Cavalier v. Clearlake Rehab Hosp., 2009 WL 33639 (5th Cir., January 7, 2009).**

Harassment, Patients vs. Caregiver: Housekeeper Is Awarded Damages.

A female housekeeper was subjected to repeated on-the-job sexual harassment by the nursing home's male patients.

Repeated Complaints
No Effective Response

The housekeeper complained again and again after each incident occurred. A male social worker who was told to go with her when she went into one particular room stopped doing so. A resident who was supposed to get counseling did not.

She was told to clock out and do home another time that she complained.

Finally, after she went over her supervisor's head to the administrator, filed a grievance with her union and called in the local police, she was told it would be best if she and the facility parted company.

The aide's lawsuit accused the nursing home of sexual harassment. The judge dismissed that aspect of the aide's lawsuit.

However, the jury awarded damages of $65,000 for retaliation because management forced her to quit to silence her complaints.

UNITED STATES DISTRICT COURT
ILLINOIS
September 3, 2008

The jury in the US District Court for the Northern District of Illinois awarded her $15,000 for lost wages and $50,000 punitive damages because her employer retaliated against her for her complaints. **Pickett v. Sheridan Health Care Ctr., 2008 WL 5517666 (N.D. Ill., September 3, 2008).**

Post-Surgical Care: Anoxic Brain Injury Tied To Nursing Negligence.

The seventy-one year-old patient's physicians started plasmapheresis several days before abdominal surgery.

Afterward, in the PACU, he desaturated to 40% and had to be re-intubated and taken to the ICU. Two days later he was extubated and ordered transferred from the ICU to a med/surg floor.

Before he was moved, however, his O_2 sat dropped to 87%, but no one reported it to the physician and he was moved anyway. While in transfer he was getting packed red cells. On arrival on the med/surg floor no vital signs were taken.

He was found basically lifeless fifteen minutes later. A code was called and he was resuscitated. Now he is in a nursing facility with a G-tube and respirator.

The jury heard expert testimony that the hospital's nursing staff was negligent for not communicating the drop in the patient's O_2 saturation to the physician before he was transferred from the ICU and for not monitoring his vital signs during and right after transfer to a med/surg floor.

SUPERIOR COURT, RIVERSIDE COUNTY
CALIFORNIA
July 17, 2008

The $2,400,000 settlement of the family's lawsuit filed in the Superior Court, Riverside County, California was reported on condition the names of the parties be kept confidential. **Confidential v. Confidential, 2008 WL 5459880 (Sup. Ct. Riverside County, California, July 17, 2008).**

Cauda Equina Syndrome: Nurse Faulted For Patient's Paralysis.

The patient was admitted to the hospital for observation and treatment with epidural steroid injections after coming to the emergency room with lower back pain, tingling in his legs and trouble urinating.

Nurse Did Neuro Checks Did Not Report Abnormal Findings

The pm shift nurse reportedly did the q 4 hour neuro checks that were ordered by the neurologist at 4:50 pm and 8:30 pm but did not communicate her findings.

The jury assigned 60% of the blame to the nurse for the fact that surgery was delayed too long to relieve nerve compression effectively in the patient's lower back.

A neurosurgeon, his physician's assistant and a physician hospitalist were held responsible for the balance, basically for failing to communicate effectively with each other about what was going on.

Pages to Physician Not Charted

A separate issue that came up in the case was a claim by the hospitalist physician that he told the nurse to page the neurologist and his PA at 7:00 pm that evening.

An electronic reconstruction showed that two pages were made to the neurologist at intervals that evening from a hospital phone in the hallway near this patient's room.

However, the neurologist had other patients on the unit and they were being cared for by other nurses. There was no charting to substantiate that the pages were made by the nurse in question or concerning the patient in question. The electronic records were useless in the nurse's defense of the lawsuit without documentation in the chart.

An odd legal wrinkle was that the patient did not actually sue the hospital or the nurse. Thus 60% of the awarded damages were not collectible. **Skrzypchak v. Jensen, 2009 WL 130130 (Wis. App., January 21, 2009).**

Trache Care: Nurse Fell Asleep, Settlement Paid For Child's Death.

A lawsuit filed in the Circuit Court, Winnebago County, Illinois contained a long list of alleged errors and omissions by the home health nurse, her agency and its CEO and medical social worker.

The nurse was accused of accepting an assignment she knew she was not trained to handle, misrepresenting her qualifications, not having got sufficient sleep beforehand and taking medications that can cause drowsiness.

The agency and its principals were accused of negligently hiring a nurse who had no training with the particular vent equipment in use, failing to train her and neglecting to insure that the nurse they assigned was certified in pediatric advanced life support for the possibility of an emergency requiring resuscitation.

Reportedly the patient's tracheostomy cannula came out while the nurse was asleep and when she awoke she was not able to re-establish an airway and resuscitate the child. The parents settled the lawsuit for $2,000,000. **Zagal v. Independence Plus, 2008 WL 5517424 (Cir. Ct. Winnegabo Co., Illinois, April 8, 2008).**

Belligerent Family Member: Jury Nixes Damages.

The son adamantly disagreed with the hospital's decision to discharge his eighty year-old father. He became abusive and belligerent with the nurse and refused to leave the beside unless an administrator would speak with him.

Three security guards with a Rottweiler guard dog escorted the son out without harming or even touching him.

The jury in the Circuit Court, Oakland County, Michigan awarded him nothing. **Copland v. William Beaumont Hosp., 2008 WL 5459473 Cir. Ct. Oakland Co., Michigan, September 3, 2008).**

Fetal Remains: Court Upholds Parents' Right To Sue Hospital.

The five-months pregnant patient was admitted through the E.R. with premature labor contractions.

The next day her male fetus was pronounced dead shortly after spontaneous delivery. The physician charted that the mother reported a heartbeat for the a brief interval she was allowed to hold the fetus.

The physician and the labor and delivery nurse declined to testify in court that there was a heartbeat. The judge in the US District Court for the District of Hawaii stated for the record, nevertheless, that no resuscitation was or should have been attempted because a fetus at twenty weeks, even with a heartbeat or apparent respiratory effort, is not viable outside the womb.

Birth Certificate
Loss of Fetal Remains

It took more than five months for the parents to get a birth certificate. Hospital risk management insisted the event be classified as a stillbirth, for which no birth certificate could be issued, rather than the death of an infant born alive, for which a birth certificate was appropriate. Eventually the hospital patient advocate prevailed. The data was sent to the State and a birth certificate was issued for a son Gregory.

The court expressly declined to fault the hospital over the birth certificate issue.

However, once the parents got the birth certificate they asked a funeral home to access the remains from the hospital morgue for a Catholic funeral mass and burial, but the remains were gone and their disappearance could not be accounted for. The best anyone could figure was that the remains were dissected and thrown out.

The court expressly ruled that the parents do have the right to sue for loss of the remains and entered judgment on their behalf against the hospital on this issue.

The court at this point has reserved judgment on the amount of compensation, noting that the mother is still suffering from depression and anxiety attacks for which she is currently seeing a therapist and taking anti-depressant medication. **Ritchie v. Wahiawa General Hosp., 2009 WL 127770 (D. Hawaii, January 20, 2009).**

Hospital personnel knew or should have known the remains were in storage pending resolution of the question whether a birth certificate was to be issued.

The parents have sufficient evidence that the hospital's negligence is the only possible explanation for the loss of the remains.

It could only have been the carelessness of some unidentified hospital employee at some unknown point in time between the last time anyone remembered seeing the remains and when the mortuary came to get them.

The remains could only have been disposed of by someone with access to the morgue but with no authorization to remove them.

It is true that the hospital's overall policies and procedures for operation of the morgue do meet the legal standard of care.

That argument fails, however, as a defense to this lawsuit because the hospital's policies and procedures were not followed. That is, there is no plausible explanation for what happened other than a violation of the hospital's policies and procedures.

UNITED STATES DISTRICT COURT
HAWAII
January 20, 2009

Bi-Level Positive Airway Pressure: Nurses Did Not Follow Orders, Faulted For Patient's Death.

The patient was admitted to the hospital for respiratory failure. He was started on and then weaned from a ventilator.

The patient had high blood pressure and a history of sleep apnea. The physician ordered the patient be placed on bi-level positive airway pressure (BIPAP) at night and any time he took a nap.

The chart revealed that the physician's order was transcribed by one of the patient's nurses.

The patient died during the night with the BIPAP equipment not in use. It was not known whether he was asleep at the time.

The hospital paid a settlement to the estate for the nurses' negligence. A jury in the Circuit Court, Hillsborough County, Florida ruled the physician was not at fault. **Garcia v. Sokol, 2008 WL 5521427 (Cir. Ct. Hillsborough Co., Florida, December 5, 2008).**

Transfusion: Air Injected Into Line, Large Verdict.

The jury in the Circuit Court, Walworth County, Wisconsin returned a $27,000,000 verdict for a newborn diagnosed with profound brain damage after a nurse injected air into an IV line to clear blood remaining in the line after a transfusion in the neonatal intensive care unit.

The infant was delivered prematurely by c-section because of the mother's pregnancy-induced hypertension, which the jurors apparently discounted as causative factors in reaching their verdict. **Bartowitz v. Waukesha Mem. Hosp., 2008 WL 5505170 (Cir. Ct. Walworth Co., Wisconsin, May 23, 2008).**

Emergency Medicine: Court Rules On Scope Of Practice For Nurse Practitioners.

The patient was still having pain in his left forearm and hand three hours after chopping wood in his back yard.

His wife wanted a doctor to look at it, but they did not have a family physician, so they went to the E.R., after stopping at some friends' house on the way to drop off some food the wife had cooked for them.

As soon as he got to the hospital a paramedic took his vital signs: BP 130/78, pulse 100, respirations 20.

A nurse practitioner examined him. She noted no pain or tenderness in the arm above the elbow, no shortness of breath and no pain in his shoulder, jaw or chest.

Nurse Practitioner
Consulted E.R. Physician

The nurse practitioner consulted with the E.R. physician but did not have the physician examine the patient. They concurred it was just minor musculoskeletal pain from overexertion and sent him home.

At home he collapsed and died three hours later from a heart attack. The widow sued the hospital for negligence.

Hospital Policy Upheld
Nurse Practitioners
To Consult With E.R. Physician

To maximize their utilization in the E.R. the hospital had changed its policies regarding nurse practitioners.

Formerly they assessed and triaged patients but each and every patient was seen by the emergency physician.

Now E.R. nurse practitioners see and treat patients, consult with the emergency physician and, in collaboration with the physician decide which patients need to be seen by the physician or another physician and which can just be sent home.

The Court of Appeals of Tennessee ruled there was nothing per se wrong with the new policy for utilization of nurse practitioners. **Barkes v. River Park Hosp., 2008 WL 5423981 (Tenn. App., December 29, 2008).**

Missing Incident Report: Jury Returns $9,000,000+ Verdict After Judge Instructs The Jury On Spoliation Of The Evidence.

The judge did not err instructing the jury:

"If you find from the evidence -

- that an incident report was prepared by [the nurse] recording material information about [the patient's] surgery,

- and if you further find from the evidence that [the hospital] intentionally and in bad faith lost or destroyed the incident report,

- you may, but are not required to -

- infer that the information recorded in the incident report would be, if available, adverse to [the hospital] and favorable to [the patient]."

COURT OF APPEALS OF KENTUCKY
January 16, 2009

The patient arrested in the operating room. She was revived and sent to the ICU where it was discovered she had sustained irreversible hypoxic brain damage.

Life support was later withdrawn and she expired.

The patient's arrest occurred while surgical personnel were caught up in a difficult, frantic and ultimately unsuccessful effort to locate, obtain, type, cross-match and administer blood transfusions to restore her hematocrit.

A nurse testified she wrote up a detailed incident report chronicling the whole episode and dropped it in the bin on the desk in the surgical department. However, the hospital could not or would not produce the incident report at the trial.

The Court of Appeals of Kentucky ruled that the factual data in the nurse's incident report would not be off limits in the lawsuit and it was not inappropriate to allow the jury to reason that those facts, if they could have been unearthed, would implicate the hospital for negligence. **University Med. Ctr. v. Beglin, 2009 WL 102800 (Ky. App., January 16, 2009).**

Groshong Catheter: Patient's Death Tied To Substandard Care.

The patient was discharged home from the hospital with a Groshong catheter in place for IV administration of antibiotics and arrangements for care by a home health nurse.

The nurse who usually came to see the patient used her scissors one day in changing the dressing at the catheter site. She apparently cut the tubing but left the home without realizing anything was wrong, until the patient's wife phoned the agency to get her back later that afternoon.

When the nurse returned a neighbor watched, and would later testify, that she pulled and tugged on the catheter, taped over the cut in the tubing and tried to flush the clotted blood from it with air.

The patient's condition deteriorated rapidly and he had to be taken to the hospital. The catheter was found dislodged from the right atrium of the heart and lodged somewhere under the clavicle. The patient died the next day. **Mary Breckinridge Healthcare v. Eldridge, __ S.W. 3d __, 2008 WL 5428213 (Ky. App., December 31, 2008).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Employee Business Expenses: Tax Court Looks At The Deductions Claimed On Nurse's Federal Income Tax Return.

The United States Tax Court recently had occasion to review certain deductions a nurse claimed on her 2003 income tax return. The court allowed some of the deductions and disallowed others.

Employee Business Expenses Are Deductible Documentation Is Essential

The total of employee business expenses for the year is deductible under current Internal Revenue Service regulations as an itemized deduction only to the extent the total exceeds 2% of the employee's adjusted gross income.

A nurse is allowed to include in the total the cost of obtaining and maintaining nursing uniforms. Clothing worn while at work is not tax deductible if, unlike a professional uniform, it is regular street attire that some people happen to wear while they are working.

Travel, meals, lodging and attendance fees for continuing nursing education events can be added into the total deduction, along with nursing association memberships, nursing journal subscriptions, state licensing fees, national accreditation fees and union dues.

Travel costs associated with job searches and job interviews are also deductible.

Each element of the total employee business expense deduction must be claimed as an exact dollar and cents figure. The IRS will not accept an estimate for any employee business expense, even if the estimate is realistic or less than the actual amount that could be tallied exactly from actual invoices or receipts. Each cost item must be listed exactly and must be based on actual documentation or it may not be added into the total that will be claimed.

The only exception comes when business expense records existed at one time but were lost or destroyed due to factors beyond the taxpayer's control, in which case an estimate is acceptable. **DeVito v. Commissioner, 2009 WL 36536 (U.S. Tax Ct., January 7, 2009).**

Pregnancy Discrimination: All Employees Must Be Treated Equally Re Light-Duty Work Restrictions.

The US District Court for the Northern District of Mississippi refused to grant the employer's motion to dismiss a CNA's pregnancy discrimination lawsuit due to the fact critical disputed evidence was still unresolved.

The CNA had a note from her physician restricting her to light-duty patient care assignments.

Her supervisor told her the nursing home only honored employees' physicians' restrictions to light duty for medical conditions that resulted from on-the-job injuries.

Unable to work with her medical restriction, she took time off, her right under the US Family and Medical Leave Act, but was terminated when she could not return to full unrestricted duty after twelve weeks.

The US Pregnancy Discrimination Act requires employers to treat pregnant employees the same as other employees for all purposes related to employment.

An employer is not required to provide light duty to a pregnant direct-care worker.

An employer is allowed to reserve light-duty assignments only for employees with on-the-job injuries.

UNITED STATES DISTRICT COURT
MISSISSIPPI
January 13, 2009

The court stated in general terms that an employer does not commit discrimination if all employees, pregnant or not, are treated the same by a policy which reserves light duty only for those, pregnant or not, who have medical restrictions from on-the-job injuries.

The CNA was forced to admit in a pretrial deposition that five other pregnant CNA co-workers who got light duty did, in fact, have medical restrictions from on-the-job injuries.

The CNA claimed, however, that one CNA co-worker got light duty only because she was pregnant. That fact alone would prove the CNA's case if true, but a supervisor denied it. A jury must decide whom to believe before the court can rule. **Long v. Rest Haven, 2009 WL 94504 (N.D. Miss., January 13, 2009).**