

# LEGAL EAGLE EYE NEWSLETTER

May 2003

*For the Nursing Profession*

Volume 11 Number 5

## Lifting Restriction: Court Turns Down Nurse's Disability Discrimination Claim.

A staff nurse was injured while working in the hospital's cardiac care unit when a patient grabbed on to the nurse's left shoulder in the process of sitting up in bed.

The nurse applied for and received worker's compensation time-loss and medical payments benefits and was approved for two extended periods of medical leave according to the Family and Medical Leave Act (FMLA).

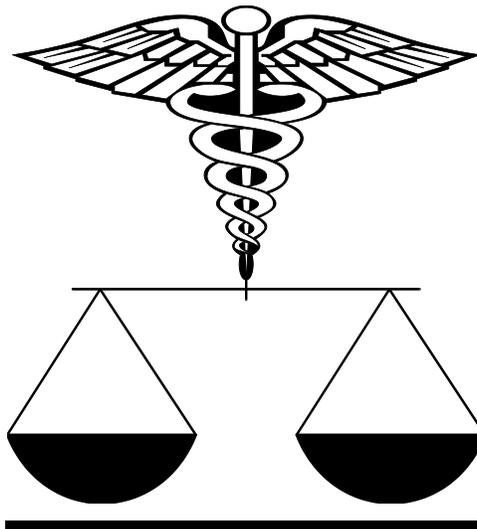
A controversy arose when the nurse felt he was ready and wanted to return to work.

His physician certified him as fit to return to duty, with a medical restriction against lifting more than forty pounds. Human resources told him he had to be 100% fit for duty and able to perform CPR.

### Accommodation Requested

After speaking with a representative of the US Equal Employment Opportunity Commission (EEOC) the nurse wrote a letter asking for what he believed was a reasonable accommodation so he could return to work.

Pointing to the Americans With Disabilities Act (ADA) the nurse officially requested an accommodation from the hospital in the form of a nursing position that did not involve lifting more than forty pounds.



***The nurse's medical restriction that he cannot lift more than forty pounds is not a disability under the Americans With Disabilities Act.***

***In order to be substantially limited in the ability to work for a living an individual must be unable to perform a broad class of jobs, not simply a single job or type of job.***

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
April 3, 2003

### Job Description Revised To Meet JCAHO Recommendation

Human resources told the nurse the hospital had just recently revised the generic job description for staff nurses to require all staff nurses to be able to lift at least fifty pounds, in line with a recommendation to the hospital from the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) that specific quantitative benchmarks be implemented for nurses' clinical competency.

In February 1999 the nurse finally resigned. He sued for disability discrimination, citing the hospital's alleged refusal to provide reasonable accommodation to his disability.

### Court Turns Down Nurse's Disability Discrimination Claim

Nurses with medical restrictions against lifting who are not given light-duty positions do not have the right to sue their employers for disability discrimination, as a general rule.

The US District Court for the Southern District of New York went through the series of steps the courts use in the legal analysis of these cases.

The threshold issue is always whether the employee has a disability as disability is defined by the ADA.

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# Lifting Restriction: Court Turns Down Nurse's Disability Discrimination Claim.

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## Disability Defined By

### Americans With Disabilities Act

The ADA defines a disability as a physical or mental impairment that substantially limits one more of the major life activities of the individual. An employee can also be considered disabled for purposes of disability discrimination law if the employee is regarded by the employer as having such an impairment, even if the employee in fact has no such impairment.

### Impairment Must Substantially

#### Limit a Major Life Activity – Lifting

For an impairment to be substantially limiting it must significantly restrict the individual in comparison with an average person in the general population in terms of how well the individual can perform a major life activity.

In this case, according to the court, the nurse's lifting restriction did not come under the definition of a disability under the ADA because the inability to lift over forty pounds is not a substantial limitation. Since the average person in the general population may not be able to lift forty pounds or more, the nurse's lifting ability was not substantially restricted in relation to that of most people, the court said.

### Working as a Major Life Activity

Looking at it from a different angle, in order to be substantially limited in the ability to work, an individual must be unable to perform a broad class of jobs, not simply a single job or a single type of job.

Since many jobs in the general economy do not require lifting over forty pounds, a person who cannot lift more than forty pounds is not substantially limited in his ability to work, the court ruled.

### Employer's Perception of Employee As Disabled

According to the court, the hospital did not consider the nurse to have a substantial limitation of his ability to work.

First, the hospital's own medical examiner considered him only "mildly" disabled by his restrictions, not completely disabled from working altogether.

***Employers must exercise extreme caution when dealing with disability discrimination issues.***

***An employee's right to sue for retaliation is not affected by the fact the employee does not actually have a disability as the law defines a disability.***

***An employee who asks for reasonable accommodation or who complains about discrimination is protected from employer retaliation, assuming the employee has a good-faith belief that the employer's conduct is unlawful.***

***To sue for retaliation an employee must show that he or she engaged in an activity protected by the ADA, like requesting something the employee believes is his or her legitimate legal right, and that the employer then took adverse action.***

***The employer then has to convince the court there was a legitimate, non-retaliatory reason behind the action taken.***

***The employee then can try to discount the employer's reason as merely a pretext for discrimination or retaliation.***

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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Second, the hospital went along with the nurse being placed under surveillance by a private security firm while he was out on worker's comp, suspecting he was actually working somewhere else as a nurse while drawing time-loss payments.

Third and most important, human resources offered the nurse the option of looking at non-nursing positions without the fifty-pound lifting requirement for staff nurses. Had the hospital considered him significantly limited, the court reasoned, the hospital would not have done this.

When an employee makes an allegation, like saying his employer perceives him as disabled, the employee has to prove the allegation. The employee has to come up with facts to back it up. The employer does not have to disprove something that the law says is the employee's burden of proof, the court noted in passing.

### Retaliation Is A Separate Issue

The hospital put in its explicit fifty-pound lifting requirement for staff nurses while this nurse was still in the process of trying to get light-duty as a reasonable accommodation, having been advised by the EEOC that light duty was his right.

The court ruled the hospital's doing this gave the nurse a *prima facie* right to sue the hospital for retaliation, whether or not his underlying disability discrimination case was valid.

When the employee has a *prima facie* case of retaliation apart from the underlying discrimination case, the employer has the burden of proof to show a legitimate, non-retaliatory reason behind its action.

In the final analysis the court accepted the hospital's desire to go along with JCAHO as a non-retaliatory motive for putting in the new lifting requirement.

The court said it made a close call when it threw out the nurse's *prima facie* case of retaliation. The hospital did not ever test other staff nurses for how much they could lift and did accommodate pregnant nurses who had medical lifting restrictions. ***Taylor v. Lenox Hill Hospital*, 2003 WL 1787118 (S.D.N.Y., April 3, 2003).**