

## Harassment: Did The Offensive Conduct Stop?

Several female hospital nurses filed suit for alleged sexual harassment by a male charge nurse.

The US District Court for the Western District of Texas magistrate's recommendation to the District Judge was to allow some of the cases and disallow others to go forward.

**Federal and state anti-discrimination laws, among other things, require an employer to take prompt and effective action to stop sexual harassment once the employer learns or reasonably should have learned that it has taken place.**

UNITED STATES DISTRICT COURT  
TEXAS  
January 3, 2012

In addition to having appropriate anti-harassment policies in effect before the fact, employers are required to take prompt and effective action after the fact once sexual harassment is reported by an employee to a supervisor or otherwise becomes known to supervisory personnel.

Action after the fact can include interviewing witnesses under assurances of confidentiality and non-retaliation to get all the facts, counseling, reprimanding, disciplining or firing the offender or separating the offender and the victim by transferring one or both of them within the institution.

In one nurse's case the harassment stopped when the offender was told to stop. That put an end to her right to sue.

In another nurse's case, the offender was only written up for "inappropriate interaction" rather than expressly reprimanded for violation of the hospital's anti-harassment policy and the harassment continued for two more months while no follow-up was done by management to assess whether the write-up had been effective. Her case, the magistrate concluded, was valid and could proceed to trial. Taylor v. Seton Healthcare, 2012 WL 13680 (W.D. Tex., January 3, 2012).

## Americans With Disabilities Act: Court Applies New Definition Of Disability To Nurse's Case.

**Amendments to the Americans With Disabilities Act which went into effect on January 1, 2009 broadened the definition of disability, that is, made the law more employee-friendly.**

**A disability is a physical or mental impairment, that is, any physiological disorder or condition affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine which substantially limits a major life activity like caring for oneself, doing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.**

**The US Congress reworded the definition of disability to eliminate the hurdle interposed by the US Federal courts that to be a disability an impairment must substantially limit a major life activity that is of central importance to most people's daily lives.**

UNITED STATES DISTRICT COURT  
KENTUCKY  
January 5, 2012

A hospital medical/surgical RN was diagnosed with atrial fibrillation and began taking meds.

A month later she had a stroke, diagnosed as a thromboembolic event from a cardiovascular source. After speech therapy to resolve residual expressive aphasia she was cleared by her cardiologist and a neurologist to return to work, except that she was restricted to a 5 day x 8 hour work week with no additional on-call shifts, due to lingering problems with fatigue.

Other staff nurses and managers accommodated her for a while by picking up more than their share of extra shifts required by absences and heavy patient censuses, but eventually the nurse was fired.

The US District Court for the Western District of Kentucky dismissed the nurse's disability discrimination lawsuit.

### Definition of Disability

The Court said that fatigue which prevents a person from working more than forty hours per week would not have been considered a disability before but now would be a disability under the more employee-friendly January 1, 2009 amendments to the Americans With Disabilities Act. However, being disabled is only one element of a disability discrimination case.

### Nurse Was Not a

#### Qualified Individual With a Disability

The requirement still remains intact that to benefit from the anti-discrimination laws a disabled individual must be a qualified individual with a disability, one who, with or without reasonable accommodation can fulfill the essential functions of the job.

The law still gives considerable deference to the employer's judgment in defining essential job functions. Working extra on-call shifts was required of med/surg nurses by hospital personnel policies.

The employer making non-disabled personnel assume more than their pro-rata share of the burden of filling on-call vacancies to accommodate a disabled co-worker is an accommodation that is not reasonable and it is not something a disabled employee has a legal right to expect, the Court said. Azzam v. Baptist Healthcare, 2012 WL 28117 (W.D. Ky., January 5, 2012).