LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

May 2012 Volume 20 Number 5

Respite Care: Nursing Assessment Faulted, Verdict Upheld For Fractured Hip From Fall.

The couple contacted the nursing facility to make arrangements for one week's respite care for the husband's father while they went on vacation. The seventy-nine year-old gentleman had been living with them in their home for almost two years.

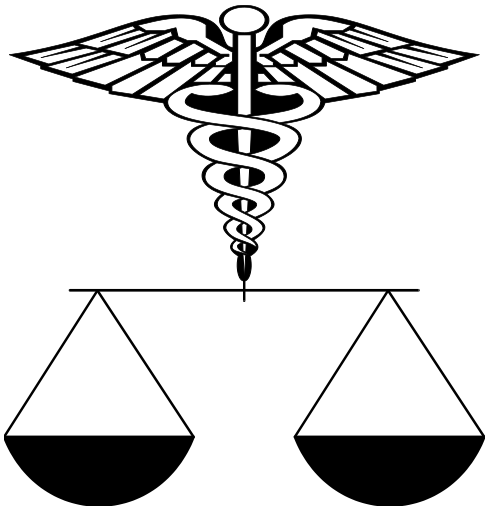
A marketing representative went to visit the prospective resident in the son's home and filled out a level-of-care form.

The data entered on the form indicated the man would need full staff assistance with bathing and dressing and changing the adult diapers wore for incontinence. He also required standby assistance or supervision with transfers.

Assessment Data Not Communicated To Nursing Staff

The marketing representative testified in court he believed he did not communicate with the director of nursing about this resident's care needs and he was not sure what happened to the level-of-care form he filled out during the home visit.

The director of nursing testified the practice at the facility was to put the marketing representative's level-of-care form in the resident's financial file, not in the medical chart, as it was considered part of the process of pricing the daily cost of his stay rather than assessing his care needs.



Neglect is the failure to provide adequate medical or personal care which results in injury to a resident or in the deterioration of a resident's physical or mental condition.

The facility's policy was to require a nursing admission checklist within 24 hours, the first item being checking and orienting the resident to use of the call light.

APPELLATE COURT OF ILLINOIS
April 11, 2012

The Appellate Court of Illinois approved the jury's verdict for the patient against the nursing facility.

No Nursing Assessment on Admission

The nurse on duty the afternoon shift when he came in testified that she never saw the level-of-care form. She just assumed the resident was independent with mobility and transfers.

The nurse working that same night testified that at 11:00 p.m., one hour into her shift, the resident was still lying on top of the covers on his bed, continuing as he had during the afternoon shift to refuse even to remove his coat.

At 12:25 a.m. night nurse found the resident on the floor, still fully dressed and wearing his coat. He said he hurt his hip. The night nurse checked his call light and found it was not working.

The son and daughter testified his short-term memory had been completely gone and they had been afraid to leave him alone in the home even briefly for fear he would hurt himself or accidentally start the house on fire.

The nursing home's physician testified that an abrupt change to an unfamiliar living environment can acutely exacerbate problems with orientation and judgment in a person already suffering from dementia. **Graves v. Rosewood Care Ctr., __ N.E. 2d __, 2012 WL 1112232 (Ill. App., April 11, 2012).**

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Arbitration: Patient's Mental Competency Proven By Nursing Assessment Data.

After the resident died the family sued the nursing home for negligence.

The lawsuit alleged the nursing home's nurses failed to monitor the diabetic patient's glucose levels and allowed him to fall into an irreversible hypoglycemic coma from which he died.

The nursing home's lawyers' first line of defense was to insist the lawsuit be transferred off the civil court jury trial docket to be heard by an arbitrator, according to the alternative dispute resolution agreement signed by the patient at the time of his admission to the nursing home.

Nursing Assessment Data Critical to Court's Ruling

The US District Court for the Southern District of Mississippi looked to the nursing assessment data recorded at the time of admission, concluded the patient did not lack the mental capacity to sign a valid contract and ordered the case into arbitration as the nursing home wanted.

The sixty-seven year-old patient was discharged to the nursing home after a ten-day hospital stay for septicemia. His medical diagnoses in the hospital included rheumatoid arthritis, hyperpotassemia, failure to thrive, dehydration, sacral decubitus, scrotal edema, anemia, coronary artery disease, uncontrolled Type II diabetes and altered mental status.

The LPN who admitted him to the nursing home found him oriented to time, place and person. He responded when called by name, was able to make himself understood and verbalized an understanding why he was in the nursing home.

A week into his stay his long-time personal physician noted he was fully oriented, could communicate and understand others and did not have Alzheimer's or any other cognitive impairment indicating a need for further testing.

The physician later testified equivocally that he had doubts whether the patient had the capacity to sign a legal contract, but the Court was nevertheless satisfied that the nursing assessment data positively answered that question in the affirmative. **Dillard v. Covenant Health, 2012 WL 1067910 (S.D. Miss., March 29, 2012).**

The patient required considerable assistance with all his physical activities of daily living such as bathing, eating, toileting, dressing and mobility.

However, despite his serious health issues, the nursing documentation in the chart showed that his mental faculties were intact.

He was alert and oriented the day he was admitted and signed the arbitration agreement.

Earlier that day he was able to participate in a meaningful discussion at the hospital with his family and his caregivers on the issue of going to a nursing home. Although he voiced considerable resistance he did understand the reason for going and eventually did express his reluctant agreement.

He would not necessarily be able to comprehend the arbitration agreement if it was simply handed to him for signature, but he was able to understand the explanation given to him by the facility administrator and was able to ask questions for clarification of how the agreement would affect his legal rights.

UNITED STATES DISTRICT COURT
MISSISSIPPI
March 29, 2012

Marriage: Patient's Mental Capacity Proven By Nursing Notes.

The fifty year-old patient had end-stage tongue cancer that had spread to her lymph nodes.

Ten days before she died she and her long-time boyfriend were married in the hospital. One of the witnesses for the wedding was a hospital nurse.

The next day an attorney came to the hospital so that the patient could sign a durable power of attorney naming her mother as her surrogate decision-maker.

After the patient died her family filed a lawsuit to have her marriage annulled, presumably so that they rather than the husband would inherit her property.

A wedding ceremony is presumed to create a valid marriage relationship.

A marriage can be annulled, that is, ruled never to have existed at all, if either party lacked the mental capacity to enter into a valid contract at the time of the wedding ceremony.

COURT OF APPEALS OF MICHIGAN
April 17, 2012

The Court of Appeals of Michigan looked at the nursing notes for the evening of the wedding ceremony and the next day and found proof that the patient was mentally competent to be wedded.

The patient was oriented to time, place and person and her affect, appearance and behavior were appropriate. The nurse that evening noted expressly that the patient had a real interpretation of the event [wedding] and understood the procedure.

The next morning another nurse noted the patient was alert and oriented x3, and also that her family members were "complaining, controlling, demanding, hovering, uncooperative" and the patient was tired of the family demanding her for responses. **Mullin v. Duenas, __ N.W. 2d __, 2012 WL 1319420 (Mich. App., April 17, 2012).**

Labor Law: Charge Nurses Are Not Supervisors.

A skilled nursing facility balked at bargaining with the union on the grounds that the bargaining unit the union claimed to represent included the charge nurses and nursing shift supervisors who, the facility claimed, were supervisors rather than rank-and-file employees and did not belong in the bargaining unit.

The US Court of Appeals for the District of Columbia Circuit disagreed with the facility's position and ordered it to bargain in good faith with the union.

Supervisors Use Their Own Independent Judgment In Meting Out Employee Discipline

Charge nurses were responsible for assigning patient care responsibilities, for overseeing tasks being carried out and for mediating minor day-to-day disputes.

However, when a disciplinary matter came up the charge nurse could only gather the facts and refer the situation to the director of nursing for a final decision. The charge nurse then could only enforce the disciplinary decision made by the director.

The charge nurses did not have the requisite personal authority over discipline of subordinates to qualify them as supervisors as that term is used in labor law. **735 Pike v. NLRB, 2012 WL 1138773 (D.C. Cir., April 2, 2012).**

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Involuntary Psych Medication: Court Dismisses Patient's Case.

If the hospital complied with all the legal requirements for involuntary hospitalization and forced medication, the patient has been afforded due process of law and has no right to sue for violation of her civil rights.

Administration of medications over the patient's objections in this case was expressly authorized by a court order issued following a hearing and an adjudication that the patient was not competent to make her own decisions about her medical care.

That adjudication of the patient's incompetence precludes her from re-opening the issue later by turning around and suing her caregivers for damages. The patient and her legal representative already had their chance to argue that point.

UNITED STATES DISTRICT COURT
NEW YORK
April 12, 2012

The patient sued the hospital along with a psychiatrist and a psychiatric nurse practitioner employed by the hospital who were involved with her care during her involuntary hospitalization.

Her lawsuit sought damages for the fact she was administered Risperdal despite her objection that that medication is not appropriate for a patient like her who is also taking blood-pressure medication and an antidepressant.

The inappropriate combination of medications, she claimed, caused her to experience untoward side effects in the form of vomiting, shaking and twitching movements.

The US District Court for the Southern District of New York dismissed the case.

Mental Hygiene Law Was Strictly Followed

The Court noted that the hospital strictly adhered to the state's mental hygiene law and ruled that that fact precluded the patient from later being able to sue her caregivers for deprivation of her rights.

The same day the patient was taken into custody, and before she was administered antipsychotic medication, she was given notice of her right to request a court hearing to determine if she could be required to stay at the hospital for fifteen more days and be medicated.

At the hearing a judge listened to the medical testimony, concluded from the testimony that the patient was not able to make her own decisions and gave the hospital authority to make her take Risperdal and Prozac. **Spencer v. Bellevue Hosp., 2012 WL 1267886 (S.D.N.Y., April 12, 2012).**

Substandard Care: Court Upholds Verdict For Patient's Family For Wrongful Death.

The $1.5 million verdict for the family against the nursing home was based on the jury's acceptance of the patient's family's experts' slant on the highly disputed medical evidence.

The family's experts testified the elderly patient died from sepsis with a fracture of the right humerus and fluid accumulation in the lungs both caused by a fall in the nursing home as contributing factors.

The nursing home's experts countered with testimony of their own that the humerus fracture could have happened after transfer to the hospital and that congestive heart failure caused the fluid in the lungs.

Jury's Verdict Upheld Widespread Substandard Practices

The Supreme Court of Mississippi resolved the conflict in the experts' opinions and upheld the jury's decision by pointing to testimony from the nursing home's care-giving personnel about widespread substandard nursing practices as ample evidence that could relate the patient's medical status to a fall and other lapses in his care at the nursing home.

Turning and repositioning were not documented every two hours and likely were not done. One pressure sore was not spotted until Stage II and another was at Stage III or IV before it was noticed.

The patient's nourishment through his PEG tube was not adequate to meet his needs. His mentally-challenged roommate apparently often pulled out the tube and the liquid nourishment spilled into the bed, while nothing was done to prevent that from recurring on a regular basis.

He continued to lose weight even though he was supposed to be getting tube feedings and actually showed signs of dehydration even though it was documented he was getting more fluid through the tube than ordered.

Weight loss and problematic fluid disappearance were abnormal assessment data which required nursing follow-up, in the family's experts' opinion. Failure to follow up was a negligent breach of the standard of care, the Court said. **Gibson v. Magnolia Healthcare, __ So. 3d __, 2012 WL 1216216 (Miss., April 12, 2012).**

There were orders for the bed rails to be raised but a CNA testified they were left down on many occasions. There were two documented falls with the bed rails found down afterward.

The right hand and wrist were noted to be swollen at one point, but no fall was actually documented by the nurses.

A CNA also testified the nursing home was short-staffed much of the time she cared for the patient.

Short-staffing meant she was not able to make her rounds to turn the patient every two hours as required and did not even have time to keep him clean.

There was no turn clock in the room.

The facility was often short on supplies such as the ointment she was supposed to apply to the skin to prevent skin breakdown.

The CNA also testified she found his bed soaked in a fluid she described as milk, with his PEG tube disconnected. The patient's mentally-challenged roommate was in the habit of going over and pulling out his PEG tube. The patient was not getting sufficient nutrition to meet his needs.

SUPREME COURT OF MISSISSIPPI
April 12, 2012

Expert Witnesses: Court Disqualifies Nurse As Expert In Her Own Case.

A registered nurse filed a lawsuit alleging that her physician committed malpractice during her hysterectomy by cutting one of her ureters during the procedure and by failing to order a sonogram before the procedure.

The first allegation was based on the argument that it should be plain to any lay person sitting on a jury that a surgeon is not supposed to sever a patient's ureter during surgery.

The second allegation was based on the nurse's own experience as a surgical nurse involved in more than one-hundred hysterectomies during which time she never saw a surgeon not order a sonogram beforehand.

In a lawsuit involving a health care liability claim against a physician for injury to a patient, an expert witness on the issue of the physician's alleged departure from the accepted standard of care must be a physician with sufficient qualifications.

UNITED STATES DISTRICT COURT
TEXAS
April 11, 2012

The US District Court for the Northern District of Texas dismissed the lawsuit.

The Court ruled the answers to questions of professional malpractice are not as a rule obvious to lay persons.

A nurse is not considered an expert on the question of a physician's negligence in a medical malpractice lawsuit, that is, state law in Texas as in most US jurisdictions requires expert testimony by a practitioner in the same field as the defendant in the lawsuit and necessitates dismissal of the lawsuit if proper expert testimony is not forthcoming from the patient. **Lewis v. US, 2012 WL 1216234 (N.D. Tex., April 11, 2012).**

Whistleblower: Nurse's Lawsuit Vindicated.

A young student was seen by the school nurse for a facial injury which he said came from his father intentionally striking him. The nurse contacted the father, who not only admitted but reportedly boasted that he had struck his child.

When she informed the school's headmaster he discouraged the nurse from reporting the incident to social services even after she explained that she had a legal duty to do so.

The nurse reported the incident anyway. Several months later she was terminated for "not being a team player."

The state's whistleblower protection law says that no employer shall take retaliatory personnel action against an employee who objects to or refuses to participate in any activity, policy or practice that presents a danger to the health and safety of the public in violation of a law, rule or regulation.

NEW YORK SUPREME COURT
APPELLATE DIVISION
April 12, 2012

The New York Supreme Court, Appellate Division, ruled that the nurse's lawsuit for wrongful and retaliatory termination fit squarely within her legal rights under the state's whistleblower protection law.

The state's social services law requires certain professionals, including school nurses, to report when there is reasonable cause to suspect that a child with whom they interact in their professional or official capacity is an abused or maltreated child.

Further, a school is not permitted to take retaliatory action against an employee who has reasonable cause to suspect that a child is abused or mistreated and reports that suspicion as required by law. **Villarin v. Rabbi Haskell School, __ N.Y.S.2d __, 2012 WL 1214695 (N.Y. App., April 12, 2012).**

Nurse Whistleblower: Court Rules Allegations Too Vague, Retaliation Lawsuit Dismissed.

A registered nurse was placed on administrative leave along with two other nurses involved in an incident in which a patient became unresponsive in the dialysis clinic where they worked and died the same day shortly after being taken to the hospital.

The nurse was never allowed to return to work. She later claimed protection under the state's whistleblower law from being terminated for speaking out to the clinic's agents investigating the incident about what she considered to be improper action by other nurses at the clinic which she implicated as the cause of the dialysis patient's death. That is, when the patient became unresponsive he was given a transfusion of a blood product that allegedly was not appropriate for him.

The US District Court for the Western District of Tennessee ruled in the clinic's favor and dismissed the nurse's retaliation and wrongful-termination lawsuit.

The Court's ruling hinged on correct interpretation of the phrase "illegal activity" in the state's whistleblower protection law.

JCAHO Patient Safety Goals

The nurse's lawsuit pointed to a Patient Safety Goal which requires at least two patient identifiers when providing care, treatment or services. She was prepared to testify that her charge nurse did not witness the other nurses giving the transfusion, in her opinion a violation of JCAHO's two-identifiers goal.

The Court did not delve into the correct interpretation of the Patient Safety Goal. JCAHO is merely an independent, non-profit organization which aspires to improve patient-care outcomes. Its goals are not laws, statutes or regulations.

A complaint about a violation of JCAHO patient-safety goals, even if correctly interpreted, is not enough to invoke the protection of the whistleblower law.

Federal Regulations

Seemingly more directly to the point, the nurse's lawsuit also cited chapter and verse of a specific Federal regulation requiring certain facilities to establish and to follow policies and procedures for positive identification of blood product recipients and to prevent transfusion reactions.

However, according to the Court, this regulation lies within a subpart of the Code of Federal Regulations which applies to clinical laboratories. Although it pertains directly to the conduct in question the regulation does not apply to a dialysis clinic, as a dialysis clinic does not fall within the definition of "laboratory" as expressly spelled out in the regulations.

Board of Nursing Standards

The state board of nursing's standards for nursing practice, unlike JCAHO's goals, are governmental regulations.

However, the problem with basing a whistleblower case on the board's standards is that they spell out only in general language that nurses are not to cause physical or mental injury to a patient, not to fail to take appropriate action in safeguarding a patient from incompetent health practices, not to engage in acts of dishonesty in the practice of nursing or fail to maintain accurate records for each patient, not precisely what the Legislature had in mind when it enacted the whistleblower law. **Drake v. Bio-Medical, 2012 WL 1023016 (W.D. Tenn., March 26, 2012).**

Employees are protected by state law from being terminated for refusing to participate in or for refusing to remain silent about illegal activities.

The phrase "illegal activities" refers to violations of the criminal or civil code of the US or the state or any state or Federal regulation intended to protect the health, safety or welfare of the public.

UNITED STATES DISTRICT COURT
TENNESSEE
March 26, 2012

Attendance Problems: Court Turns Down Nurse's Disability Discrimination Lawsuit.

The US Court of Appeals for the Ninth Circuit has upheld a lower court decision we reported in October, 2010: *Attendance Problems: Court Turns Down Nurse's Disability Discrimination Lawsuit.* Legal Eagle Eye Newsletter for the Nursing Profession (18)10, Oct. '10 p.5.

The case involved a registered nurse with considerable experience in neonatal intensive care nursing who suffers from fibromyalgia, a medical condition which causes chronic pain and can affect sleep. Her condition forced her to call in sick more often than allowed by the hospital's attendance policy. After the hospital had extended the nurse a good deal of flexibility above and beyond what hospital policy allowed she was finally terminated.

Regular Attendance Is An Essential Job Function

Some legal case precedents involving disabled employees in lines of work other than specialized clinical nursing have required employers to go to great lengths to allow flexibility in attendance to accommodate disabled employees' needs, the rationale being that one generic employee who is on the job or available for work can readily be substituted for another who needs to take the day off.

The Court ruled, however, that that rationale does not apply to nurses who possess and use specialized skills in caring for a particularly vulnerable at-risk patient population with special care needs, like the patients in a hospital's neonatal intensive care nursery.

A hospital gets the benefit of the doubt as to the appropriateness of the way it defines and enforces attendance policies for specialized clinical personnel.

A disabled employee is protected from discrimination only to the extent the employee is a qualified individual with a disability, one who with or without reasonable accommodation can perform the essential functions of the job. On a fundamental level reporting for work at the employer's place of business is an essential function of a direct-care nurse's job. **Samper v. Providence St. Vincent, __ F. 3d __, 2012 WL 1194141 (9th Cir., April 11, 2012).**

The hospital's neonatal intensive care unit (NICU) offers a high level of care to premature infants.

The at-risk patient population cries out for constant vigilance, team coordination and continuity.

Absences among NICU staff nurses can jeopardize patient care. Understaffing in the NICU is highly undesirable for patient safety and for the hardship it can place on other nurses.

NICU nurses require special training. It is very difficult to find replacements, especially when a nurse calls in on short notice. There are only a limited number of nurses from the available pool who can be called in at the last minute to fill a staff-nurse vacancy in the NICU.

Striking a balance between the needs of its patients and its employees the hospital's attendance policy does allow five unplanned absences in any twelve-month period, with approved absences for family medical emergencies, jury duty and bereavement not counting in the total.

Consistent attendance is an essential job function.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
April 11, 2012

Sexual Abuse: Nurse Did Not Report, License Not Revoked.

The Supreme Court of Delaware has upheld the ruling of the Superior Court of Delaware we reported in January, 2012: *Sexual Abuse, Mandatory Reporting: Nurse Did Not Report, But Court Orders License Restored.* Legal Eagle Eye Newsletter for the Nursing Profession (20)1, Jan. '12 p. 8.

A nurse had her license suspended for two years for unprofessional conduct for allegedly violating the state's mandatory child-abuse reporting statute by failing to report sexual abuse of several young children who were playmates of her grandchildren, which she learned about second-hand from her daughter.

The state's mandatory reporting statute in effect at the time designated a list of medical providers who were mandatory reporters of child abuse.

The statute was intended to apply only to abuse a designated mandatory reporter became aware of during the course of his or her professional practice.

SUPREME COURT OF DELAWARE
March 30, 2012

The Court ruled the nurse was not guilty of unprofessional conduct. She did not violate the mandatory-reporting statute as it was worded at the time.

Although the Delaware mandatory reporting statute is now much more broadly worded, at that time it required mandatory reporters only to report abuse they learned of in the course of their professional practices and did not apply to abuse learned of simply as relatives or acquaintances of victims or as citizens in the community at large. **Delaware Board of Nursing v. Gillespie, __ A. 3d __, 2012 WL 1071712 (Del., March 30, 2012).**

Drunk Driving: Court Upholds Discipline Against Nurse.

The state Board of Registered Nursing placed a registered nurse's license on three years probation after he pled no contest to misdemeanor drunk driving after he lost control of his car one night on the way home from a party and collided with the center divider. His blood alcohol was .16.

The nurse had an exemplary work record and, according to friends called as character witnesses, he rarely drank.

In fact, a psychiatrist who evaluated him after the incident concluded he did not meet the diagnostic criteria for alcohol abuse or dependence. It was a single, isolated episode of poor judgment, in the psychiatrist's opinion.

The Board of Nursing never required further evaluation, treatment or counseling for chemical dependency. There was no direct evidence that consumption of alcohol in any way affected the nurse's ability to practice his profession.

Unprofessional conduct for a nurse includes use of alcohol in a manner dangerous to oneself or others.

CALIFORNIA COURT OF APPEAL
April 19, 2012

The California Court of Appeal upheld the disciplinary sanctions imposed by the Board of Nursing.

Driving while intoxicated is a behavior which is dangerous to oneself and others. As such it fits the legal definition of unprofessional conduct for a nurse. The California courts have already reached the same conclusion for physicians.

To be grounds for discipline with respect to a professional license it is not necessary to show that unprofessional conduct occurred during professional practice or had any effect on one's ability to practice or is evidence of an ongoing state of impairment that could have an effect on one's ability to practice as a nurse, the Court ruled. **Sulla v. Board of Registered Nursing, 2012 WL 1355556 (Cal. App., April 19, 2012).**

Correctional Nursing: Case Against Nurses Dismissed.

A prisoner filed a civil-rights lawsuit alleging that the nurses and physicians working for the contractor that provided medical services to the state department of corrections were deliberately indifferent to his serious medical needs.

It is a violation of a prisoner's Constitutional rights to subject the prisoner to unnecessary and wanton infliction of pain by showing deliberate indifference to the prisoner's serious medical needs.

UNITED STATES DISTRICT COURT
MISSISSIPPI
April 3, 2012

The US District Court for the Southern District of Mississippi dismissed the prisoner's lawsuit.

The prisoner put in sick-call requests for hemorrhoids, constipation and a cold. The physician ordered chest and abdominal x-rays, blood tests and a metabolic panel and did an abdominal exam. Finding nothing else wrong he gave the patient two hemorrhoid creams.

On his first follow up dispensary visit the nurse documented that she gave him milk of magnesia for his constipation.

On his second visit another nurse documented that she gave him more milk of magnesia for his constipation and also chlorpheniramine maleate and acetaminophen for his stuffiness and cold symptoms.

The Court did not play down the seriousness of hemorrhoids or a common cold as health conditions in a prisoner which correctional medical personnel have an obligation to address.

The Court dismissed the case because the medical evidence pointed clearly to the fact they listened, evaluated their patient's complaints, rendered appropriate treatment and fully documented what they did for him. **Evans v. Wexford Health, 2012 WL 1120674 (S.D. Miss., April 3, 2012).**

Discrimination: Short-Term Condition Is Not A Disability.

An operating room circulating nurse had to have knee replacement surgery due to degenerative arthritis.

Afterward she wanted to come back to work, but with a modification of the physical demands the hospital required of all staff nurses to allow her not to have to stand for more than two hours without a rest period to sit down and elevate her legs for five to ten minutes.

The accommodation was requested for a period expected to last six months to one year, the time her physician told her that knee-replacement patients usually need to return to 100% physical capacity.

The nurse was placed on extended medical leave, applied for long-term disability insurance benefits, was approved for disability, then had her benefits terminated because she was able to work.

The hospital was not able to accommodate the modifications the nurse requested for the physical demands of the O.R. nurse position, due to the patient safety risk posed by the nurse's medical restrictions.

UNITED STATES DISTRICT COURT
NORTH CAROLINA
April 12, 2012

The US District Court for the Eastern District of North Carolina ruled that the nurse was not disabled.

A temporary medical condition which normally should resolve and which does resolve is not a disability for purposes of the Americans With Disabilities Act (ADA).

It was not relevant whether her supervisors perceived her as disabled and discriminated on that basis, even though she was not disabled, because a recent amendment to the ADA has removed that concept as grounds for a disability discrimination lawsuit. **Ryan v. Columbus Regional, 2012 WL 1230234 (E.D.N.C., April 12, 2012).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Emotional Distress: Court Dismisses Family Members' Suit Over Dangling Teddy Bear.

When the pediatric patient left her room for ear surgery a nurse came in to make the bed. A teddy bear was dangling near the floor from a necklace attached to the bed rail. The nurse moved it to the trapeze bar above the bed so the patient would be able to see the teddy bear when she came back from surgery.

The patient's father and uncle sued the hospital alleging as African-Americans they were upset by the image of lynching the dangling teddy bear evoked for them. They did express their concerns to the patient's nurse but did not allow her to take the teddy bear down.

The Court of Appeals of Iowa noted for the record it was not the Court's place to devalue the truth or the power of the family members' emotional reaction, pointing to a 2010 US Supreme Court opinion which made mention that there were at least 3,446 reported lynchings of African-Americans in the US between 1882 and 1968.

The Court also noted for the record that the family did not claim in the lawsuit that the nurse did it intentionally to offend them or even had any actual knowledge whatsoever what their reaction would be.

Nevertheless, the Court dismissed the case.

The law allows persons other than the patient to sue for their own emotional distress over what happens in the course of the patient's care, but only very close relatives of the patient and in a very narrow range of circumstances.

The law limits family members' right to sue for their own emotional distress to highly charged situations involving issues of the patient's life and death.

Insensitivity over the reporting of a loved one's demise to family members or the handling of a loved one's remains might be one such situation. Another highly charged situation might be the delivery of a child, particularly where complications such as fetal demise are involved.

According to the Court, routine pediatric ear surgery is not a highly charged life and death patient-care situation. It went smoothly with no specific medical complications.

This did not qualify as an exception to the general rule that persons other than the patient cannot sue for their own emotional distress. **McNeal v. Northwest Iowa Hosp., __ N.W. 2d __, 2012 WL 1066500 (Iowa App., March 28, 2012).**

Racial Epithets: Court Allows Nurse To Sue Employer For Racially Hostile Work Environment.

The US District Court for the Eastern District of Pennsylvania noted for the record that a minority employee, as a general rule, has a difficult burden of proof in a lawsuit alleging a racially hostile work environment.

The minority employee must prove the existence of intentional discrimination because of race that is so severe and pervasive as to alter the terms and conditions of employment.

As a general rule, offhand remarks and isolated incidents are considered insufficient evidence by the courts to support a lawsuit for a racially hostile work environment.

However, in the case of a registered nurse working as an admitting nurse in home health, the Court ruled that even minimal use of certain racially charged words is enough.

The "N-word" is steeped in historical racial animus that instantly separates African-Americans from others.

The alleged use of the "N-word" by the nurse's supervisor three times and another slur used once, combined with another racially discriminatory remark, can be seen as sufficiently severe and pervasive as to create a racially hostile work environment.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
March 30, 2012

The nurse's supervisor expressly used the "N-word" three times, used another highly charged and offensive racial slur once and made a further remark in which she referred disparaging to African-Americans as lazy.

Taken in totality, this would be considered grounds for a civil rights case alleging a racially hostile work environment, the Court said.

The nurse's supervisor countered with allegations that the nurse falsified her mileage reimbursement records and allegedly failed to take a particular patient's blood pressure but nevertheless documented a blood pressure in the chart after the fact. It was during a performance review over these very issues, however, that the racial epithets were spoken several times. **Williams v. Mercy Health, 2012 WL 1071214 (E.D. Pa., March 30, 2012).**