

## Nurse Violated Attendance Policy: Retaliation, Disability Discrimination Lawsuit Is Dismissed.

The record of the relevant facts before the US District Court for the Central District of Illinois was very complex.

To summarize, an LPN was hired for a staff position in a nursing home with an existing 15-pound lifting restriction imposed by her physician, which the nursing home agreed in writing it would honor.

The LPN injured her back on the job and filed for workers' compensation. Eventually the employer's medical examiner and her own physician said she could return to work. Their reports were furnished to the employer as part of the LPN's ongoing workers' comp claim.

The LPN was told by letter and follow-up voice mails to contact the director of nursing for a start date to resume her duties. The LPN replied she was seeking other medical treatment for her persistent back pain which she said still prevented her from coming back to work.

Eight days after the last communication from the LPN on the subject of her status re returning to work she was sent a letter of termination for violating the nursing home's 3-day no call/no show policy.

She sued for retaliation and disability discrimination.

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***An employee can sue for damages if the employer retaliates against the employee for exercising her rights under the workers' compensation laws.***

***Unless the employer can state a legitimate reason for the action taken, the court will assume it was retaliation, that is, if the employee worked for the employer before an on-the-job injury, was injured on the job, filed a claim and was then fired, demoted or disciplined.***

***Even if the employer can state a seemingly legitimate reason for its actions, the employee can still try to convince the court it was only a pretext for an underlying retaliatory motivation.***

***Violation of a "no call/no show" policy is considered a legitimate reason for discharging an employee, even one with an ongoing work comp claim.***

UNITED STATES DISTRICT COURT  
ILLINOIS  
December 9, 2005

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### **No Call/No Show Policy Ruled Legitimate**

Since the nursing home had been honoring the LPN's medical restrictions and had been working with her on her worker's comp claim, the court could see no retaliatory motive on the part of her employer. Violation of an employer's legitimate attendance policy is grounds for terminating an employee, even one who has certain rights under the worker's comp laws. The LPN would have to show that it was not her employer's real reason in order to keep a retaliation suit alive.

### **No Disability Discrimination**

Nurses' back injury cases give the courts the opportunity to reiterate how the Americans With Disabilities Act (ADA) is supposed to be interpreted.

To be protected from disability discrimination, a person must be a qualified individual with a disability.

The LPN was a qualified individual, qualified to work at her job and for working in general in an environment where her restrictions could be honored.

However, the courts routinely state that a lifting restriction due to a back condition or a back injury is not a disability as the concept of disability is contemplated for purposes of the ADA. A person who cannot do any significant lifting on the job does not face major restrictions to entering and remaining in the job market.

The upshot is that a nurse or other healthcare worker basically has no rights under the ADA solely on the basis of a lifting restriction. **Reible v. Illinois Odd Fellows Home, 2005 WL 3358869 (C.D. Ill., December 9, 2005).**