Hello, my name is Ken Snyder. I am an attorney and a registered nurse. For more than fourteen years I have been writing and publishing Legal Eagle Eye Newsletter for the Nursing Profession, in which I follow and highlight the latest legal developments affecting nurses and nursing practice.

The title of this program is Narcotics Diversion and Other Legal Issues with the Chemically Impaired Nurse. This program is one in a series dealing with legal issues in nursing practice. The overall goal of the series is to help nurses in clinical practice settings learn how to avoid legal liability. This program, however, is primarily geared to nursing supervisors and managers who make personnel or human resource decisions.

The big legal issues with addicted and alcoholic employees are disability discrimination, family and medical leave act protection for time taken to get treatment, wrongful termination and defamation. These are the issues that stand out if you do as I do and look at the actual cases coming out of the courts.

The US Americans With Disabilities Act, referred to as the ADA, and some state disability-discrimination laws define a successfully rehabilitated drug abuser as a disabled person who has certain rights in the workplace. The Americans With Disabilities Act and the Equal Employment Opportunity Commission regulations which apply to private-sector employers do not mention alcohol or alcoholism, just drugs, drug abuse and addiction. However, the courts have glossed over this point on the assumption Congress did not mean for the ADA to create any distinctions between drugs and alcohol dependence, addiction or alcoholism, or, for that matter, between legal use of legal prescription drugs, illegal uses of legal drugs, as in narcotics diversion by healthcare professionals, or illegal street drugs use.

The US Family and Medical Leave Act and comparable state laws give employees the right to unpaid time off for their own and family members’ serious health conditions. Supervisors and employees alike have to pay attention to all the complicated details in the regulations, but the basic bottom line is that Federal and state laws give employees the right to unpaid time off for chemical dependency treatment.

I want to stress the fundamentals in this short program so I have put the complicated Federal Family and Medical Leave Act regulations that apply to chemical dependency treatment on my website at www.nursinglaw.com/FMLA.pdf Federal regulations are not copyrighted so feel free to download, copy and redistribute them.

Defamation is the common-law legal term for the right to sue for damages in civil court over statements which damage or which would tend to damage a person’s reputation. Sometimes the terminology is not used in its strict legal sense, but strictly speaking libel involves a written statement and slander involves an oral statement. Libel and slander are grouped together under the general heading of defamation.

An employee who is wrongfully accused of illicit or illegal drug use, chemical de-
pendency, drug addiction, alcoholism, etc., may be able to sue for defamation and also for wrongful termination if fired over accusations that were not actually true or not carefully enough investigation to determine if they were true.

Let’s get back to disability discrimination and cover that topic in some detail as it applies to employees who suffer from chemical dependency.

If you want to cut right to the chase the starting point is to ask just what is a successfully rehabilitated drug or alcohol abuser who has legal rights under the anti-discrimination laws.

What does the law consider a successfully rehabilitated drug abuser? Remember, a person with a history of chemical dependency is only entitled to protection from disability discrimination once the person is successfully rehabilitated. To be candid, all of the case precedents I have read that try to deal with this point were cases where the employee in question had actually relapsed by the time the case got to the level of a court of appeals or state supreme court.

But that is not the point. Legally the point is, what was the status of the employee’s rehabilitation at the time of the disciplinary action, demotion, firing, failure to promote, etc., in question that affected the employee and brought on the lawsuit? At that point the employee may or may not appear to be successfully rehabilitated, and that is all that matters, not 20/20 hindsight whether the employee actually did stay clean and sober or actually did relapse.

Let’s jump right in and start looking at some key court cases. The most important recent case I have seen is from the US Federal District Court for the Western District of New York in September, 2005 Strong v. University of Rochester Strong Memorial Hospital 384 F.Supp.2d 602. The court’s opinion contains a basic synopsis of all the relevant legal considerations I need to cover.

An African-American hospital unit secretary was fired for excessive tardiness, failure to meet established standards on the unit for prompt transcription of physicians’ treatment orders into charts and for one episode of use of profane language in a patient-care area. She had held her same position at the hospital for more than twenty-six years.

She sued for race discrimination, disability discrimination and for violation of her rights under the US Family and Medical Leave Act (FMLA). The race-discrimination issue is very complicated. Even if an employee has done something wrong, disciplinary punishments have to be applied evenhandedly across the board to all employees of all races irregardless of race, but that is not really relevant to this program.

In general terms the anti-discrimination laws protect an employee from disability discrimination if the employee, number one, has a disability and, two, if the employee is nonetheless qualified for his or her position, with or without reasonable accommodation.

Chemical dependency, that is, drug addiction and/or alcoholism, is a disability. However, the law carves out a major exception to the general rule of protection from disability-discrimination for employees who are currently abusing drugs and/or alcohol.
Errors and omissions on the job, even if they can be traced related to the employee’s disability, i.e., the employee’s chemical dependency, if they are sufficiently egregious, can be grounds for termination without employer liability for disability discrimination.

The law looks to the moment of the disciplinary action, termination, etc., to determine whether an employee is a current drug or alcohol abuser, not to the time the employee committed the errors or omissions in question for which the employer has sought to terminate the employee.

The rationale is to protect employees who voluntarily elect to seek treatment or rehabilitation. An employee cannot suffer consequences for asking for FMLA leave for a chemical dependency problem. An employee who successfully completes a treatment or rehab program or supervised program of recovery, and who is no longer currently abusing drugs or alcohol at the time of disciplinary action, termination, etc., would be considered a victim of disability discrimination, even if the employee’s past errors or omissions would have justified termination at the time and the employee was actively abusing substances at the time of the errors and omissions.

The court acknowledged that employers who really understand the legal ins and outs might be motivated to terminate substance abusers right away when errors or omissions justifying such action come to light. And if they want to terminate people right away for alcohol or drug dependency related errors or omissions they can do so under the disability discrimination laws and the FMLA.

The employee in this case had been on the payroll more than one year and had worked more than 1250 hours in the previous year, satisfying the threshold FMLA requirement.

US Department of Labor regulations for the FMLA explicitly state that chemical dependency is grounds for an eligible employee to take medical leave, assuming the employee’s (or a family member’s) chemical dependency meets the criteria of a serious health condition.

The regulations further require employers to notify their employees of their rights under the FMLA.

The upshot is that an employee suffering from ongoing chemical dependency might neglect to apply for FMLA leave to enter treatment or rehab, not knowing that he or she has the right to ask for medical leave for that purpose, and then commit errors or omissions justifying termination, or be caught abusing illegal drugs on or off the job contrary to employer policy, and be terminated, and sue because the employer failed to notify the employee of his or her FMLA rights.

As I mentioned before I have placed the portions of the US Department of Labor regulations that relate to the US Family and Medical Leave Act and chemical-dependency treatment on my website at www.nursinglaw.com/FMLA.pdf and this web page is not copyrighted.

To move on, one wrinkle in the interpretation of the US Americans With Disabilities Act is that an employee is not only protected from disability discrimination but also protected from discriminatory action taken by an employer under the erroneous per-
ception that the employee has a disability when the employee in fact is not disabled. What does that mean? A good case that will permit me to segue from disability discrimination into the topic of defamation and wrongful termination is Hill v. Hamilton County Public Hospital, 71 F. Supp. 2d 936 from the US District Court for the Northern District of Iowa, April 1999.

A nurse with six years at the hospital usually took her break outside, weather permitting, sitting at a picnic table with the other cigarette smokers.

One day her usual companion on breaks was not on duty, so she took a walk by herself around the outside perimeter of the hospital. When she returned to the smoking area two other smokers observed a white powdery substance under her nostrils and reported her to their supervisors after their breaks.

The nurse returned to her unit. Two individuals on the unit also observed the same white powdery substance under her nostrils. They claimed she seemed “hyper” or had an elevated mood while she worked the balance of her shift.

Nine days later she was phoned at home, told to report to a meeting with the assistant director of nursing and told to bring her union rep along if she wanted. She was confronted by the four witnesses and fired on the spot. She demanded a drug test, which was refused. She went to her own physician that day and produced a urine sample that tested negative.

The court said when a nurse’s employer becomes aware of facts pointing to illicit drug use, a drug screen should be offered if it will show whether the nurse was on drugs at the time of the behavior in question. A drug test after the fact may not prove anything about drug use during a particular time frame, the court pointed out, which could help or hurt the nurse’s or the employer’s legal position, depending on the circumstances.

Mandatory drug and alcohol testing and screening of healthcare employees is a very complicated question. In very broad terms legal questions are answered by first looking at the general rule and then looking to see if there is an exception that applies to the specific case. The general rule is that a healthcare employee cannot be ordered to undergo drug testing. Federal laws say that some employees like airline pilots and truck drivers not only can be screened and tested, they have to be screened and tested routinely. But that is not the general rule for nurses and other healthcare workers. For nurses and other healthcare workers, if and only if the collective bargaining agreement or individual employment contract explicitly allows it, an employee can be terminated for refusing a drug or alcohol test that is demanded, and if and only if there was probable cause from the employee’s appearance or demeanor to demand a drug or alcohol test in the first place.

A good recent court case on this point is Brannigan v. Unemployment Board, 887 A. 2d 841 (Pa. Cmwlth., 2005). from the Commonwealth Court of Pennsylvania, December 2005. A nursing assistant reported for work smelling of alcohol. His nurse manager sent him for an evaluation by a nurse practitioner in the employee health office. The nurse practitioner suspected he was impaired and asked the medical director to see him and confirm her suspicions.
The nursing assistant called his union rep who advised him to refuse any further testing. There is no way an employee can be forced to undergo testing or screening. There is a possibility the employee will lose his or her job, but that is as far as the coercion can go. For his refusal this nursing assistant was terminated. The unemployment judge ruled he was terminated for cause and the court agreed.

To require an employee to choose whether to be tested or to be fired the employer must already have a policy in place for suspected intoxication on the job. The employer's established policy must be communicated to all employees so they will be aware of the consequences, which may include termination, if they are justifiably suspected of intoxication and refuse to be screened. If we wanted to go off on a tangent and discuss labor law issues, a drug screening or testing policy cannot be dictated unilaterally by the employer in a union shop, unless it is mandated by law, but must be worked out in contract negotiations.

This employee's job history included a prior incident of intoxication on the job. He had signed a written agreement stipulating that just one more violation of the employer's policies could result in termination.

Smelling of alcohol on the job is employee misconduct, the court ruled, whether or not the alcohol was consumed on the premises and whether or not the employee can still fulfill his duties.

And once there is a drug or alcohol screening policy in effect then you get into the whole problem of chain of custody of blood and urine samples, tampering, and the qualifications and reliability of labs that do drug screening. That is too complicated for this program.

Getting back to the Hill v. Hamilton County case, the court upheld in general terms a nurse's right to sue for disability discrimination over adverse personnel action taken under an erroneous perception the nurse is abusing or addicted to drugs. The court made these general observations, some of which are a review of what I have already covered:

The analysis starts with the definition of a disability:

A disability is having a physical or mental impairment that substantially limits one or more major life activities, or

- Having a record of such an impairment, or
- Being perceived by the employer as having such an impairment.

A successfully rehabilitated drug abuser is by law disabled, but not a person who is currently addicted to or abusing illegal drugs.

Regardless of past history, an employee fits the legal definition of disabled if the employer erroneously perceives the employee is currently using or impaired by illicit drug use.

A current or discharged employee can sue for disability discrimination if the employer took adverse personnel action against the employee under an erroneous perception of the employee as a current addict or substance abuser.
In the legal arena, what is true or not true is not as important as what can and
cannot be proven in court. I really like a recent case from the US Court of Appeals for
the First Circuit from November 2005 which makes that point, The Mercy Hosp., Inc. v.

A nurse had been working in critical care for more than twenty-five years and
had gained respect for her competence and dedication before suspicions began to
gather that she was diverting narcotics.

The hospital had installed equipment in the ICU, described by the US Circuit
Court of Appeals for the First Circuit as a “computerized medicine cabinet,” to monitor
nurses’ narcotics. It recorded the nurse’s personal keypad code and the patient’s data
before unlocking to dispense the medication.

Nurses were also required to document their narcotics by jotting down by hand
the patient’s identity, medication, time, route and dosage on a traditional paper medi-
cation administration record.

Discrepancies came to light between the two records for this nurse’s patients’
narcotics, that is, the electronic data did not always match her handwritten notations on
the MAR’s.

She was questioned by her superiors. Finding her explanations not credible,
they suspended her. She filed a grievance. The arbitrator upheld her grievance and
ordered her reinstated. The hospital appealed the arbitrator’s ruling but the Federal District Court and the Cir-
cuit Court of Appeals both agreed with the arbitrator.

Discrepancies existed in other nurses’ charting. The court pointed to testimony
to the effect that other nurses in the same ICU routinely caught up on their handwritten
MAR entries during breaks or at the end of their shifts when they could not always re-
member the exact medications and dosages given.

There was testimony that nurses would check out narcotics to prepare IV drip
bags well in advance of knowing whether or not they would actually need to hang them.
Although not a commendable practice, nurses sometimes deviated from physicians’
orders and administered narcotic meds through IV lines rather than IM.

There was testimony that the hospital had no established policy for which nurse
was to document narcotics in the MAR when two nurses, that is, a trainee and a pre-
ceptor, both had responsibility for a patient.

Given the laxity the hospital tolerated in the way other nurses documented their
narcotics, the court ruled that discrepancies in the way this nurse charted her narcotics
did not prove she was diverting narcotics.

This did not come up in the Federal Court of Appeal’s ruling, but one can envi-
sion a defamation or wrongful termination lawsuit as possibly the next thing to happen
in a case like this.

A contrasting case is Bohannon vs. Arkansas Board of Nursing, 895 S.W. 2d
923 (Ark., 1995). from the Arkansas Supreme Court April, 1995 where the court
looked at the detective work that was done by the managers at the facility where a
nurse The nurse in question left a trail of damaging evidence. Seven adulterated
Demerol vials were found in the emergency room controlled substance supply, where
she worked until June 30. After July 1, the pharmacy director found other vials on the med/surg unit to which this nurse was transferred, which had each been tampered with in the same distinctive manner. That is, vials had been opened, the medication removed and another substance, the same substance, was put in them and then they were haphazardly resealed. A very distinctive M.O., (modus operandi or mode of operation) if we want to use police detective lingo.

The director of nursing did a retrospective review of this nurse’s documentation of p.r.n. administration of narcotics, and found some suspicious discrepancies. Many entries failed to document an assessment before giving Demerol. Some patients had p.r.n. Demerol charted only from this nurse. That is, other nurses, even working at the same time on the same shifts, did not find the patients to be in pain, but this nurse found them suffering to the extent they seemed to need major doses of Demerol. She also supposedly gave a large dose of Demerol to a patient minutes before discharge, which, if she actually did it and it was not just a smokescreen for narcotics diversion, would have been a major breach of patient-care standards. Patients who were interviewed reported not getting drugs charted for them. To sum it up, the court found sufficient evidence to suspend this nurse’s license.

The point of these two cases is that you need to have very strong evidence against a nurse if the case is going to end up in court.

We know from certain criminal prosecutions against celebrities in the last few years that when suspects are able to hire good lawyers, dig in their heels and fight, they can often gain acquittal.

The best course of action is to put the evidence together, confront the affected employee, offer to help – getting help or treatment for chemical dependency is the employee’s legal right anyway – and assure the employee there will be no reprisals for getting help – which the employer cannot do anyway – and hope for a good outcome.

That is about all the time we have in this short program. For more information please visit our website www.nursinglaw.com On our homepage are links to a lot of nursing law topics including chemical dependency and narcotics diversion. You can also get information about subscribing to my newsletter Legal Eagle Eye Newsletter for the Nursing Profession and other video programs in this series. Again, thank you for your time and attention.