LEGAL EAGLE EYE NEWSLETTER

April 2002 *For the Nursing Profession* Volume 10 Number 4

Breast Cancer: Primary Care Nurse Held To Same Standard Of Care As Physician.

A patient had to undergo a mastectomy and six months of chemotherapy, but she did survive.

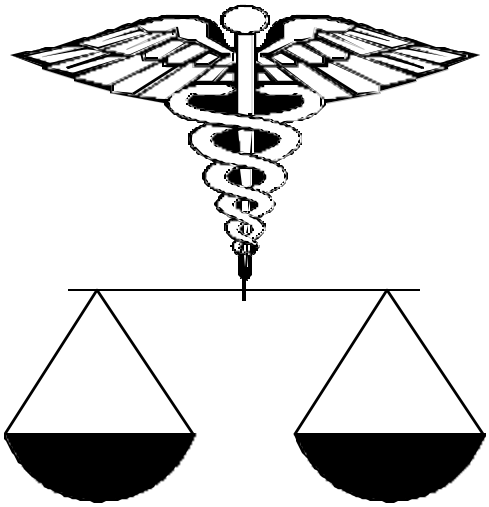
She had gone to a county health clinic for a checkup and was seen by a nurse midwife. The nurse midwife wrote a chart note about fibrocystic disease and, according to the patient, said there was nothing to worry about.

Six months later, at the same clinic, a physician diagnosed breast cancer. The physician later testified, based on what he found, that a palpable cancerous lump was present six months earlier and should have been found and followed up upon.

The jury awarded a verdict to the patient, but also ruled the nurse midwife was only 51% at fault and the patient herself was 49% at fault for not reporting a lump to the nurse midwife.

The Supreme Court of Appeals of West Virginia said it was wrong to blame the patient in whole or in part.

The court pointed to the chart. The nurse midwife noted her assessment of fibrocystic disease. That meant the nurse midwife must have examined the patient. It did not matter what the patient told her. Even if the patient did not report a lump, the lump was there and the nurse midwife should have found it, the court believed.



The courts hold a nurse with advanced standing working in primary care to the same standard of care as a physician performing the same tasks.

An advanced practitioner doing women's health exams must be able to differentiate fibrocystic disease from a cancerous lump and can be sued after the fact if the patient actually had cancer.

SUPREME COURT OF APPEALS
OF WEST VIRGINIA, 2001.

Failure to Diagnose Cancer

Failure to diagnose cancer and treat it at an early stage is a common scenario in medical malpractice litigation. Delayed detection can complicate treatment, take away some percentage chance of survival or cause a patient's death. It often leads to a lawsuit.

In these cases the courts routinely accept expert medical testimony regressing the progression of a tumor to the size and consistency it would have had when the faulty examination took place, as was done in this case.

Advanced Practice In Primary Care

In civil malpractice lawsuits the courts apply the same standards to nurses and physicians for the same tasks in primary care, regardless of the differences in education, certification and licensure that separate nurse midwives and various advanced nurse practitioners from one another and the differences that separate advanced-practice nurses from physicians.

For tasks traditionally associated with the practice of medicine, judges and juries treat nurses the same as physicians. There is only one legal standard of care for primary care providers. **Judy v. Grant County Health Department, 557 S.E. 2d 340 (W. Va., 2001).**

Inside this month's issue ...

April 2002

New Subscriptions Page 3

Non-Emergency Ambulance Transfers: New Regulations Expand Coverage And Increase Nurses' Role In Certifying Medical Necessity For Services.

Effective April 1, 2002 Medicare has expanded coverage for non-emergency ambulance transport and has increased the authority of registered nurses and nurse practitioners in certifying medical necessity.

The new language in the regulations is in bold type.

The full text is on our website http://www.nursinglaw.com/67fr9099.pdf

FEDERAL REGISTER, February 27, 2002
Pages 9099 – 9135.

Sec. 410.40 Coverage of ambulance services.

(b) Levels of service. Medicare covers the following levels of ambulance service:

(1) Basic life support (BLS**) (emergency and nonemergency).**

(2) Advanced life support, **level 1 (ALS1) (emergency and nonemergency).**

(3) Advanced life support, level 2 (ALS2).

(4) Paramedic ALS intercept (PI).

(5) Specialty care transport (SCT).

(6) Fixed wing transport (FW).

(7) Rotary wing transport (RW).

* * * * *

(d) Medical necessity requirements--

(1) General rule. Medicare covers ambulance services, **including fixed wing and rotary wing ambulance services,** only if they are furnished to a beneficiary whose medical condition is such that other means of transportation are contraindicated. **The beneficiary's condition must require both the ambulance transportation itself and the level of service provided in order for the billed service to be considered medically necessary.**

Nonemergency transportation by ambulance is appropriate if either: the beneficiary is bed-confined, and it is documented that the beneficiary's condition is such that other methods of transportation are contraindicated; or, if his or her medical condition, regardless of bed confinement, is such that transportation by ambulance is medically required. Thus, bed confinement is not the sole criterion in determining the medical necessity of ambulance transportation. It is one factor that is considered in medical necessity determinations. For a beneficiary to be considered bed-confined, the following criteria must be met:

(i) The beneficiary is unable to get up from bed without assistance.

(ii) The beneficiary is unable to ambulate.

(iii) The beneficiary is unable to sit in a chair or wheelchair.

(2) Special rule for nonemergency, **scheduled, repetitive** ambulance services. Medicare covers **medically necessary** nonemergency, **scheduled, repetitive ambulance services** if the ambulance provider or supplier, before furnishing the service to the beneficiary, obtains a written order from the beneficiary's attending physician certifying that the medical necessity requirements of paragraph (d)(1) of this section are met. The physician's order must be dated no earlier than 60 days before the date the service is furnished.

(3) Special rule for nonemergency ambulance services **that are either unscheduled or that are scheduled on a nonrepetitive basis.**

Medicare covers **medically necessary** nonemergency **ambulance services that are either unscheduled or that are scheduled on a nonrepetitive basis under one of the following circumstances:**

(i) For a resident of a facility who is under the care of a physician if the ambulance provider or supplier obtains a written order from the beneficiary's attending physician, within 48 hours after the transport, certifying that the medical necessity requirements of paragraph (d)(1) of this section are met.

* * * * *

(iii) If the ambulance provider or supplier is unable to obtain a signed physician certification statement from the beneficiary's attending physician, a signed certification statement must be obtained from either the physician assistant (PA), nurse practitioner (NP), clinical nurse specialist (CNS), registered nurse (RN), or discharge planner, who has personal knowledge of the beneficiary's condition at the time the ambulance transport is ordered or the service is furnished. This individual must be employed by the beneficiary's attending physician or by the hospital or facility where the beneficiary is being treated and from which the beneficiary is transported. Medicare regulations for PAs, NPs, and CNSs apply and all applicable State licensure laws apply; or,

(iv) If the ambulance provider or supplier is unable to obtain the required certification within 21 calendar days following the date of the service, the ambulance supplier must document its attempts to obtain the requested certification and may then submit the claim.

Acceptable documentation includes a signed return receipt from the U.S. Postal Service or other similar service that evidences that the ambulance supplier attempted to obtain the required signature from the beneficiary's attending physician or other individual named in paragraph (d)(3)(iii) of this section.]

(v) In all cases, the provider or supplier must keep appropriate documentation on file and, upon request, present it to the contractor.

FEDERAL REGISTER, February 27, 2002
Pages 9099 – 9135.

Abuse: One Incident Is Enough To Discipline CNA.

According to the record, a CNA went into a dementia patient's room, began poking her in the ribs, took her juice away, threatened to pour it on her, poured it on her, rubbed her head and teased her saying, "It will be all right, honey."

The aide was reported to the state department of health. The aide was placed in the registry of care workers who had abused a patient. The Appellate Court of Illinois agreed with the state's hearing examiner that such action was warranted.

One Incident Sufficient

Pattern Does Not Have to Be Shown

The hearing examiner in his report stated he believed there was a pattern of abuse. The aide appealed on the basis that one incident does not establish a pattern.

After reviewing the legal definition of abuse the court stated it could find nothing in the law that there must be a pattern of abuse. One incident is enough to discipline an aide and effectively remove the aide from further caregiving employment, the court ruled. **Mason v. Department of Public Health, 761 N.E. 2d 794 (Ill. App., 2001).**

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E. Kenneth Snyder, BSN, RN, JD
Editor/Publisher
12026 15th Avenue N.E., Suite 206
Seattle, WA 98125-5049
Phone (206) 440-5860
Fax (206) 440-5862
info@nursinglaw.com

Dementia: Court Rules Patient Needs Nursing Home, Selects Guardians To OK Placement.

The legal issue is whether to override the patient's durable power of attorney and appoint a legal guardian.

That is not a cut-and-dried legal technicality. The real question is whether the patient can be cared for at home or needs to be placed in a nursing facility.

The daughter who wants to try to take care of her at home is the attorney-in-fact nominated by the durable power of attorney.

The son and the other daughter who want to keep their mother in the nursing facility are the petitioners seeking an order appointing them as the guardians.

A nurse testified she needs 24/7 two-person assistance to transfer and one-on-one assistance with even the most basic activities of daily living.

The son and other daughter will be the guardians.

NEW YORK SUPREME COURT, APPELLATE DIVISION, 2002.

The patient was ninety-one years-old. Living at home she broke her hip, went to the hospital and then to a nursing home. Complete nursing, physical therapy and social-work psychosocial assessments were done at the nursing home.

Durable Power of Attorney

One daughter lived nearby and had been taking care of the patient at home before she went to the hospital. This daughter had her sign a durable power of attorney appointing her as the attorney-in-fact for her mother's healthcare decisions.

On the face of it, that gave the daughter legal authority to remove her mother from the nursing home, take her home and try to care for her there.

Legal Guardianship

The son and another daughter did not live nearby and could not take care of her. But they also sided with the nursing home's professional staff's assessments that their mother's needs dictated she remain in the nursing home.

They went to court for an order appointing them as guardians with authority to override the durable power of attorney.

Patient's Needs

The New York Supreme Court, Appellate Division, threw out the durable power of attorney because the patient already had significant dementia before she signed it. More important, based on testimony from the nurse who assessed her, the court ruled nursing home placement was necessary and appointed the son and the other daughter as the legal guardians. **In re Mary J., 736 N.Y.S.2d 542 (N.Y. App., 2002).**

Medication Error: Court Says Nurse's Negligence Does Not Justify Termination For Cause.

The Supreme Court of Pennsylvania had to decide if a new graduate nurse was terminated from the hospital's pediatric intensive care after a medication error for just cause as opposed to excusable inadvertence that did not justify termination.

Just after completing a preceptorship for another unspecified patient-care error the nurse did not properly dilute an antibiotic before administering it to a pediatric patient. The court record did not specify the medication, the route or the dosage.

It was the hospital's express policy for nurses to look up medications in a reference book if they had any questions, but this nurse had given the same medication before and believed she knew the proper dilution factor.

Forced Resignation = Termination

The nurse was offered the option of resigning or being terminated and resigned. That is considered termination.

Just Cause / Willful Misconduct

The question was whether she was terminated for cause. Willful misconduct and just cause for termination are basically the same thing in legal terminology.

Medication Errors Not Considered Willful Misconduct

The court ruled that inadvertent medication errors are not willful misconduct for a nurse. The court essentially shifted the burden to a nurse's employer to supervise and correct a nurse who commits medication errors.

The court applied the same standard to nurses that applies to other employees. Inadvertent mistakes are not willful misconduct justifying termination. Nurses' mistakes can cause substantial harm to patients and can lead to legal liability for their employers, but in the court's mind that did not change the general rule.

If a nurse is accepting supervision and making a best effort to administer medications properly, but commits an error, there is no willful misconduct. **Navickas v. Unemployment Comp. Review Bd., 787 A. 2d 284 (Pa., 2001).**

Nurses are not held to a different standard than employees in other occupations.

That is, a nurse cannot be terminated for cause unless there has been willful misconduct or intentional disregard of the employer's interests.

Nurses sometimes commit medication errors. Medication errors always have a potential to harm patients and sometimes do harm the patient.

When a nurse commits a truly inadvertent mistake in administering medications there are no grounds to find willful misconduct.

The archaic terminology of the common law is still relevant today in defining when there is willful misconduct justifying an employee's termination.

Inadvertence is willful misconduct only if it is of such a degree as to manifest culpability, wrongful intent, or evil design, or show and intentional and substantial disregard of the employer's interests or of the employee's duties and obligations toward the employer.

SUPREME COURT OF PENNSYLVANIA, 2001.

Wrongful Discharge: Court Says Employee Can Sue Management Company.

A nursing home administrator was fired for reporting his employer to the US Occupational Safety and Health Administration.

The District Court of Appeal of Florida did not get into the particulars except to report that the jury did find illegal retaliation and did award damages for wrongful discharge based on the state's Whistle Blower Act. However, before the jury began deliberations the local trial judge dismissed the nursing home management corporation from the case, leaving the nursing home itself as the only defendant that would be responsible to pay the verdict.

The management corporation was under contract to establish personnel policies, set wages and salaries, recruit employees, set employee schedules and perform various other management duties.

The management corporation can be sued in a wrongful discharge case.

DISTRICT COURT OF APPEAL OF FLORIDA, 2001.

The Court of Appeal ruled that the management corporation, although technically not the administrator's employer, should be treated as if it were his employer. The management corporation hired him and wrongfully decided to fire him and should have to pay the damages. **Martinolich v. Golden Leaf Management, Inc., 786 So. 2d 613 (Fla. App., 2001).**

Revolving Door: Hospital Ruled Not Liable To Senior Visitor With Walker.

A hospital held a senior health fair on its premises to which the hospital invited residents of a particular nursing home. A nursing home employee brought a van full of seniors to the fair. One of the residents, who used a walker, was injured exiting the building through a revolving door and sued the hospital and the nursing home for negligence.

The Court of Appeals of Georgia ruled there was no basis for a lawsuit against the hospital.

A hospital visitor with a walker is as knowledgeable as the hospital itself of the danger of a revolving door.

A hospital is not required to post persons by the revolving doors to help visitors.

There were four employees and four volunteers helping seniors at the senior fair, but the hospital was under no legal obligation to provide special accommodation to these visitors.

COURT OF APPEALS OF GEORGIA, 2001.

The court said it was the nursing home's staff member's responsibility to help the residents through the revolving door. In fact, the staff member did tell this resident to wait while she helped the others to the van and she would come back and help her, but the resident went ahead alone and fell in the revolving door.

The court ruled the resident nevertheless was entitled to her day in court in a jury trial to try to prove the nursing home was negligent. **Owens v. Dekalb Medical Center, Inc., 557 S.E. 2d 404 (Ga. App., 2001).**

Family And Medical Leave Act: Court Says Different Shifts Not Equivalent Nursing Positions.

The US Family and Medical Leave Act (FMLA) makes employees working for employers with fifty or more employees eligible to take medical leave.

When an eligible employee returns to work after medical leave the employee has the right to be restored to the same position as before or an equivalent position.

A night shift is not equivalent to a day shift. Federal regulations say explicitly that an employee returning from leave is entitled to go back on the same shift. This employee's supervisor conceded that most hospital employees find one particular shift more desirable than others, most persons preferring the day shift.

Even if the day shift and night shift are on the same nursing unit with the same duties and responsibilities and the same pay, a night shift is not the same or an equivalent position under the FMLA.

However, if an employee stays out beyond the twelve weeks allowed by the FMLA the employee forfeits the right to be reinstated to the same job or to any job for that matter.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, 2001.

The Family and Medical Leave Act (FMLA) is extremely complex.

In a recent court decision involving a hospital critical care nurse the US Circuit Court of Appeals for the Fifth Circuit focused only on the issues that pertained to the case. There was no dispute the hospital had more than 50 employees, the nurse worked more than 1250 hours in the preceding year, the nurse gave proper notice and provided medical documentation, the nurse's injuries from a motor vehicle accident were a serious health condition, etc.

Same or Equivalent Position On Return From Leave

The court ruled that the night shift the nurse was offered when she returned from leave was not the same or equivalent to the day shift she worked before.

The FMLA requires the employer to restore the employee to the same or an equivalent position in terms of pay, benefits and other terms and conditions of employment.

The night shift was on the same unit at the hospital, with the same duties and responsibilities and the same pay. However, according to the court, Federal regulations state in general that different shifts are not equivalent positions and the court said the same rule should apply to nurses. Further, the nurse's own supervisor testified that most hospital employees find one shift more desirable than another, with most preferring the day shift.

No Constructive Discharge

The nurse went into the day nursing pool for a while and made less money than on the CCU day shift before her leave began. But soon she resigned voluntarily.

When an employee is forced out the law refers to it as constructive discharge. It is the essentially the same as retaliatory discharge and it is grounds to sue. But the bottom line for this nurse was her voluntary resignation effectively cut off her right to seek more than minimal damages. **Hunt v. Rapides Healthcare System, LLC, 277 F. 3d 757 (5th Cir., 2001).**

Post-Op Care: Failure To Ambulate As Cause Of Embolism.

The Court of Appeals of Texas stated that nurses have a strict legal duty to follow the physician's orders for ambulation after surgery.

If the patient remains immobile there is a substantial risk of thrombosis leading to a pulmonary embolism.

A thrombus or blood clot can form as the result of a patient's immobility following surgery, or the size of an existing thrombus can increase.

If a thrombus, often in the leg, breaks loose and enters the lungs it is a pulmonary embolism, a dire life-threatening condition.

Nurses must ambulate patients post-surgery in accordance with the physician's orders and must be able to recognize the signs of a pulmonary embolism.

COURT OF APPEALS OF TEXAS, 2001.

That being said, the court dismissed the family's wrongful death lawsuit against the surgeon and the hospital. The deceased died from a pulmonary embolism after a routine laparoscopic appendectomy.

The pathologist testified he died from a pulmonary embolism and pulmonary embolism is a generally known risk from immobility, but the court did not find specific evidence that failure to ambulate caused or aggravated the thrombus in this patient. **Sisters of St. Joseph of Texas, Inc. v. Cheek, 61 S.W. 3d 32 (Tex. App., 2001).**

Quadriplegic Scalded: Can Sue For Pain And Suffering.

The Court of Appeal of Louisiana ruled that a personal care attendant assisting a quadriplegic to shower has a strict legal duty to monitor the temperature of the water to make sure the patient is not scalded by hot water.

In this case while maneuvering the patient the attendant apparently bumped the lever-type hot water control in the shower over to the very hot position, allowing hot water to flow out and scald him, which the court said is negligence.

No Feeling In Quad's Lower Body

The court threw out the argument that a quad cannot sue for pain and suffering if he is scalded in his lower body. He had to sleep in an unaccustomed and awkward position while his injuries healed. **Keel v. West Louisiana Health Services, 803 So. 2d 382 (La. App., 2001).**

Psych : Danger To Self Legal Standard.

The District Court of Appeal of Florida reiterated the established legal rule that danger to self or danger to others are the only accepted legal bases for involuntary mental health commitment.

Refusal To Take Meds Is Not Enough

In and of itself, a patient's verbalizing that she will not take her psych meds after she is discharged from the hospital is not grounds to keep the patient in the hospital and medicate her against her wishes, even if her psychiatric condition will deteriorate. The court said there must be proof of a substantial likelihood the patient will inflict serious harm on herself or anther to justify involuntary mental health treatment. **Henson v. State of Florida, 801 So. 2d 316 (Fla. App., 2001).**

Narcotics: Nurse Guilty Of Voluntary Act, License Suspended.

A nurse stole a fentanyl patch from the trash at work, took it home, extracted the narcotic, mixed it with water and injected himself, he said, in an attempt to commit suicide. He lost his nursing license and his case-manager job which required a nursing license.

He claimed he had a disabling mental illness that forced him to do it and rendered him not responsible for his actions.

A nurse who diverts narcotics may be suffering from an addiction or mental illness that to some extent diminishes the nurse's power of control over his actions.

However, the law looks at whether there was time for the nurse to reflect on his actions and consider the consequences.

If there was time to reflect, the law considers the act voluntary and the nurse is guilty of criminal conduct for which he can lose his license and his job.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2001.

The Superior Court of New Jersey, Appellate Division, disagreed. It was a conscious, deliberate and voluntary criminal act for which he was legally responsible. Even if compelled by mental illness or addiction to divert narcotics, nurses are fully responsible for their actions. **Mullarrney v. Board of Review, 778 A. 2d 1114 (N.J. App., 2001).**

Discrimination: Race Bias Case Dismissed.

A psychiatric facility serving adolescent girls fired an African-American mental health technician for an ongoing pattern of inappropriate sexual conduct involving his patients.

He sued for race discrimination. The US Circuit Court of Appeals for the Eighth Circuit dismissed his lawsuit.

When a minority employee is terminated from a position for which the employee is qualified, the employee has a prima facie case of discrimination.

It is then up to the employer to show a legitimate, non-discriminatory reason why the employee was treated as he was.

Inappropriate sexual contact with adolescent patients is a legitimate, non-discriminatory reason to terminate an employee.

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT, 2002.

The employee did not deny he had fraternized inappropriately. He argued that two white mental health technicians were disciplined less harshly for inappropriate sexual conduct on the job.

Differential Discipline Is Race Bias

Differential discipline is a legitimate argument in a race discrimination case. Punishment must be the same for the same offense. However, the court ruled the offenses were not the same. A white employee was referred to counseling for sexual harassment of co-workers, considered less vulnerable than adolescent patients, and another was written up after a patient's room door accidentally closed behind him, a minor violation of policy. **Williams v. Saint Luke's Shawnee Mission Health System, Inc., 276 F. 3d 1057 (8th Cir., 2002).**

Home Health Nursing: Court Defines When Nurses Are Entitled To Overtime Pay.

The US Fair Labor Standards Act (FLSA) says that employees are entitled to overtime at one and one-half their usual hourly rate for any hours worked over and above forty hours in a seven-day week.

A major exception exists for employees in a bona fide professional capacity.

The FLSA has its own definition of a professional employee who does not have to be paid overtime:

The employee's duties consist of the performance of work requiring advanced knowledge in a field of science or learning; and

The work requires the consistent exercise of professional judgment; and

The employee is paid on a salary or fee basis and earns more than $250 per week.

A home health nurse is a professional employee under the first two prongs of the test.

However, this nurse was not paid strictly on a fee-for-service basis. She was paid partly on an hourly basis. All three prongs of the FLSA's test were not met. She is entitled to overtime.

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT, 2002.

The United States Circuit Court of Appeals for the Sixth Circuit had to decide if a particular home health nurse was entitled to overtime pay.

The court ruled she was not a professional employee under the US Fair Labor Standards Act's (FLSA) special three-part definition of an exempt professional employee. Not being an exempt professional employee, the nurse was entitled to enforce her judgment from the Federal District Court for back overtime premiums her employer owed her.

Flat Fee For Services versus Hourly Compensation

There is no hard-and-fast rule, although most home health nurses probably are exempt professionals who are not entitled to overtime pay.

A court has to look carefully at the particular nurse's compensation plan. Is the nurse paid strictly on a fee-for-service basis, or to any extent on an hourly basis?

In this case the nurse was paid in part on a hourly basis, depending on the time required to perform certain nursing tasks and for her time on an hourly basis for meetings, training and on-call time.

By contrast, the Court of Appeals for the Sixth Circuit admitted it handed down a case in 2000 with the exact opposite result, that home health nurses are exempt professionals who are not entitled to overtime. In that case the home health nurses were paid strictly on a fee-for-service basis regardless of the length of time spent on the nursing task at hand and regardless of other time spent on no-shows, travel time, staff meetings, in-services, etc.

Burden of Proof Is On The Employer

The FLSA puts the burden of proof on the employer. The employer has to convince the court an employee not being paid overtime is an exempt professional. In this case the court believed the employer did not meet that burden of proof. **Elwell v. University Hospitals Home Care Services, 276 F. 3d 832 (6th Cir., 2002).**

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Auto-immune Skin Disorder: Nurse Practitioner Should Have Obtained Physician Consult.

A patient was seen by a nurse practitioner in a county health clinic for a skin disorder. She prescribed antibiotics and a topical cream. The patient actually had pemphigus vulgaris, an uncommon auto-immune skin disorder from which she died three months later.

The New York Supreme Court, Appellate Division, ruled there were grounds for a malpractice lawsuit against the county for the nurse practitioner's negligence.

Minimal Training in Dermatology

Her training in dermatology was minimal, one day at best, but that made no difference. The nurse practitioner should have consulted with a physician about referring this patient to a specialist in dermatology, the court believed. **Rivera v. County of Suffolk, 736 N.Y.S.2d 95 (N.Y. App., 2002).**

Transfer Of Nursing Home Resident: No Reason Found.

A nursing home sought legal permission from the state Department of Children and Families before transferring a resident to another facility against the resident's wishes.

The Department's hearing examiner ruled there were no grounds to transfer the resident against her wishes and the District Court of Appeal of Florida agreed.

Involuntary Transfer / Federal Standards

Involuntary transfers of nursing home residents from facilities that accept Medicaid or Medicare are governed by Federal standards. The transfer must be necessary to meet the resident's needs which no longer can be met at the facility or must be necessary to protect the health or safety of other residents who are endangered by the resident's continued presence.

The court noted the facility had a specialized lockdown security unit for Alzheimer's dementia patients which was completely appropriate for this resident. **Edgewater Village v. Youngren, 803 So. 2d 900 (Fla. App., 2002).**

HIV Discrimination: Court Says Some Direct-Care Workers Do Pose A Significant Risk To Patients.

A recent case from the US Circuit Court of Appeals for the Eleventh Circuit involved a dental hygienist.

HIV Is A Disability

The court upheld the general rule that HIV is a legally-recognized disability. In general, HIV-positive healthcare workers can sue their employers for disability discrimination if they are excluded from direct patient care on the basis of their HIV status.

Significant Threat Of HIV Transmission

The court also upheld an exception to the general rule for a small segment of the direct-care population whose jobs pose a significant risk to patients of HIV transmission. Their employers can exclude them from direct care without being sued for discrimination.

It is illegal disability discrimination to exclude an HIV-positive healthcare worker from direct patient care unless there is a significant risk of HIV transmission due to the special nature of the worker's job.

This exception exists only for employees doing invasive procedures with sharp instruments who can cut themselves and bleed into the patient.

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, 2001.

Invasive Procedures / Sharps

According to the court, the CDC has evidence that direct-care workers like dental hygienists and O.R. personnel who perform invasive procedures with sharp instruments can cut themselves inadvertently and their blood can enter the patient's bloodstream. The HIV virus can be transmitted in this manner and lead to seroconversion in the patient, according to the CDC.

Consultation With CDC

The court commended the employer in this case for consulting with the CDC before deciding to dismiss the HIV-positive employee, and for taking potentially controversial action rather than risking the health of patients. **Waddell v. Valley Forge Dental Associates, Inc., 276 F. 3d 1275 (11th Cir., 2001).**