

## Drug Diversion, Abuse: Court Turns Down Nurses' Disability Discrimination Lawsuit.

***This hospital has a policy not to employ any nurse or other licensed professional with a license restriction, whether from drug use, patient abuse, incompetence or other misconduct that did not involve an employee's disability.***

***The hospital's policy requires automatic disqualification of any applicant for a licensed position whose license had been restricted or was currently restricted, without regard to the applicant's ability to work or the applicant's sobriety or whether or not the applicant is or was actively participating in a recovery program.***

***The hospital cannot afford to employ nurses who require additional supervision for any sort of license restriction, and the hospital has a legitimate concern over possible recidivism into past bad behavior.***

***The hospital's policy has a rationale which the court must accept as plausible.***

***The nurses have been unable to support their lawsuit with any evidence that the hospital now employs even a single nurse with any sort of past or present license restriction.***

UNITED STATES DISTRICT COURT  
KENTUCKY  
December 3, 2014

Two registered nurses who worked at the same hospital had been referred into their State Board's monitored recovery program after being caught diverting controlled substances.

One nurse had been stealing fentanyl from radiology. The other had been using her med/surg patients' morphine, methadone and Vicodin that she should have been wasting.

Both nurses were progressing as expected in the monitored recovery program. They were back working at the hospital with license restrictions that curtailed their access to narcotics and required on the job monitoring, and they both were participating in off-campus recovery programs.

### **New Hospital Ownership**

#### **New Policy, "Clean" Licenses Only**

The hospital underwent a change in corporate ownership. With that change came a new policy that the hospital would not employ any licensed staff who had any current or prior license restriction.

Both nurses were asked to re-interview for their jobs, admitted to having license restrictions, were not rehired and then sued for disability discrimination.

#### **Prior Illegal Drug Use Is a Disability**

The US District Court for the Eastern District of Kentucky agreed with the nurses that past illegal drug use or chemical dependency can qualify an employee either as a disabled individual or as an individual who is perceived by the employer as an individual with a disability.

With a past history of illegal drug use or chemical dependency, the employee must have undergone successful rehabilitation to be considered a qualified individual with a disability who has rights under the US disability discrimination laws.

Nevertheless, the Court ruled the hospital's new policy was acceptable because it categorically refused employment to anyone with a current or prior license restriction, whether or not the license restriction stemmed from a disability or from something else like patient abuse, incompetence or other misconduct. **Lopreato v. Select**, 2014 WL 6804221 (E.D. Ky., December 3, 2014).

## FMLA: Court Says Family Member's Medical Records Are Relevant.

A former nursing home employee sued her former employer claiming the employer violated her rights under the US Family and Medical Leave Act (FMLA).

She was eligible for FMLA leave, having been on the job a year and having worked 1250 hours during the prior twelve month period.

However, the nursing home disputed whether her daughter's pregnancy qualified as a serious health condition.

***The US Family and Medical Leave Act (FMLA) gives an eligible employee the right to medical leave for the employee's own or a family member's serious health condition.***

***Only if complications were expected was this employee's daughter's pregnancy or the child's birth a serious health condition.***

UNITED STATES DISTRICT COURT  
KENTUCKY  
November 17, 2014

The US District Court for the Western District of Kentucky has not yet ruled on the basic issue whether the nursing home violated its former employee's rights.

The Court has ruled that the nursing home is entitled to see copies of the employee's daughter's medical records.

Those records will show whether complications were, in fact, expected when the nursing home granted its former employee six-weeks FMLA leave on condition that she corroborate that complications were expected in her daughter's pregnancy or her grandchild's birth.

A family member's complicated pregnancy or complicated birth is a serious health condition for which FMLA leave is appropriate, but a family member's normal pregnancy or birth is not. **Biggers v. Green Acres**, 2014 WL 6460705 (W.D. Ky., November 17, 2014).