

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
CLAUDIA GAYLE, Individually, On Behalf :
of All Others Similarly Situated and as Class :
Representative, : 07 Civ. 4672 (CPS) (KAM)
:
Plaintiff, :

- against -

HARRY'S NURSES REGISTRY, INC., and :
HARRY DORVILIER a/k/a HARRY :
DORVILIEN, :
:
Defendants. :
----- X

AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

Cherilynne

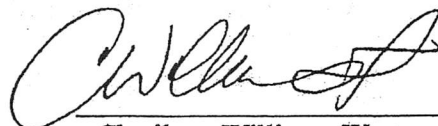
CHERYLYNN WILLIAMS-WEST, being duly sworn, deposes and says:

1. I am a registered nurse. I was employed as a nursing supervisor by Harry's Nurses Registry, Inc. ("Harry's"), for approximately one year ending November 2007. During the period of my employment, my job duties and responsibilities included monitoring the patients and the nurses (both licensed practical nurses and registered nurses) placed by Harry's in their homes.

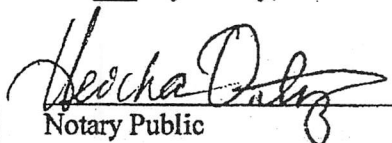
2. Within 90 days of the time that a nurse was placed in service by Harry's, I (or another of the nursing supervisors employed by Harry's) would go into the field, that is, to the home of the patient. While there, I would observe and assess the nurse's skills, for example, hand washing (because many patients breathe through ventilators and are fed through gastric tubes, the nurse's hand washing is of paramount importance). I would also check the book of doctor's orders relating to the patient, to make sure the orders with respect to medication and dosage were up-to-date. Nurses who had been in service for extended periods would receive

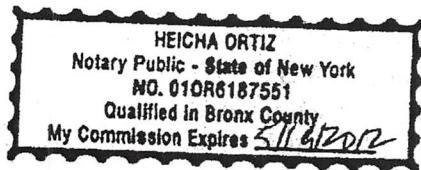
supervision of this kind every 6 months. I, or one of my colleagues, would also perform an assessment of this kind within 48 hours of the time that Harry's began to care for a patient.

3. During my employment at Harry's, I was also responsible for documentation, that is, review of assessments performed by nurses in the field. For example, I would work with the nurse by teaching her how to do a proper head-to-toe assessment of the patient, including such things as mental capacity, heart rate, condition of tracheotomy, sound of lungs, with a focus on the condition being treated. I would also talk to the nurses about such things as infection control and legal issues in nursing. On occasion, I would be accompanied on these in-service assessments by vendors of medical equipment (e.g., ventilators) or their technicians so that I could better instruct the nurses on the use of equipment. These monthly assessments typically lasted 4-5 hours. That is, each month, I (or another nursing supervisor) would spend 4-5 hours in the field with each nurse placed in service by Harry's.


Cherilyn Williams-West
Cherilyn

Sworn to before me
this 13th day of ~~July~~^{August}, 2008


Notary Public



Fourth, even ignoring all of the above, the decisions of Administrative Law Judges are not binding on the Appellate Division. *See, e.g., Keeffe v. Tax Appeals Tribunal of State of N.Y.*, 216 A.D.2d 692, 694 (3rd Dept. 1995) (“To the extent that petitioners rely on a prior decision by an ALJ in another matter, we note that the Tribunal was not required to follow such a decision and, even if it were, such a decision is not binding on this court.”). Thus, appellate counsel cannot be faulted for not advancing arguments based upon these decisions.

And, fifth, a recent decision of the United States Court of Appeals for the Second Circuit – a decision which petitioner fails to supply or mention – found, in an action brought by petitioner’s employees under the Fair Labor Standards Act (FLSA), that the nurses were, in fact, employees rather than independent contractors. Indeed, the nurses’ status as employees was so plain that the District Court granted the nurses’ motion for summary judgement, a decision which was affirmed by the Second Circuit. The Second Circuit decision cites various factors in support of its determination: the Registry fixed the nurses’ pay rate; the nurses had to submit “progress notes” to receive payment; the nurses received training from the Registry; and the nurses worked under the direction of Registry supervisors, who handled matters such as document collection and emergencies. *See Gayle v. Harry's Nurses Registry, Inc.*, 594 F. App’x 714, 717 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 2059 (2015). All of these factors are present in this case as well (*see, e.g.*, A. 134-135 [Registry provided nurses with training and nurses were required to call the Registry in case of an emergency]; A. 163, 216 [petitioner determined hours and pay rate]; A. 136-39, 156-57, 216-17 [nurses were required to fill out and submit progress notes and time sheets to Registry to get paid]; A. 146-47, 562 [if a nurse became ill and could not work their shift, they were required to report this to the Registry so that the latter could find a replacement]; A. 343 [supervisor assembled care plan for patients]; A. 377 [supervisor gave out assignments to nurses]). Thus, even if civil and/or administrative decisions or determinations outside the existing appellate record were legally and factually relevant, *Gayle* demonstrates that appellate counsel still did not act unreasonably by failing to brief and argue petitioner’s legal sufficiency claim.