

## Retaliation: Timing Was Suspicious, Court Lets Nurse's Case Go Forward.

An LPN was terminated over a medication error after taking a four-month block of medical leave for an aneurysm followed by more days off intermittently.

She sued her employer for violation of her rights under the US Family and Medical Leave Act (FMLA) and for disability discrimination.

***After the nurse's medication error her supervisor was only going to speak with her about it.***

***Two weeks later the hospital's administrator told her supervisor about a disparaging remark the nurse had made about him in front of another nurse and a patient.***

***At that point her supervisor went over her personnel record, which revealed a history of approved absences for medical leave, as well as other attendance issues, and then terminated her employment.***

UNITED STATES COURT OF APPEALS  
SIXTH CIRCUIT  
December 11, 2012

The US Court of Appeals for the Sixth Circuit (Kentucky) ruled the nurse was entitled to her day in court for her FMLA retaliation case. However, her aneurysm was not a disability for purposes of the Americans With Disabilities Act and that portion of the case was dismissed.

The timing of the decision to terminate her was very suspicious. If the medication itself error really was serious enough to justify her termination, she would have been terminated as soon as the facts were known, that is, right after it happened. ***Laws v. HealthSouth***, 2012 WL 6176797 (6th Cir., December 11, 2012).

## E.R.: Patient's EMTALA Lawsuit Dismissed.

The parents brought their child to the E.R. at 3:30 a.m. because she had a fever and was vomiting.

The child was seen immediately by a triage nurse. A general-practice physician saw the child at 5:00 a.m., ordered blood drawn for the lab, IV fluids and Benadryl and diagnosed the child with gastroenteritis. The labs came back and were read by the physician as within normal limits.

The child was seen again by physicians at 9:10 a.m. and 3:50 p.m. and discharged home around 6:00 p.m.

More than three weeks later she came back to the same hospital and was diagnosed with renal failure.

The parents sued the hospital for violation of the US Emergency Medical Treatment and Active Labor Act (EMTALA).

***The EMTALA requires medical stabilization of the patient's condition only if the emergency medical screening discloses that it is an emergency medical condition.***

UNITED STATES DISTRICT COURT  
PUERTO RICO  
January 17, 2013

The US District Court for the District of Puerto Rico dismissed the case.

The mother testified she voiced her concerns to the physicians and the E.R. nurse about discoloration of the urine and what she thought were abnormal lab results for creatinine, ketones and protein.

However, the Court ruled that the medical and nursing personnel in the E.R. were working with a medical diagnosis of gastroenteritis which was confirmed by three different physicians over an interval of more than twelve hours.

The patient was given an appropriate medical screening in the E.R. as required by law and that screening did not reveal an acute emergency medical condition, notwithstanding what came up later. ***Kenyon v. Hosp. San Antonio***, 2013 WL 210273 (D. Puerto Rico, January 17, 2013).

## Nurse Faxed Patient's Charts: Termination Not Justified, Court Says.

An LPN was fired after she faxed patients' medical records from her clinic to another clinic.

The records were those of three patients whom she had cared for who were patients of the physician with whom she had worked in the clinic who had moved to the other clinic to which the nurse faxed the records.

She was fired for violation of a company policy that only certain employees were authorized to respond to medical records requests and to fax patients' records out of the facility.

However, the nurse reportedly had never been informed of the policy and had often seen other nurses doing the same thing. There were releases on file signed by the patients allowing their records to be sent to their providers at other locations.

The clinic had to agree that the nurse committed no violation of the Health Insurance Portability and Accountability Act (HIPAA). The nurse only violated the clinic's own internal policy.

***There is nothing inherently improper about a nurse faxing medical records to another medical facility that has requested the records, assuming the patient has signed a proper release.***

COURT OF APPEALS OF MINNESOTA  
December 24, 2012

The Court of Appeals of Minnesota agreed with the nurse that her firing was not justified under the circumstances.

Violation of a company policy which was not communicated to the employee and which the employee had seen others routinely ignore and which is not a violation of the law is not considered misconduct of sufficient severity to justify termination for cause, the Court said. ***Tschida v. Unity***, 2012 WL 6652599 (Minn. App., December 24, 2012).