LEGAL EAGLE EYE NEWSLETTER

December 2002 *For the Nursing Profession* Volume 10 Number 12

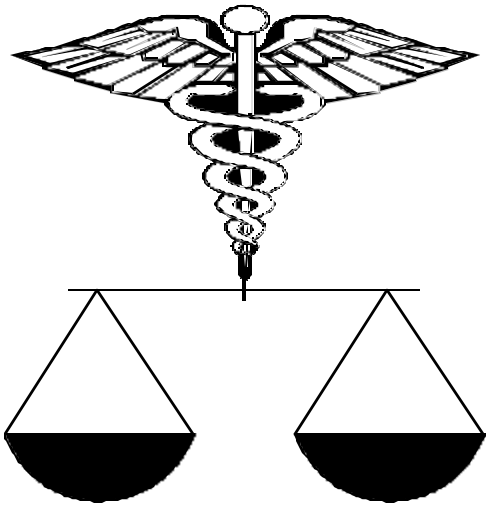
Nurse Practitioners: Patient's Claim Of Negligent Credentialing Upheld By Court.

A woman died from a heart attack the next morning after an improperly credentialed nurse employed by an outpatient clinic sent her home with antibiotics for an ear infection.

The widower sued the clinic. His civil lawsuit at first alleged the nurse was negligent. Later his lawyers amended his lawsuit to include an allegation that the clinic was negligent for failing to ensure that the nurse was properly credentialed as a nurse practitioner when she treated his late wife.

The local judge dismissed the amended allegation of negligent credentialing. The local judge's reasoning was that it was enough for the clinic to prove that the nurse, although her state provisional license as a family nurse practitioner had lapsed because she failed the licensing exam, which she later re-took and passed, was fully qualified by education, experience and advanced-practice certification eligibility to treat the patient in question.

The Court of Appeals of Georgia reversed the local judge's decision. There was no question the nurse was not licensed as a family nurse practitioner. Therefore the widower was entitled to summary judgment that the clinic was negligent for letting her treat patients as a nurse practitioner.



A healthcare facility has a legal duty to provide competent health care providers.

Above and beyond that there is a legal duty to provide health care providers who are duly licensed by the state.

A patient can sue a healthcare facility for negligent credentialing for providing a provider who is competent but not properly licensed.

COURT OF APPEALS OF GEORGIA
October 18, 2002

Competency Was Not The Issue

The widower's attorneys made a formal civil-discovery request for admission that the nurse was not licensed by the state as a family nurse practitioner at the time she saw the patient.

The clinic responded with a recitation of the nurse's other credentials. Her credentials included a master's degree, provisional state licensing as a nurse practitioner pending the results of her state exam and eligibility to sit for certification exams.

The Court of Appeals saw the clinic's round-about answer to the key question as an admission the nurse was not licensed at the time in question. It was negligent for the clinic to have allowed her to practice as a family nurse practitioner without proper licensing, the Court of Appeals ruled.

No Civil Battery

The Court of Appeals, however, did rule that the nurse did not commit a civil battery. The patient consented to be treated by a nurse practitioner and she was not a nurse practitioner. Yet the nurse did not actually state she was a nurse practitioner as the patient signed the consent form so the court felt there could be no battery. **Wellstar Health Systems, Inc. v. Green, __ S.E. 2d __, 2002 WL 31324127 (Ga. App., October 18, 2002).**

Inside this month's issue ...

December 2002

Nurse As Expert Witness: Court Discounts Nurses' Expertise On Issue Of Medical Causation.

A forty-four year-old woman suffered a subarachnoid hemorrhage and had to be admitted to a nursing home in a semi-comatose condition.

Two months after admission to the nursing home she had to be hospitalized for pneumonia and respiratory distress. She was discharged from the hospital and transferred to another nursing home where she died, nine months after leaving the first nursing home to go to the hospital.

Inadequate Oxygenation
Inadequate Blood Glucose Monitoring

The family filed a civil lawsuit against the first nursing home alleging negligence and gross negligence.

Specifically, the lawsuit claimed the nursing home staff did not administer the level of oxygen ordered by her physician, gave her unhumidified rather than humidified oxygen and did not adequately monitor her blood glucose levels.

Further, it was alleged, these specific errors and omission caused her death some nine months later.

Nurses As Expert Witnesses

The court acknowledged the two nurse/witnesses who were retained to testify for the deceased's family's lawsuit did have a certain level of expertise. One was a licensed vocational nurse who had formerly worked at the same nursing home and the other was a registered nurse.

Either of the nurses could testify in general terms it would be a gross departure from the legal standard of care for nursing-home nurses to neglect to follow physician's orders for oxygenating a patient or for monitoring a patient's blood glucose levels. But that was not the point.

There must be acceptable medical proof linking specific departures from the legal standard of care and the specific harm suffered by the patient. Neither nurse offered such an opinion or had the credentials to back it up if she had, the court ruled. **Crocker v. Paulyne's Nursing Home, Inc., __ S.W. 3d __, 2002 WL 31489514 (Tex. App., November 8, 2002).**

The nursing home is entitled to have the allegations dismissed by the judge on summary judgment without a jury trial.

In ruling on a defendant's request for a summary judgment of dismissal the judge only considers evidence that is properly before the court.

There needs to be legally acceptable evidence that errors or omissions by the nursing home staff caused severe respiratory distress and hypoglycemia and that those conditions caused this patient's death.

The nursing home properly objected to the testimony of two nurses as not qualified to give expert opinions on the issue of proximate cause.

With the nurses' testimony excluded, there is basically no evidence for the lawsuit.

There is no acceptable evidence that any act or omission by any defendant proximately caused any injury to the deceased patient or any evidence that any failure of any defendant to provide proper care to the patient proximately caused any injury to her.

COURT OF APPEALS OF TEXAS
November 8, 2002

Nurse As Expert Witness: Court Discounts Nurse As Expert On Medical Causation.

In a recent opinion that has not been selected for publication in the Federal Reporter, the US Circuit Court of Appeals for the Sixth Circuit approved dismissal of a medical and nursing negligence lawsuit filed by a patient against a hospital.

Simply stated, when a hospital patient suffers a staph infection following surgery, even if the judge or jury could reasonably find the hospital to have been negligent in the care of that patient, such a finding of negligence does not equate with proof that the negligence was a proximate cause of the staph infection and the ensuing suffering.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
October 24, 2002

The patient's knee became infected with staph following surgery to repair damage from a motor vehicle accident.

The court could not sustain the patient's lawsuit based on the testimony of two nurses and a physician who were offered as expert witnesses by the patient's attorneys.

One nurse stated she was not a physician/specialist in infectious disease. The physician also testified he had no such specialized expertise. The other nurse, a state hospital inspector, was an expert in infection control but still would not state how this particular patient's infection developed. **Elswick v. Pikeville United Methodist Hospital of Kentucky, Inc., 2002 WL 31412400 (6th. Cir., October 24, 2002).**

Quality Review / Confidentiality: Medical Peer-Review Privilege Extended To Nursing Homes.

The corporate parent of a nursing home in Florida was sued in civil court for the alleged wrongful death of a nursing-home resident.

At the present stage of the litigation the court has not as yet been asked to pass judgment one way or the other on the allegations of negligence filed against the nursing home.

Still in the pre-trial discovery stage of the litigation, the issue is whether the nursing home's corporate parent's internal quality review processes will be opened up to provide potential ammunition for the deceased resident's family's attorneys.

The local judge ruled in favor of the deceased's family. The District Court of Appeal of Florida, in an opinion that has not as yet been released for publication, ruled the local judge was in error.

The Court of Appeal ruled the material sought by the family's attorneys is protected by the state medical peer-review confidentiality statute.

The statute was meant to encourage critical self-analysis within the confines of internal quality assurance processes in healthcare facilities. Critical self-analysis will only occur if it is strictly kept out of the medical malpractice arena.

The law wants to encourage self-regulation by the medical profession through peer review and evaluation.

To make meaningful peer review possible, statutes have been enacted to guarantee the confidentiality of the peer-review process.

The investigation, proceedings and records of a medical-review committee are not subject to pre-trial discovery and cannot be introduced as evidence in a civil lawsuit against a provider of professional health services.

No person in attendance at a peer-review committee meeting can be permitted or required to testify about the findings, recommendations, evaluations, opinions or other actions of the committee or its members.

The policy behind the law should be interpreted to apply to nursing homes.

DISTRICT COURT OF APPEAL
OF FLORIDA
November 8, 2002

Peer-Review Privilege Extended To Nursing Homes

The courts have time and again reiterated that the proceedings of peer-review committees and boards inside hospitals are shielded from civil discovery and exempt from use as evidence in malpractice suits.

In this case the nursing home's parent corporation pointed out that the applicable state law does not define exactly what is meant by a peer-review committee or board and suggested that the definition is subject to interpretation by the courts.

In interpreting the definition of a peer-review committee or board, they argued, the courts should be guided by the clearly-articulated public policies behind the peer-review statutes. The policy for candid and accurate self-analysis should not just apply in hospitals, but should be extended to nursing homes, they said.

The Court of Appeal agreed the courts do have the discretion to apply a broad interpretation to the definition of a peer-review committee or board, and that the public policy behind the peer-review laws mandates that peer-review confidentiality should apply to internal quality review in nursing homes as well as other facilities.

The Court of Appeal pointed to what it termed the "chilling effect" that potential adverse use in litigation could have on the internal quality review process in nursing homes, optimal functioning of that process being essential to the public being afforded the best possible care in all healthcare settings, including nursing homes. **Beverly Enterprises-Florida, Inc. v. Ives, 2002 WL 31487165 (Fla. App., November 8, 2002).**

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

Indexed in
Cumulative Index to Nursing & Allied Health Literature™

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

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Colonoscopy: Nurse's Negligent Phone Advice Re Post-Operative Symptoms Made Colostomy Necessary, Court Says.

During a routine colonoscopy where three polyps were removed there was an inadvertent perforation of the patient's intestine.

The Court of Appeal of Louisiana stated for the record that this is a complication known to occur occasionally.

The patient was discharged at 12:30 p. m. after the 11:00 a.m. procedure.

Early in the afternoon the next day the patient began having abdominal pain. He tried to get a phone call through to the physician at his office.

Finally at 5:00 p.m. on the day after the procedure he spoke with a nurse in the doctor's office. He told her he was having severe abdominal pain and felt like he had a fever. The nurse told him everyone was gone from the office for the day. The nurse told him to take aspirin and call back in the morning.

His wife drove him back to the clinic at 10:00 a.m. the next day, two days after the procedure. At 1:00 p.m. he finally saw the doctor who recognized the problem immediately. He opted to try antibiotics for a day or two. That did not work and a colostomy was done. The colostomy had to be revised more than once and the patient continued to have problems.

Nurse Ruled At Fault
Doctor Ruled Not At Fault

The jury found the nurse at fault for failing to recognize the symptoms of a post-operative infection, for failing to consult with a physician and for giving the patient negligent advice of her own.

The court acknowledged there was a lot of room for argument whether the nurse actually was responsible for the infection passing the fail-safe point where a colostomy became necessary, but the court declined to second-guess the jury's verdict which could be rationalized on that interpretation of the evidence. **Holtzclaw v. Ochsner Clinic, __ So. 2d __, 2002 WL 31425415 (La. App., October 29, 2002).**

If a bowel perforation occurs during a colonoscopy where a polyp is removed, and infection results, and the infection is allowed to progress beyond a certain point, a colostomy is almost inevitable.

If the infection goes too far the lining of the intestine will not heal properly and the hole in the bowel will not close itself.

An infection from a bowel perforation during a colonoscopy usually appears within the first twelve hours, although it can take several days.

It is critical to appreciate and act upon symptoms of a post-operative bowel infection at once.

If an infection is detected within the first twelve hours antibiotics can be started and the patient will be monitored closely. Antibiotics are often successful.

If antibiotics are unsuccessful, surgery can usually close a bowel perforation successfully within the first twelve hours without a colostomy being necessary.

COURT OF APPEAL OF LOUISIANA
October 29, 2002

Emergency Delivery: Court Finds No Fault With Nurse.

A young woman was brought to the hospital's emergency room in the early stages of labor. While waiting in the waiting room she had to make several trips to the restroom.

While she was sitting on the commode the baby's head emerged. She shouted for the E.R. nurse who came and delivered the baby. The E.R. physician assisted by giving the nurse a bulb syringe to suction the baby's nose and mouth.

The baby was quickly taken to the neonatal intensive care unit and was fine.

To sue a civil defendant for intentional infliction of emotional distress the defendant's conduct must have been intentional or reckless, extreme or outrageous and must have caused the plaintiff emotional distress.

Mere worry, anxiety, vexation, embarrassment or anger does not qualify as emotional distress for purposes of a civil lawsuit.

COURT OF APPEALS OF TEXAS
UNPUBLISHED OPINION
October 30, 2002

The gurney cart would not fit through the bathroom door, so the mother had to walk out to the hall half naked to get on the cart to be wheeled to the labor and delivery unit to deliver her placenta. By now the commotion had attracted a crowd of gawkers who cheered her as she came out.

The Court of Appeals of Texas, in an unpublished opinion, ruled the nurse did nothing wrong and there were no grounds to sue her and the hospital for intentional infliction of emotional distress. **Trevino v. Christus Santa Rosa Healthcare, 2002 WL 31423711 (Tex. App., October 30, 2002).**

Sexual Assault: Court Rules Photos Of Other Psych Patients Confidential, Denies Access.

It is our editorial policy once we have covered a court opinion to follow up with any significant legal developments.

In our October, 2002 issue we covered a case handed down by the District Court of Appeal of Florida on September 4, 2002.

On November 6, 2002 that opinion was withdrawn and another opinion was substituted in its place.

The latter opinion in this case arrived at the same result as the former: A psychiatric patient suing a psychiatric facility has a very tough row to hoe when it comes to forcing the facility to reveal identifying information about the other patients.

The District Court of Appeal again came down strongly against allowing the patient's attorneys access to photos of the other patients who were on the same unit at the time of the alleged sexual assault against the patient/plaintiff, even with their names redacted from the photos.

The court was strongly against even permitting only the judge, court personnel, the lawyers and the patient to review the photos in the privacy of the judge's chambers, as even that could disclose a patient's identity to someone who did not need to know that the person had been hospitalized for mental illness.

The policy of strict medical confidentiality, especially with mental-health treatment, is meant to protect and thereby encourage people who need help to get help.

In the latter opinion, the court placed an added hurdle before the patient's quest for the other patients' photos. Her attorneys will also have to show that she had mental competence to testify in court at the time the alleged assault took place. **Cedars Healthcare Group, Ltd. v. Freeman, __ So. 2d __, 2002 WL 31466407 (Fla. App., November 6, 2002).**

Newborn Does Not Pass Stool: Nurses Ruled Not At Fault, Court Blames Physician For Negligent Phone Advice.

Following the hospital's protocol, the nurses noted almost every five hours that the newborn had not passed stool.

This information was charted on the form in the chart called the 24-Hour Newborn Care Note.

Hospital protocols required the newborn's nurses to notify a pediatrician after twenty-four hours if a newborn failed to pass stool.

This baby was discharged a few minutes less than twenty-four hours after birth.

The nurses never notified the pediatrician the baby had not passed stool.

However, the nurses were not required or expected to report that information to the pediatrician within the first twenty-four hours.

The pediatrician saw the baby at 9:00 p.m. but did not see him again the next day before he was discharged. If the pediatrician had seen him, all the pertinent nursing data was available in his chart.

CALIFORNIA COURT OF APPEAL
OPINION NOT OFFICIALLY PUBLISHED
November 6, 2002

A newborn was diagnosed with Hirschprung's disease a few months after discharge from the hospital following a routine labor and delivery.

The California Court of Appeal, in an opinion not officially published, pointed out that mother and baby were discharged from the hospital ten minutes short of twenty-four hours after birth.

The baby did not pass stool during that time, a fact the hospital's newborn nurses charted at least every five hours.

The court also pointed out the nurse who discharged mother and baby from the hospital told the mother to contact the doctor if the baby still had not passed stool within a day.

The mother called the physician at least twice over the next five days. She told him the baby had not passed stool, was irritable and had a decreased appetite. The doctor did not have him brought in for an exam but instead told the mother over the phone to treat him with laxatives and over-the-counter medications for gas.

The mother finally brought the baby in six days after birth. He was diagnosed with an obstructed and perforated bowel. After months in the hospital he was diagnosed with Hirschprung's disease.

Physician Ruled At Fault
Nurses Ruled Not At Fault

The court ruled there was no deviation from the standard of care by the newborn nurses following hospital protocols in charting the newborn had not passed stool and in not reporting that fact to the physician. It had not been twenty-four hours and the information was in the chart if the physician had wanted to look at it.

The court believed the physician should have appreciated that the signs reported by the mother mandated a medical examination rather than simplistic advice over the phone. **Garcia v. San Antonio Community Hospital, 2002 WL 31478236 (Cal. App., November 6, 2002).**

PCA Pump: Nurse Instructs Family Member To Give Doses Of Morphine, Products Liability Claim Thrown Out.

According to the US Court of Appeals for the Eleventh Circuit, the patient's nurse knew that a nurse was not authorized to permit anyone but the patient to press the button to deliver a dose of medication from a patient's PCA pump unless the nurse was authorized by a physician to do that.

However, without a physician's authorization and contrary to hospital policy, a nurse told a patient's daughter she should press the button for her mother while her mother slept through the night when it seemed to the daughter that her mother was in pain.

The patient had had bilateral knee-replacement surgery two days earlier and her physician had put her on a PCA earlier the day after surgery for complaints of increasing pain.

At 7:00 a.m. after her daughter had been giving her morphine while she slept the physician on rounds found she was having difficulty breathing. She then went into cardiac arrest, which led to anoxic brain injury.

The hospital agreed to a structured settlement as compensation for the nurse's negligence, that is, the hospital would make a series of payments to the patient's court-appointed guardian to provide for her care. The structured settlement's present economic value was approximately $8,000,000 at the time of settlement.

With the hospital released from the litigation, the case went ahead against the manufacturer of the PCA pump until the Federal District court ruled the manufacturer had no liability and the Circuit Court of Appeals agreed. The rationale was the common-law learned intermediary rule.

There was also a complex discussion of the Federal Food, Drug and Cosmetic Act in the Circuit Court's opinion. **Ellis v. C.R. Bard, Inc., __ F. 3d __, 2002 WL 31501163 (11th Cir., November 12, 2002).**

The hospital paid a substantial settlement to the guardian for the patient, now brain-damaged following cardiac arrest attributed to a morphine overdose from her patient-controlled analgesia (PCA) pump.

The guardian's products-liability claim against the PCA's manufacturer will be dismissed. Only the nurses and doctors at the hospital are to blame.

The common-law "learned intermediary" rule applies to this case.

A manufacturer of a prescription drug or prescription medical device does not have responsibility for warning the patient of potential dangers. Instead, the manufacturer must warn the physicians who will prescribe the drug or device and the nurses.

Doctors and nurses are the ones who are responsible for knowing of potential dangers and for including warnings in their instructions to their patients.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
November 12, 2002

SQ versus IM Injection: Court OK's Verdict Against Hospital.

The Court of Appeals of Michigan approved a $190,000 verdict for disfigurement to a patient's buttocks from an injection apparently not given deep enough to reach the muscle tissue.

The court ruled there was no error in the trial judge allowing the patient's attorney to theorize the nurse not charting what became apparent later was an attempt to cover up her negligence. **Mann v. Bay Medical Center, 2002 WL 31357858 (Mich. App., October 18, 2002).**

A registered nurse has the expertise to testify about the legal standard of care for giving injections.

A nurse can testify that a certain drug, in this case Vistaril, must be given intramuscularly and must not be given subcutaneously.

That is, a nurse can testify it is faulty practice for a nurse not to be sure the needle is deep enough to reach the muscle and to ignore the patient's complaints of pain.

A nurse can testify in general terms what can happen if a particular medication is not injected properly.

How the specific injury happened to the specific patient requires a medical specialist's testimony.

COURT OF APPEALS OF MICHIGAN
UNPUBLISHED OPINION
October 18, 2002

Attorney/Client Privilege: Nurse Not In Hospital's Control Group, Interview Not Confidential.

A patient committed suicide the day following discharge from the hospital. A day or two later the discharge nurse was interviewed by the hospital's in-house legal counsel about the particulars of the patient's treatment. The in-house counsel took handwritten notes.

The deceased's family sued the hospital and the physicians for negligence. The nurse herself was not named as a defendant in the family's lawsuit.

In the pre-trial discovery stage of the litigation the discharge nurse was compelled to give a deposition. During the deposition she was asked if she had given a statement regarding the circumstances of the patient's treatment. She testified she had spoken with the hospital's in-house counsel.

Before she could testify exactly what she told the hospital's legal counsel about the patient, the hospital's legal counsel stopped the deposition and went to court for an order to quash this line of questioning on grounds of attorney–client privilege and attorney work-product privilege.

No Assumption That Statements To Hospital's Attorney Are Confidential

The US District Court for Northern District of Illinois noted there are differences around the US on this point of law. In Illinois statements by an employee to corporate legal counsel are confidential only if the employee is in the corporate control group, i.e., an officer or high-level manager, which the nurse was not.

The upshot is that a nurse cannot assume that an employer's lawyer is acting as the nurse's lawyer and should have independent legal advice whether a statement to the employer's lawyer could be used against the nurse in court. **Valenti v. Rigolin, 2002 WL 31415770 (N.D. Ill., October 25, 2002).**

Race Discrimination: Court Dismisses Suit Against Nurse At Kidney Dialysis Facility.

An African-American patient sued the dialysis clinic because she was placed on a machine in the fourth row while the machines being used in the first three rows at the clinic were occupied by Caucasian patients.

In general, any person participating in any program that receives financial assistance from the Federal government is protected against race discrimination. Such programs include healthcare facilities that participate in Medicare, Medicaid or receive other Federal funding.

Every state also has laws against discrimination.

The first step is for the minority patient to prove that he or she was treated differently than non-minorities.

That does not prove discrimination in and of itself.

The healthcare facility can defend against the charges by showing a legitimate, non-discriminatory reason why the minority patient was treated as he or she was. If there was a legitimate reason the charge of discrimination will not be sustained.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
October 25, 2002

An African-American patient had been receiving regular dialysis treatments at the clinic for more than four years.

She called the clinic at 6:30 a.m. on a Saturday and told the nurse on duty she would not be able to make her appointment that morning because the state-funded transportation service she relied upon had not come to pick her up.

The a.m. nurse told her to come in during the 4:00 p.m. to 8:00 p.m. shift, the only time there was anything available that day.

She came in at 3:45 p.m. and was allowed to start her four-hour treatment then instead of waiting until 4:00 p.m.

However, she disputed being escorted to a dialysis machine in the last row while Caucasian patients were seated at available machines in the first three rows. The p.m. nurse on duty, whom the patient would later sue for race discrimination, was adamant that that was where she was going to have to sit.

Court Sees No Race Discrimination

The US District Court for the Eastern District of Louisiana acknowledged the nurse treated this patient differently than the white patients, but concluded nevertheless there was no race discrimination.

The court accepted the nurse's testimony that the white patients in the first three rows were themselves regulars on the p.m. shift and regularly were placed on their own particular machines. The unused machines in the first three rows at the time were on "heat-clean" mode and unavailable for use by anyone.

The court also noted that the Saturday p.m. nurse was charge nurse on the busy unit besides having to care for patients of her own. That could account for her undiplomatic attitude toward one particular patient without racial bias necessarily having been a factor. **Jackson v. Waguespack, 2002 WL 31427316 (E.D. La., October 25, 2002).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Blood Products: New Guidance Document From FDA Re West Nile Virus.

On October 25, 2002 the US Food and Drug Administration issued a document titled "Recommendations for the Assessment of Donor Suitability and Blood and Blood Product Safety in Cases of Known or Suspected West Nile Virus Infection."

Because of the immediate threat posed by the West Nile Virus the FDA did not seek public comments before issuing this new directive.

This new directive is too complex to summarize in our newsletter. The full text is available on our website at http://www.nursinglaw.com/westnilevirus.pdf. Click this article if you are reading our online edition and you will be linked. Or go to the FDA's website at http://www.fda.gov/cber/gdlns/wnvguid.pdf.

The FDA's guidelines are not copyrighted and can be freely re-printed and re-distributed.

Aide Lifts Resident Without Help: Court Finds Cause For Termination.

The New York Supreme Court, Appellate Division, ruled that the state Commissioner of Labor's office acted correctly in denying unemployment benefits to CNA terminated from his employment in a nursing home.

As a general rule, persons who are terminated from their employment for cause are not entitled to unemployment.

According to the court, the aide attempted to transfer a resident from the toilet to a wheelchair with a Sarah Lift after being instructed there was a strict policy that that maneuver was to be done only with two staff members.

Failure to adhere to the employer's policies is cause for termination, the court said, especially in healthcare settings where failure to adhere to prescribed safety procedures can jeopardize the safety of a patient. **Martin v. Commissioner of Labor, __ N.Y.S.2d __, 2002 N.Y. Slip Op. 08025, 2002 WL 31478932 (N.Y. App., November 7, 2002).**

Occupational Injury: Aide's Physician Restricted Her From Lifting, No Employer Retaliation Found.

The Appellate Court of Connecticut pointed out the nursing home had a written policy in effect against the assignment of nursing assistants to permanent light duty.

Due to an on-the-job injury an aide's physician imposed permanent restrictions against heavy lifting and stated she was only able to do light duty.

The nursing home, adhering to its written policy that had been in effect throughout the aide's employment, terminated her.

The aide had filed for worker's compensation and had been awarded compensation for time loss and partial permanent disability. That was not the issue.

The issue was employer retaliation.

As a general rule an employer cannot retaliate against an employee for being injured on the job and filing a worker's compensation claim.

On the other hand, an employer may have legitimate, non-retaliatory reasons for dismissing an employee, like restrictions on lifting patients, lifting being an essential function of an aide's job in a nursing home.

APPELLATE COURT OF CONNECTICUT
October 29, 2002

The Appellate Court of Connecticut ruled against the aide on the retaliation issue.

It is not retaliation to refuse to provide an injured employee with light duty, assuming the employer has had an established a policy on that issue and has been applying the policy uniformly to all employees, whether or not they have stated they intend to apply, have applied and/or have received worker's compensation benefits.

Inability to perform the essential functions of the position is a legitimate, non-retaliatory basis for action, the court ruled, even if the inability to perform is documented by a physician as the result of an on-the-job injury. **Barrett v. Hebrew Home and Hospital, Inc., 807 A. 2d 1075, 2002 WL 31379928 (Conn. App., October 29, 2002).**