

## Paid Feeding Assistants In Long-Term Care (Continued.)

Editor's Note: Please refer to *Asphyxiation Death: Court Says A Family Member Should Not Have Fed The Patient*. Legal Eagle Eye Newsletter for the Nursing Profession, (8)1, Jan. 00, p. 1.

This article is on our website at <http://www.nursinglaw.com/asphyxiation.pdf>.

In that case a certified nursing assistant left a food tray in a resident's room. The skilled-nursing patient had been assessed as incapable of feeding himself. A certified nurses aide was supposed to feed him, note what and how much he had eaten so that it could be charted, and then remove the food tray from his room.

However, his elderly wife came in and tried to feed him from his meal tray and he choked and died. The wife apparently had no idea there was any potential danger in what she was doing.

The Supreme Court of Alabama ruled the skilled nursing facility was negligent.

The court stressed that it is inappropriate to allow individuals who have not been trained to appreciate the danger of asphyxiation, to do the Heimlich maneuver, to suction or to have someone immediately suction a choking person, or who at least know to call 911 when there is an emergency, to feed certain patients.

We covered the issue of feeding assistants in *Medicare/Medicaid: Regulations Proposed To Allow State Funding For Paid Feeding Assistants In Long-Term Care*. Legal Eagle Eye Newsletter for the Nursing Profession, (10)5, May 02, p. 4.

The regulations just announced in final mandatory form, more so than the regulations that were merely a proposal last year, stress the importance of correct nursing judgment in the screening of residents who are appropriate to be fed by feeding assistants as opposed to certified nurses aides or licensed personnel.

## Gender Discrimination: Male Nurse's Lawsuit Dismissed.

***A male nurse, who works in a mostly female profession, is covered by Title VII of the US Civil Rights Act which outlaws gender discrimination in employment.***

***In legal parlance a male nurse, like racial minorities, is said to be a member of a protected class of persons.***

***Belonging to a protected class is only the first prong of the four-pronged legal analysis to determine if discrimination has occurred.***

***The male nurse must also have been performing his job to his employer's satisfaction, and in spite of meeting his employer's legitimate expectations he must be disciplined or terminated, and he must be treated less favorably than similar female employees with respect to discipline or termination.***

***There were no female nursing employees whose behavior was similar in all relevant respects to serve as a basis of comparison.***

***Two female nurses did request not to be placed on call, but they requested it right away rather than waiting until the day before, and they did not act out in a demanding and insubordinate manner.***

UNITED STATES DISTRICT COURT  
ILLINOIS  
October 10, 2003

A male dialysis nurse got in a dispute with his employer over on-call shift assignments. After he had to be fired he sued for gender discrimination.

### **Male Nurse As Minority**

A male nurse can sue for gender discrimination. In a mostly female occupation a male nurse is considered a minority protected by the US Civil Rights laws.

### **Differential Treatment**

#### **Basis of Comparison Required**

The essence of discrimination is differential treatment based on a personal characteristic that identifies the victim as a minority. To show differential treatment a male nurse like any other minority must point to one or more non-minority co-workers who were similar in all other relevant respects but were treated more favorably. Without a basis of comparison, differential treatment does not exist and discrimination cannot be proven.

The US District Court for the Northern District of Illinois described in detail the friction between the facility and the nurses, male and female, over scheduling of on-call shifts.

It was necessary during all hours when the clinic was closed that an identified nurse have the absolute duty to come to the hospital to dialyze a patient if a patient needed to be dialyzed during the specific shift the nurse was on call.

The bottom line for the court was that the male nurse acted out in a very unprofessional manner compared to his female co-workers when notified of on-call assignments he did not want

According to the court, he was prone to calling in the day before he was scheduled to be on call, sometimes leaving the facility with no on-call dialysis nurse coverage, rather than complaining when the on-call shifts were first posted, or finding a replacement, or consenting to be on call even when he did not want to be on call like the other nurses did who also objected to their on-call assignments but were not fired and happened to be female. **Robertson v. Total Renal Care**, 2003 WL 22326579 (N.D. Ill., October 10, 2003).