Dear Mary

by Mary Annas

Dear Mary is a monthly feature in which readers can ask about any nursing care issue that concerns them. Answers will be supplied by Mary Annas or a consulting nurse, physician, lawyer, or ethicist where appropriate. Readers are also invited to comment on the answers.

Dear Mary,

I recently applied and was accepted for a position as a staff nurse in a nearby hospital. The day before I was to start orientation, I went for a physical at their Employee Health Services. This physical was fairly extensive and was done by a nurse practitioner. It included an eye and ear exam. I have not had depth perception all my life, and have adapted to this without problems in driving, work, and other activities. When it was discovered that I lacked depth perception, I was instructed that due to hospital policy, they could not hire me. It was stated that studies have been done that have proven that those with lack of depth perception are more accident prone and file more disability claims. The fact that I have been an R.N. for ten years, and have a proven work record had no bearing.

I feel that this is an unfair and discriminatory practice. I was informed by the nurse practitioner that their employee health department is under study to be used as a "model" for other health care facilities. This implies to me that in the future I'll have more difficulty in getting hired if this practice is employed.

I invite your comments and advice on this practice.

Carol
Rohnert Park, California

Dear Carol,

For general information, you may find it helpful to read "Employment Rights of Handicapped Nurses: Error in Trageser?" (Vol. 1, No. 6). For a specific response, your letter was referred to Henry A. Beyer, J.D., a Boston attorney who specializes in this area.

Though it is not possible to be certain from the details you provide, the practice you describe may constitute illegal discrimination.

If the hospital is a recipient of federal funds (as practically all hospitals are), it is bound by Section 504 of the Rehabilitation Act of 1973 and its regulations. This law protects qualified handicapped persons against discrimination by recipients in employment as well as other situations.

Under the federal regulations, the experience you describe places you within the definition of "handicapped person" and therefore entitles you to the protection of Section 504. From your letter, however, I am not able to tell whether you were singled out for special treatment in the hiring process. A "handicapped person" cannot be required to take a pre-employment medical examination unless all other job applicants are also required to do so and the results are treated in a non-discriminatory manner.

The employer does have the right to determine whether you are "qualified" to perform properly the essential functions of the job, with "reasonable accommodation" to your handicap. Although the hospital may consider the results of a non-discriminatory medical examination in determining whether you are qualified, it must also take into account all other relevant information, such as your previous professional experience and work record. Employment criteria that have the effect of excluding qualified handicapped persons from employment, without regard to their individual *abilities, violate Section 504.*

If the hospital does receive federal funds, I recommend that you file a complaint with the Office for Civil Rights (OCR) of the Department of Health and Human Services. The OCR address in your region is 1275 Market Street, 14th Floor, San Francisco, CA 94103 (telephone 415-556-8586). Your signed complaint, which must be filed within 180 days of the date you were refused employment, should include your name, the name of the hospital, a description of how you were denied employment, and the date of the denial. OCR will investigate the incident and decide whether, in their opinion, the hospital's refusal to hire you was a violation of Section 504.

If it is determined that a violation has occurred, OCR will attempt to achieve compliance through informal negotiations. If this attempt fails, OCR's ultimate enforcement power, which it may use only after conducting a formal hearing, is to withhold federal funds from the hospital.

Even if the hospital receives no federal funds, its action still may be illegal under state law. Section 1420 of the California Labor Code makes it unlawful for an employer to refuse to hire any person because of a physical handicap or medical condition, unless the refusal is based upon a bona fide *occupational qualification. Again, the decision of whether the hospital was justified in refusing to hire you will turn on the factual question of whether you are qualified for the position despite your lack of depth perception. To file a complaint under this state statute, you should contact the California Fair Employment Practices Commission (FEPC), 2222 Sierra Boulevard, Sacramento, CA 95825 (telephone 916-445-9918).*

If neither OCR nor FEPC resolves the problem to your satisfaction, you may wish to obtain private legal counsel (or, if you are eligible, the services of a legal aid or other advocacy office) to explore the possibility of bringing suit. You may, in fact, wish to obtain such help first, to assist you in filing the OCR and FEPC complaints, and to exert on the hospital the pressure which the phrase "my attorney" frequently carries.

Henry A. Beyer, J.D.
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Dear Mary,

I recently had my first child at a general hospital which is attached to a major teaching hospital. My mother travelled 1000 miles to be with me and my husband at this time. When my mother came to visit (during visiting hours), the nurse told her that it was hospital policy that a patient have only one visitor during the hospitalization, to be designated at the time of admission, and that the patient could not change who this person was from day to day. She went further to say that it was a state regulation and that if she let one patient violate this regulation the hospital would lose its federal funding. Doesn't this seem extreme?

Debbie
Cincinnati, Ohio

Dear Debbie,

It certainly does. I'm sure there is no such regulation and that the nurse was misinformed. Sometimes medical personnel use excuses which make things more efficient for them, but are not in

the best interests of the patient.
I can see that the hospital maternity floor must be kept quiet, to allow for the amount of rest that the mothers need, and for the time the babies are with the mothers, so that bonding is given an optimum environment. Also it is said that the danger of infection to the baby and mother increases with the number of people who visit.

Yet it seems that the emotional needs of the patient are equally important and that nurses should be flexible enough to bend rules that don't meet these needs.

Part of the nursing assessment should include reinforcing the patient for saying things like "Show me a copy of the written policy" or "Where is it written that. . .?" (For more discussion of this issue, see *Hospital Policies: Enforcement Equals Endorsement,* Vol. 1, No. 3.)

Dear Mary,
I work in a very busy office with three pediatricians who have very different medical and psychological philosophies of raising children. I am in charge of coordinating the office and also giving advice to parents over the phone. This can be very confusing at times, and I often end up giving advice to parents that is different from the advice their pediatrician would give.

For example, one doctor believes that a baby should stay on breast milk exclusively with no solid food for at least six months and preferably for one year. Last week the mother of one of this doctor's patients called and said that her breast fed baby (three months old) seemed hungry all the time, and I told her to start him on a little rice cereal. When the pediatrician discovered this, she was angry and said that I was disorganized because I had confused her advice with that usually given by one of the other doctors. There was some truth to the criticism — do you have any ideas as to how I might avoid this in the future?

Rhoda
Newark, N.J.

Dear Rhoda,
You need help, but not necessarily mine. You need an assistant to separate the clerical and nursing responsibilities. If this is impossible, make three separate lists of the well-baby opinions of the three different pediatricians, such as "pacifier" or "no pacifier," etc. and tape them to your desk top. Then when parents call, you will have an easy reference.

It seems to me, however, that you have a larger problem. If you are employed as a professional nurse, and part of your job is giving telephone advice to parents, you should have some freedom to do an individual nursing assessment on each question, rather than just parrot the advice of the doctors. Only you can decide if this is an issue you want to broach with your employers — a process which can be very uncomfortable, particularly if you are the only nurse-employee. For support and advice in dealing with this problem your local nurses' association should be able to help.

Laetrile *Continued*

On remand, Judge Bohanon directed the FDA to hold an administrative hearing to answer these questions. He also certified the suit as a "class action" so that it would apply to all patients like Rutherford.[4]

This was in January. In April, the plaintiffs sought a clarification of the class which had been characterized as including all "terminally ill cancer patients." The Judge ruled that anyone met this definition if a practicing physician determined that they were terminally ill and signed an affidavit certifying:

1. that there is histologic evidence of a rapidly progressive malignancy in the patient possessive of a high and predictable mortality rate; and
2. (a) that further orthodox treatment would not reasonably be expected to benefit the patient; or
(b) that Laetrile will be administered only in conjunction with established and recognized forms of cancer treatment; or
(c) that the patient has made a knowing and intelligent election to take Laetrile after being fully apprised of the full range of recognized treatments available and of the fact that Laetrile is considered by most cancer experts to be of no value in combating the disease.

Judge Bohanon emphasized that "the issue before this Court is not the wisdom of using Laetrile, but rather the right of cancer patients to do so if they choose," and he specifically declined to make any findings concerning Laetrile's efficacy.[5] On May 10th an order which set forth the text of an acceptable affidavit was issued.

In the meantime, the FDA was holding its administrative hearing. More than 400 written documents were submitted, and at the hearing on May 2, 1977, in Kansas City, 47 individuals presented testimony. On the basis of this evidence, a lengthy document entitled *Laetrile: Commissioner's Decision on Status* was filed with the court and published in the FEDERAL REGISTER.[6] The Commissioner concluded that Laetrile did not qualify for any of the grandfather clause exemptions and, therefore, could not lawfully be prescribed except under the new drug provisions of the Food, Drug and Cosmetic Act. Had it ended here, the decision would be relatively uninteresting. The Commissioner proceeded, however, to address a number of questions not asked by the court, including the question of limiting use to the terminally ill.

If the physician believes . . . that orthodox therapy has done all it can for the [terminally ill] patient, there is no compelling reason to force the patient to fly to Mexico to obtain a drug for which he is willing to spend his life's savings.

The argument lies uneasy in its procrustean bed. Ignoring the patently silly assertions (*e.g.*, "there is no such thing as a 'terminally ill' patient"), the two major reasons put forth by the FDA for refusing the terminally ill access to the drug are: (1) It is difficult to accurately define the term "terminally ill" and (2) Nonterminal patients would be misled by the exception and attempt to obtain Laetrile from illegal sources. If these arguments are the best the FDA can construct, permitting only terminally ill patients to use Laetrile under the conditions of the Bohanon affidavit seems an attractive alternative to a ban that is admittedly ineffective and forces more than 50,000 people to go to tremendous expense and sometimes violate the law to obtain Laetrile.

The definitional problem is a red herring. There are no certainties in cancer cures. One must also agree that "medical history is full of miracles," and "no one knows if and when any patient is going to die." But none of this compels the conclusion that a physician can never say with a reasonable degree of certainty that his patient's condition is terminal. If the physician believes this, and if he further believes that orthodox therapy has done all it can for the patient, there is no compelling reason to force the patient to fly to Mexico to obtain a drug for which he is willing to spend his life's savings. Under these