

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).