

Operating Room: Burn Not The Type Caused By A Bovie Pad, Court Says, So Hospital Not Liable.

Because a patient in the operating room is unconscious and unaware of what is going on, and only medical personnel who are potential medical malpractice defendants are with the patient, courts often give surgical patients the benefit of the *res ipsa loquitur* rule. It translates as "The thing speaks for itself."

The rule means that a surgical patient does not have to come up with direct evidence of negligence in the operating room to succeed with a medical malpractice case, if three conditions are met:

1. The injury is one which does not ordinarily occur without negligence;
2. The injury was caused by something over which the healthcare providers had exclusive control; and
3. The injury was not due to any voluntary act of the patient.

The telling fact which swayed the Court of Appeals of Indiana not to apply *res ipsa loquitur* in favor of the patient, but to rule in favor of the hospital, was a med/surg staff nurse's chart note of her nursing physical assessment of the patient.

The nurse noted a burn on the patient's thigh as one of the multiple traumas from the industrial mishap which brought the patient to the hospital in the first place, among other things, for the orthopedic ankle surgery in which he allegedly sustained a burn from the bovie pad.

The patient's attorneys were unable, or did not think it necessary, to produce expert medical testimony that the patient's thigh burn was the type consistent with an electrical burn from a bovie pad. The patient's case rested entirely on the patient's testimony that he noticed the burn a day or two after surgery. This was not sufficient for the court to invoke the rule of *res ipsa loquitur* for the patient's benefit, and he lost his case. **Sliese vs. Hughbanks, 684 N.E. 2d 496 (Ind. App., 1997).**

Job Discrimination: Court Says "Constructive Discharge" Can Be Grounds For A Claim.

An employee can claim "constructive discharge" if the employee resigns to escape intolerable working conditions caused by illegal acts of discrimination.

To claim constructive discharge, the employee must prove that the employer deliberately created intolerable working conditions with the intention of forcing the employee to quit.

However, the courts do not give the benefit of the doubt to an employee who is unreasonably sensitive to his or her working conditions. Constructive discharge occurs only when a reasonable employee would find the conditions intolerable.

It is unlawful discrimination for an employer to discharge an employee because of the employee's race, national origin, gender, etc.

An employee who is scrutinized and reprimanded more than others does not have unreasonable working conditions, just because the job is less enjoyable and the employee experiences added stress.

UNITED STATES DISTRICT COURT,
MINNESOTA, 1997.

According to the U.S. District Court for the District of Minnesota, there was no question that the LPN who had filed charges of employment discrimination against her former employer, a nursing home, had resigned from her position rather than being terminated.

However, that was not the end of the court's inquiry into whether this nurse had been a victim of illegal employment discrimination. The court drew guidance from case precedents set down by other Federal courts, the U.S. Supreme Court and state courts, which have said that "constructive discharge" can be the basis of a valid employment discrimination claim.

In general terms, if an employer makes an employee's working conditions so intolerable that the employee is compelled to resign, and that is done for discriminatory reasons, the employer may be faced with a discrimination lawsuit, the same as if the employee were terminated for the same discriminatory reasons.

The nurse contended the nursing home treated male nurses more favorably, paying them better and allegedly allowing them to leave the premises on their meal breaks. In fact, the nursing home settled with her on this issue, paying her \$20,000 as restitution for unequal pay, removing the gender discrimination issue from further consideration by the court.

The court, however, was not persuaded in this particular case that the employer's ongoing close scrutiny of this nurse over medication errors and other lapses in professional judgment resulted from illegal discriminatory motivation or was an attempt to constructively discharge her by forcing her to quit. On the contrary, the employer's efforts to straighten out the nurse's clinical performance indicted a desire to keep her on staff despite certain deficiencies. **French vs. Eagle Nursing Home, Inc., 973 F. Supp. 870 (D. Minn., 1997).**