LEGAL EAGLE EYE NEWSLETTER

April 2005 *For the Nursing Profession* Volume 13 Number 4

Patient Education: Nurses Are Sued For Talking Down To Patient, Case Dismissed.

The patient had to go back to the hospital for almost a month when staph and e coli infections arose at home after her discharge following quadruple bypass surgery.

When leaving the hospital this time she enrolled with a visiting-nurse association for in-home care, to be paid for by her health insurance.

The care plan was for the nurses to treat her wounds and flush her peripherally inserted central catheter.

The care plan also called for the nurses to teach the patient how to care for her wounds herself, how to maintain her diet, how to care for her diabetes and how to keep her home safe.

From the start the patient objected to her nurse's "overly polite" attitude and complained that her nurse was talking down to her during patient-teaching sessions.

Over the course of the first week the nurse repeatedly insisted the patient needed to start participating in her own wound care and learn to flush her own PICC line or she might possibly forfeit her insurance coverage for skilled nursing care. The patient became upset at the prospect of losing her insurance coverage for home care, as she might die if the nurses stopped coming and caring for her.

The nurse's "overly polite" comments were meant to prompt the patient to become more medically independent. That was fully consistent with the patient's care plan.

It may have been insensitive to suggest she could lose her insurance coverage for being uncooperative, but an average member of the public would not consider that offensive.

COURT OF APPEALS OF GEORGIA
February 17, 2005

Patient Refused Teaching Refused to Participate In Care

The patient resisted the nurse showing her how to flush her own PICC tube and change her own wound dressings.

The patient flatly refused to try to do these tasks, maintaining that it was strictly her nurse's responsibility to do everything for her.

Emotional Distress Suit Thrown Out

The patient sued the non-profit visiting nurse association, her nurse and her nurse's supervisor. The Court of Appeals of Georgia agreed with the local county court judge's decision to dismiss the case.

To sue for intentional infliction of emotional distress there must be intentional malicious conduct that is outrageous in the extreme. That certainly was not the case here, the court said.

The nurse was acting properly and was following the patient's care plan ordered by her physician when the nurse steadfastly insisted the patient had to take an interest in her own care.

It may have been insensitive to threaten loss of insurance coverage, the court said, but not grounds for a lawsuit. **Canziani v. Visiting Nurse Health Systems, Inc., __ S.E. 2d __, 2005 WL 388279 (Ga. App., February 17, 2005).**

Inside this month's issue ...

April 2005
New Subscriptions
See Page 3

Patient Teaching/Emotional Distress - Nursing Home Understaffing
Abuse Of Dependent Adult/Duty To Report/Facility Staff
Post-Op Nursing/Vomitus Aspiration - Drug/Alcohol/Confidentiality
Exit Interview/Emotional Distress - Pregnancy Discrimination
HIPAA/Interview With Patient's Attorneys - HIV Discrimination
Correctional Nursing/Medication Error/Deliberate Indifference
Male Nurse/Female Supervisor/Harassment/Discrimination
Adult Diaper Not Changed/Nursing Home Residents' Bill Of Rights

Understaffing: Court Looks At Widespread Pattern, Orders Large Judgment Against Nursing Home's Management Company.

Two elderly residents were taken to the doctor's office by one staff member of the nursing home.

On arrival at the doctor's office both residents were placed in their wheelchairs by the one staff member.

The resident in question was left unattended while the staff member went back to assist the other resident.

While unattended, the resident in question began rolling down the sidewalk at a rapid speed. A witness would later state the resident had a really scared expression on her face as her wheelchair veered off the sidewalk and she was thrown onto the concrete surface of the doctor's office parking lot.

She died four days later from her injuries. The family sued the nursing home and obtained a $1.7 million jury verdict. The Court of Appeals of Texas ordered the damages reduced to $1.3 million and assessed the damages only against the corporation that managed the nursing home and not against the parent corporation which owned the facility.

Understaffing Was the Issue

The family's attorneys were able to present a case to the jury of a widespread pattern of understaffing at the facility. That pattern was behind the decision to send only one person to the doctor's office with the two residents, they claimed.

Numerous employees and former employees were called to court to testify as to the difficulties they had experienced. The jury concluded that understaffing in fact was the factor which caused the tragic event which killed this resident.

Treating Physician / Medical Director

The resident's treating physician testified that a facility which cares for persons, like the resident in question, who have a high risk of falling have a responsibility to see that sufficient staff are available to meet the residents' needs for supervision and assistance when transferring and being transported.

There was a widespread pattern of understaffing at the nursing home.

The nursing home management company was under considerable pressure from the corporation which owned the nursing home to reduce personnel costs to a minimum. The management company received frequent line-item directives over excessive staff-expense issues.

However, the ownership corporation had no direct control over management or staff-allocation issues. The evidence is inconclusive that the ownership corporation, as opposed to the management corporation, is the party at fault.

The owners will be affected indirectly by the verdict against the facility which they own. The verdict will have a substantial negative impact upon their investment in the nursing home, but they are not directly responsible for payment of the judgment.

The jury's verdict will be reduced from $1.7 million to $1.3 million and will apply against the management company alone.

COURT OF APPEALS OF TEXAS
March 11, 2005

CNA Coordinator

The facility's CNA coordinator testified she was told to keep CNA staffing to the state-allowed minimum despite complaints from nursing staff that CNA staffing levels were insufficient to meet the residents' needs.

Payroll Clerk

The facility's payroll clerk testified the facility's pay rates were the lowest in the area. This contributed to high staff turnover, which in turn contributed to the facility often being short-handed.

Staff Nurse

A staff nurse testified the facility was constantly understaffed, due primarily to low wages and poor working conditions.

The understaffing had an effect on the resident in question and other residents. High fall-risk patients like her were instructed to use their call buttons to summon assistance rather than trying to get up on their own. But when no one responded they would have to try to get up on their own. When they tried to get up on their own they would often fall.

The jury heard testimony that the resident in question had not made it to the bathroom and had fallen in her own urine on at least one occasion with no one available to help her.

Former CNA

A CNA who had formerly worked at the facility testified the resident in question was known to try to get out of her wheelchair by herself and to try to do things by herself when no one would come to help her.

This was a common occurrence because the facility more often than not was short handed.

The CNA testified she was told after the fact to go back and fill in blanks in CNA flow charts after she was unable to render all the personal care that was expected of her. **Sunbridge Healthcare Corp. v. Penny, __ S.W.3d __, 2005 WL 562763 (Tex. App., March 11, 2005).**

Abuse Of Dependent Adult: Facility Administrator Convicted, Failed To Report Incident With Staff.

In a recent opinion, the California Court of Appeal applied the state's law on mandatory reporting of adult abuse to an administrator of a skilled nursing facility for adult psychiatric patients who failed to report a staff member who placed a patient in a choke hold after the patient refused to stand down from aggressive behavior toward a nurse.

Mandatory Reporter

Each state has its own definition of a mandatory reporter, who by law must report abuse or suspected abuse of a vulnerable adult to protective services and/or law enforcement. These definitions as a general rule include nurses, with respect to patients who are under their care.

Failure to Report Abuse
Criminal Offense

A mandatory reporter must report known or suspected abuse to proper authorities who are specified by state law. State law may say it is adult protective services, and give a phone number for the reporting hotline, and/or say that local law enforcement is to be notified.

A mandatory reporter can be charged with a serious criminal offense for failing to report abuse as required by law.

Overreaction by a staff member in an institution for the mentally ill, involving physical contact that could produce physical injury, is abuse and must be reported to authorities.

By law, certain healthcare professionals have the mandatory duty to report abuse of dependent adults.

In California the definition of a mandatory reporter of abuse is very broad, including any staff of any public or private institution that cares for dependent adults.

The legal definition of what must be reported is also very broadly worded. It includes actual abuse that has been witnessed directly, abuse that has been reported to the mandatory reporter and abuse that is suspected to be occurring or to have occurred, provided there is a reasonable basis behind the reporter's suspicion of abuse.

CALIFORNIA COURT OF APPEAL
February 18, 2005

Staff Member Overreacted
Court Sees Abuse
Mandatory Duty to Report

The events occurred in a skilled nursing facility providing long-term care to adults disabled by psychiatric problems. The patients qualified as dependent adults.

A nurse intervened in an argument between two patients. She sent the non-aggressor to her room. A male staff member then moved in and began trying verbally to intimidate the aggressor patient to stand down. Both the patient and the staff member became more agitated. Then the staff member put the patient in a choke hold. It did not produce unconsciousness or any visible injury.

A report of the incident went from the nurses to the director of nursing to proper authorities. It resulted in criminal charges being filed against the administrator for not reporting abuse by the staff member.

Injury Not Required

Actual injury is not required for conduct to amount to abuse that must be reported. The potential to produce injury, physical or psychological, is all that is required. A choke hold is not appropriate in these circumstances and can cause injury or death. A choke hold is an example of plainly abusive conduct, the court said.

A mandatory reporter need not actually witness abuse or its effects, to be required to report it. Reasonable suspicion is all that is required. The fact the perpetrator is also a caregiver and a subordinate or co-worker is also no defense to the mandatory duty to take action. **People v. Davis, 126 Cal. App. 4th 1416, 25 Cal. Rptr. 3d 92 (Cal. App., February 18, 2005).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession
ISSN 1085-4924

© 2004/2005 Legal Eagle Eye Newsletter

Indexed in
Cumulative Index to Nursing & Allied Health Literature™

Published monthly, twelve times per year.
Mailed First Class Mail at Seattle, WA.

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
http://www.nursinglaw.com

Circle one: $155 one year $85 six months | Phone toll free
Check enclosed ____ Bill me ____ Credit card ____ | 1-877-985-0977
Visa/MC/AmEx/Disc No. ________________________________ Mail to:
Signature ________________________ Expiration Date _______ Legal Eagle
PO Box 4592
Name ____ Seattle WA
Organization____ 98194-0592
Address____
City/State/Zip_______________________________________

Vomitus Aspiration: Nurse Cleared Of Negligence In Patient's Death Post-Op.

The twenty-six year-old patient was hospitalized for orthopedic surgery. His surgery went smoothly. He was transferred from post-anesthesia to the orthopedic floor. He was on a patient-controlled anesthesia morphine pump. He vomited during the night after surgery and the physician started him on Phenergan for the nausea. The Court of Appeals of Tennessee noted that morphine and Phenergan are commonly used post-surgery medications which alone or in combination can depress respiratory function.

He vomited during the morning hours and was given more Phenergan. He had nothing liquid, semi-solid or solid to eat all day. In the early evening he was given a cheeseburger after he refused the meal on his hospital tray and was fine until 1:00 a.m.

Patient Vomits / Nursing Assessment

When the patient vomited at 1:00 a.m. a family member summoned the nurse. The nurse and family member cleaned the patient and changed his linens and gown. The nurse noted he was able to sit up in bed and carry on a normal conversation. He did not appear to have breathing difficulty or suppression of mental function.

At 4:00 a.m. the nurse checked him again. He was sleeping soundly and had only used a small amount of morphine in the previous three hours compared to the 7:00 p.m. to 1:00 a.m. interval. There was no indication of any breathing difficulty.

At 5:45 a.m. an aide found him in respiratory distress and the nurse called a code. Coffee-ground emesis came out of his mouth. He died at about 6:30 a.m.

Although the autopsy concluded in retrospect he had aspirated vomitus at 1:00 a.m., the court could find no deficit in the nursing care by the night nurse. To justify a finding of negligence a bad outcome is not enough, there must be some departure from the recognized standard of care. That was absent in this case. **Smith v. State, 2005 WL 589818 (Tenn. App., March 14, 2005).**

The patient's family's nursing expert's testimony did not reflect the prevailing standard of care for a nurse caring for a patient post-operatively.

There was no indication from the facts contained in the medical record that the nurse should have suctioned the patient's lungs after the 1:00 a.m. vomiting episode and then attempted to obtain a new airway by getting a tracheotomy.

It was a nursing judgment call whether the nurse should have listened to the patient's lungs with a stethoscope after he vomited. There is no good reason to discount the assessment the nurse did at the time concerning the patient's respiratory status.

There was also no reason to believe the nurses had earlier acted improperly in carrying out the physician's routine post-op orders to advance the patient from a liquid to semi-solid to solid diet, that is, there was no breach of the standard of care by the nurses which could reasonably be seen as the cause of the 1:00 a.m. vomiting episode.

COURT OF APPEALS OF TENNESSEE
March 14, 2005

Confidentiality: Nurse Fired, Reported Drug Dependency Patient To Local Police.

A nurse was working the night shift on an acute-care hospital's chemical dependency unit when one of the patients approached her at the nurses' station demanding methadone. He threatened to kill her, but then walked away.

The nurse locked herself in the nurses' station and called hospital security and the house nursing supervisor.

The next time she worked the night shift on the chemical dependency unit, more than a month later, she realized the same patient was on the unit. Although he was sleeping at the time, she phoned the police, reported the prior incident, identified the patient by his full name and said she wanted to file a criminal complaint.

For drug and alcohol treatment, patient confidentiality rules prohibit so much as mentioning that the person was getting treatment.

An exceptions exists only when there is an immediate threat.

UNITED STATES DISTRICT COURT
NEW YORK
March 1, 2005

The US District Court for the Southern District of New York upheld her firing.

There was no immediate threat of harm, the court said, when she revealed to police the patient's identity as a patient. Thus she violated the law as well as hospital policies which called for her to turn it over to hospital security to deal with the problem. **Yarde v. Good Samaritan Hosp., __ F. Supp. 2d __, 2005 WL 589028 (S.D.N.Y., March 1, 2005).**

Exit Interview: False Charges, Emotional Distress Lawsuit.

A public health nurse suffered from multiple sclerosis, a progressive condition which made it increasingly difficult for her to do her job. As her condition progressed her duties were adjusted to accommodate her disability.

The nurse also was found guilty of nursing errors, not specified in the court record, which could have had serious consequences for her patients. A decision was made to terminate her employment.

During her exit interview a co-worker accused her of falsifying patient records to conceal the errors she had made. According to the court, the co-worker knew this accusation was false. The nurse sued for negligent infliction of emotional distress. The Appellate Court of Connecticut upheld her right to sue.

To prove negligent infliction of emotional distress intent is not required, only proof that it is foreseeable that emotional distress could occur.

APPELLATE COURT OF CONNECTICUT
January 18, 2005

The court ruled the nurse did not have to prove her co-worker intended to inflict emotional distress. It was not necessary that her co-worker's conduct be extreme or outrageous, only that it was wrong and she knew it was wrong. Wrongful conduct in a termination, even if the termination is justified, can be the basis for a lawsuit.

It was only necessary that the co-worker should have anticipated that making false accusations could cause a person in the nurse's position to experience emotional distress. **Olson v. Bristol-Burlington Health Dist., 87 Conn. App. 1, 863 A.2d 748 (Conn. App., January 18, 2005).**

Pregnancy Discrimination: Employee Does Not Actually Have To Be Pregnant To Sue.

An employee has a straightforward case of discrimination in violation of the US Pregnancy Discrimination Act (PDA) if the employee can show:

1. She was pregnant;

2. She was qualified for her job;

3. She was subjected to an adverse employment decision; and

4. There was a connection between her pregnancy and the adverse employment decision.

However, it can get more complicated than that.

The PDA also prohibits an employer from discriminating against a woman because of her capacity to become pregnant.

The most obvious case of that would be discrimination against a woman who had been pregnant, had taken maternity leave and might become pregnant again and decide to go out on leave.

This discussion, however, is based on the assumption the employee can prove that her potential to become pregnant was her supervisor's motivation.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
March 11, 2005

The US Circuit Court for the Sixth Circuit has given a broad interpretation to the US Pregnancy Discrimination Act, an interpretation which allows not only pregnancy but an employee's capacity to become pregnant or a supervisor's expectation she will become pregnant as grounds for a discrimination lawsuit.

A nurse resigned her position due to complications of her first pregnancy. When she was ready to return to work she applied for re-hire on a part-time basis. She was turned down. She filed a complaint with the Equal Employment Opportunity Commission, then sued her former employer in Federal court.

Potential Pregnancy Grounds For Suit

The court agreed in general terms with the underlying legal premise behind her lawsuit, but ruled she did not have the evidence to prove her case.

There had been scheduling difficulties surrounding her pregnancy before she resigned. It can be considered discriminatory for an employee to be penalized based on a supervisor's expectation that normal pregnancy-related scheduling difficulties may occur and/or that the employee will take leave or resign due to pregnancy.

In this case, however, the court put the blame for the scheduling difficulties on the nurse's uncooperative attitude. The court did not see her former supervisors as having a discriminatory attitude toward the normal consequences of pregnancy.

Was Asked If She Intended To Become Pregnant Again

She was asked in her re-hire interview if she intended to become pregnant again. Although asking her that question was ill-advised, the court ruled it was not persuasive evidence of discriminatory motivation when taken in context with her uncooperative attitude. One isolated remark is generally not sufficient evidence of discrimination. **Kocak v. Community Health Partners of Ohio, Inc. __ F.3d __, 2005 WL 563974 (6th Cir., March 11, 2005).**

HIPAA: Court Discusses Requirements For Contacts With Attorneys In Litigation.

A Parkinson's Disease patient was getting home nursing care from a nurse practitioner. She came to believe he was contemplating imminent suicide and phoned the police. Two state troopers went to his house and had him transported by ambulance to a hospital for a mental health evaluation.

The patient was released the next day with a finding of no suicidal ideation. That is, the hospital's psychiatric staff determined there were no grounds for a court order for an involuntary mental-health hold.

The patient sued the state troopers for false imprisonment and violation of his civil rights. The attorneys representing the state troopers wanted to interview the nurse practitioner *ex parte*, that is, without the presence of the patient or his attorney.

The US District Court for the Northern District of New York issued a complex decision explaining how the US Health Insurance Portability and Accountability Act (HIPAA) applies to this scenario.

State Law Can Be More Restrictive

The HIPAA is a Federal law which provides a baseline of protection to patients with respect their medical records. It also provides a baseline of protection against health care providers communicating with others about the patient, verbally or in writing, in or outside the context of civil litigation, whether it be malpractice, personal injury or other types of litigation.

The court first looked for the possibility that New York law would be more patient-protective than the HIPAA. If so, state law would apply. The court found no explicit bar under New York law to *ex parte* interviews of healthcare providers by defense attorneys, and turned to the HIPAA for direction.

The nurse practitioner could speak with the patient's lawyers if, and only if, the patient's lawyers had a judge sign a court order that fully complied with the HIPAA. **Bayne v. Provost, __ F. Supp. 2d __, 2005 WL 469360 (N.D.N.Y., January 25, 2005).**

When contacted by a patient's lawyer, a healthcare provider should obtain advice from legal counsel how the US Health Insurance Portability and Accountability Act (HIPAA) applies.

In this case, before the patient's lawyers can speak with the patient's nurse practitioner the lawyers must go to court for a protective order containing all of the provisions outlined in the Code Federal Regulations 45 CFR 164.512(e)(1)(v)(A) and (B).

Even with a protective order, the lawyers must advise the nurse practitioner that she is not required to speak with them about the patient against her wishes or without the presence of her own lawyer if she wants a lawyer present.

If the nurse practitioner is placed under subpoena to testify in a deposition or in court, the HIPAA still applies and it is necessary to ascertain that compliance with the Federal Regulations is taking place.

State law may be more patient-protective and may overrule Federal law.

UNITED STATES DISTRICT COURT
NEW YORK
January 25, 2005

Nursing Home Admissions: HIV Discrimination Suit Upheld.

An HIV+ patient was to be discharged from the hospital after treatment for liver disease. She was not symptomatic for AIDS. She needed to be placed in a skilled nursing facility.

Her nurse case manager phoned two nursing facilities. Both said they had female beds available. The nurse case manager faxed portions of the patient's medical chart and received phone messages back within hours from each facility indicating that no space was available. A suitable placement was found elsewhere that day.

The nurse case manager reported the two facilities to an AIDS advocacy group. The group had people call the facilities pretending to seek admission for an HIV+ patient and were turned down. They also called pretending to place a non-HIV+ person and received open welcomes.

The patient sued for HIV discrimination.

HIV is a disability. Disability discrimination violates the US Americans With Disabilities Act, US Rehabilitation Act, US Fair Housing Act and state civil rights laws.

UNITED STATES DISTRICT COURT
CALIFORNIA
February 22, 2005

The US District Court for the Northern District of California pointed to a laundry list of Federal and state laws which outlaw discrimination by healthcare facilities on the basis of disability, HIV being a disability recognized by law. The only legal issues where to what extent each law allows facility staff as well as the facility itself to be sued. **Wood v. Helping Hands Sanctuary, 2005 WL 589328 (N.D. Cal., February 22, 2005).**

Nurse's Med Error: No Deliberate Indifference.

According to the court record, an inmate in a county jail was given the wrong medication by the jail nurse. The nurse quickly discovered her error and told the inmate. The medication caused itching and a full-body rash for which the patient was then given Benadryl and topical creams per the jail physician's orders.

The inmate sued for violation of his Constitutional rights. The US District Court for the Northern District of Iowa ruled that a negligent mistake by a healthcare provider does not amount to deliberate indifference to a serious medical need, the catch-phrase for prisoners' Eighth Amendment Federal lawsuits. He may well have the right to sue for common-law malpractice, but that was not the issue in this case. **Mallett v. Naph Care, Inc., 2005 WL 327545 (N.D. Iowa, February 9, 2005).**

Instructional Videos Available Online.

All of our video titles are available for free pre-viewing on the Internet.

Please go to our website www.nursinglaw.com and follow the link to our video programs. Our current lineup includes:

Patients' Falls – Avoiding Liability: Nursing Documentation Before an Incident

Twenty Five Legal Do's and Don'ts of Nursing Documentation

Use of Patient Restraints: Avoiding Legal Liability

Nurses' Employment Issues: Disability / Pregnancy Discrimination

Legal Issues in Labor and Delivery Nursing

Pressure Sores / Decubitus Ulcers: Avoiding Legal Liability

Correctional Nursing: Nurse Not Deliberately Indifferent, Prisoner's Suit Dismissed.

The Eighth Amendment to the US Constitution forbids cruel and unusual punishments.

Denial of necessary medical treatment or necessary nursing care is considered a form of cruel and unusual punishment.

A prisoner, like anyone else, can use the US Civil Rights Act to sue for damages when a government official deprives the prisoner of a recognized Constitutional right like the right to be free from cruel and unusual punishment.

The definition of a government official in this context applies to doctors, nurses and other healthcare professionals working with prisoners or responsible for supervising or managing delivery of healthcare services to prisoners.

A prison official is not liable unless the official knows of and disregards an excessive risk to the inmate's health or safety, that is, not unless the official is guilty of deliberate indifference.

Deliberate indifference is the legal touchstone in these prisoners' lawsuits.

UNITED STATES DISTRICT COURT
TEXAS
March 3, 2005

A prisoner in a state correctional institution filed suit against the medical director, a treating physician and the staff nurse over the treatment, or lack thereof, he received while incarcerated.

The prisoner suffered from keloid scarring on his scalp. The condition existed before his incarceration.

Even though the prisoner told him previous treatments with tetracycline, clindamycin, Bactrim and doxycycline had been ineffective and that he had had side effects with tetracycline, the prison physician prescribed tetracycline.

The prisoner had GI side effects in prison that were linked to the tetracycline. In his lawsuit he claimed he should have been prescribed Accutane instead of tetracycline.

Deliberate Indifference Required

To sue in Federal court for a violation of the Constitutional right to be free from cruel and unusual punishment the touchstone is deliberate indifference. A prisoner must prove a prison caregiver knew of the prisoner's serious health condition and was guilty of deliberate indifference to the prisoner's condition.

Prison Nurse Exonerated

The US District Court for the Northern District of Texas dismissed the nurse from the lawsuit along with the medical-doctors. The court ruled the nurse's actions were medically reasonable in all respects and certainly no deliberate indifference occurred.

The nurse listened to the prisoner's complaints and made careful note so that his situation could be accurately presented to the physician.

The nurse recommended a dermatologist referral to the physician on the prisoner's behalf. It was not the nurse's judgment call to order such a referral or to decide what medication would be chosen to treat him, although the court did not fault the physician for his choice of one antibiotic over another. **Thompson v. Basse, 2005 WL 524966 (N.D. Tex., March 3, 2005).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Male Nurse, Female Supervisor: Court Validates Gender-Discrimination Lawsuit.

A male nurse working at a VA hospital sued the US Department of Veterans Affairs over his treatment by a female supervisor.

The US District Court for the District of Columbia ruled the nurse has a valid *prima facie* case and will be given his day in court to present his case to a jury. If his allegations can be proven, he will be entitled to damages.

Sexual Harassment
Hostile Work Environment

A male nurse working with a female supervisor is a member of a class of persons protected by the gender-discrimination laws.

As the courts phrase it, a hostile work environment exists when an employee is a member of a protected class, is subjected to harassment based upon his membership in a protected class, the harassment unreasonably interferes with his work performance and creates an intimidating, hostile or offensive working environment and the employer knows or should have known of the harassment and fails to take action to prevent it. When a person is harassed by a supervisor, the corporation or government agency who is the person's actual employer is considered to know that the harassment is taking place and to have decided to allow it to continue.

Evidence of Harassment

From the start of their relationship, the supervisor repeatedly told the nurse he did not belong on the unit, did not fit in and the supervisor hoped he would quit.

He was treated differently than female nurses. His work was more closely audited and he was placed under a more detailed plan of improvement than had ever before been applied to a female nurse by this particular nursing supervisor.

He was given a janitor's closet as his office so that his former office could be re-painted, re-carpeted and given to a female nurse.

The court said there was also a pervasive pattern of personally abusive conduct by the supervisor including abusive language, threats to write him up, false accusations, etc., which the court said a jury could interpret as harassment in violation of the gender-discrimination laws. **Evans v. Principi, 2005 WL 485743 (D. D.C., February 17, 2005).**

Adult Diaper Not Changed: Lawsuit For Loss Of Dignity, Nursing Home Residents' Bill Of Rights.

The Court of Appeal of Louisiana accepted the premises behind the civil lawsuit the family filed against the nursing home after their ninety-nine year-old family member had passed.

The court noted that the resident's care plan required her adult diaper to be changed every two hours whether or not it was soiled. She was also to be checked and changed more often than that if needed.

Instead, the resident was allowed at times to remain in her own waste. The court noted the Nursing Home Residents' Bill of Rights protects residents from wrongful conduct by nursing home staff that deprives them of the right to personal dignity. The resident or legal representative does not need an expert witness for the claim. It was also alleged the resident developed problems with skin integrity as a result of her diaper not being changed as needed. The court ruled this does not come under the Nursing Home Residents' Bill of Rights, but instead is a claim for professional malpractice. The family, as required by state law, did submit this aspect of the case for review by a medical review panel and was prepared with expert testimony on the skin-care issue.

It does not take expert testimony, however, for a jury to conclude that aides are negligent for not changing a diaper, as aides have no discretion to exercise professional judgment whether to follow the directives of a personal care plan. **Henry v. West Monroe Guest House, Inc., __ So. 2d __, 2005 WL 474878 (La. App., March 2, 2005).**

After she passed, the family sued the nursing home for damages under the Nursing Home Residents' Bill of Rights because her adult diaper was not changed every two hours or sooner as needed, as required by her care plan.

The suit claimed the resident suffered a loss of personal dignity while being left in her own waste. That is valid grounds for a suit.

COURT OF APPEAL OF LOUISIANA
March 2, 2005