LEGAL EAGLE EYE NEWSLETTER

December 2011 *For the Nursing Profession* Volume 19 Number 12

Narcotics Diversion: Accused Of Tampering, Nurse Wins Malicious Prosecution Lawsuit.

The District Court of Appeal of Florida approved a jury's award of $539,657 to a nurse from her former employer, a nursing home, after she was fired and criminal charges were filed against her for alleged medication tampering and narcotics diversion.

The jury's award came after the criminal charges were dropped seven months after being filed and a letter was sent by the State Attorney's office stating she had been cleared of suspicion.

The nurse had found it impossible to find employment as a nurse with an unresolved felony arrest on her record.

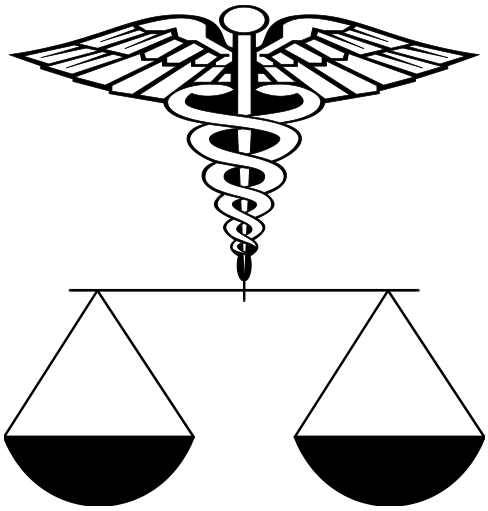
Lack of Probable Cause For Accusations of Tampering, Diversion

When the nurse was first hired a nurse who had worked with her at another facility told her boss that the nurse was "bad news" and that she had been suspected of stealing narcotics at her last job.

At the end of a work shift the nurse did a med count with another nurse and everything added up.

A day or two later, however, it was noticed that some of the blister packs prepared by the pharmacy had been opened and re-taped.

Further investigation revealed that oxycodone and hydrocodone pills had been replaced with potassium supplements and Cardizems.



Lack of probable cause means that a complaint which led to criminal charges was initiated without reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the person accused was guilty of the offense of which he or she was being accused.

DISTRICT COURT OF APPEAL
OF FLORIDA
November 9, 2011

The situation was reported to the local police. When interviewed by a police detective the nurse's supervisor and co-workers repeated the suspicious gossip they had heard about her previous employment. Based on little more than second-hand gossip the detective filed criminal charges.

In fact, there were lots of other nursing personnel who had had possession of the keys to the med room and the blister packs could have been opened and re-taped on any one of several days before being discovered. It all added up to a lack of genuine probable cause to suspect this particular nurse.

After her firing, while the criminal charges were still pending against her, another theft of narcotics was discovered at the facility committed using exactly the exact method, opening the blister packs, substituting other pills for narcotics and re-taping them.

Following discovery of this theft a co-worker who worked hours before the nurse on the day in question was required to give a sample and tested positive for narcotics. She was fired. However, the nurse, her attorney, the local police and the State Attorney's office were never informed so that the charges could be dropped sooner. **Alterra Healthcare, __ So. 3d __, 2011 WL 5374765 (Fla. App., November 9, 2011).**

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Suicide: Hospital Ruled Not Liable For Patient's Death After Discharge From The E.R.

The family's lawsuit alleged that the hospital's E.R. physicians and nurses were responsible for the patient's death from an apparent suicide two and one-half days after discharge from the hospital.

He was found dead by the police in the van in which he lived. The *post mortem* revealed he had ingested a fatal overdose of methadone several hours earlier.

The E.R. physicians and nurses allegedly failed to assess the extent of the patient's risk for self-harm and made an inappropriate decision to release him.

Emergency Room Assessment

The police brought the patient to the E.R. around 2:00 a.m. after they found him in a park. He was homeless but was on disability and was eligible for Medicaid. He said he had nowhere else to go.

He told the E.R. personnel he had taken a large dose of methadone earlier that afternoon for a toothache. He said he got the methadone from a friend. He also revealed a history of psychiatric treatment for depression and bipolar disorder.

His chief complaints were nausea and depression. He was given Zofran for nausea and later given Ativan for agitation.

However, a few hours into his stay he went into respiratory arrest and was quickly brought back with Narcan. At that point the plan was to keep him and watch him for further signs of narcotics overdose and then release him once he was stable.

The patient, except for his brief respiratory arrest, was at all times alert and oriented x3 and denied he was suicidal.

Soon after being fed his breakfast he was discharged with a recommendation that he follow up with a psychiatrist.

The US District Court for the Eastern District of Michigan ruled the hospital did not violate the US Emergency Medical Treatment and Active Labor Act, in that this patient was given the same emergency medical screening and stabilizing treatment before discharge in stable condition that any other patient would have received at the hospital with the same presenting signs and symptoms. **Estate of Lacko v. Mercy Hosp., 2011 WL 5301775 (E.D. Mich., November 3, 2011).**

The hospital's standard practice was to stabilize an overdose patient medically and then discharge the patient with instructions to follow up with a psychiatrist.

This patient was given a pamphlet from the crisis center where he was supposed to go later that day if he needed to and the name of a specific psychiatrist he was supposed to phone.

The US Emergency Medical Treatment and Active Labor Act requires a hospital emergency department to give every person who comes in seeking treatment for an emergency medical condition the same medical screening examination as any other patient.

The hospital's E.R. nurses and physicians recorded the patient's mode of arrival, chief complaint, history of present illness, vital signs, past medical history, social history, family history, review of systems, medications and physical examination.

The psych assessment by the E.R. physician was that he was stable, fully oriented and not suicidal at the time he was discharged.

UNITED STATES DISTRICT COURT
MICHIGAN
November 3, 2011

Suicide Attempt: Nurse Fired, Did Not Respond Promptly.

While a nurse was getting ice for one of her patients a resident rolled up in his wheelchair in the hallway yelling that his roommate was trying to kill himself. The resident was so excited that he knocked the cup from the nurse's hand and scattered ice cubes all over the floor.

Another nurse immediately went to the room. She took a pair of scissors away from the roommate who was slashing at himself, having as yet only cut his gown.

The first nurse, instead, took the time to pick up the spilled ice cubes before going to the room.

She was soon terminated and then she sued for disability and age discrimination.

The nurse's thyroid condition, Grave's disease, is not a disability. It does not cause a substantial limitation of a major life activity.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
October 24, 2011

The US District Court for the Eastern District of Pennsylvania ruled against the fired nurse's discrimination lawsuit.

Her condition did not cause a substantial limitation of a major life activity and could be controlled by medication. She was not disabled within the meaning of the Americans With Disabilities Act.

She was sixty-four years of age at the time of her firing and the oldest nurse at the facility and was replaced with a thirty year-old newly hired LPN who earned $7 per hour less than she, ostensibly grounds for an age discrimination lawsuit.

However, the nurse's intentional and inexplicable failure to respond immediately to a potentially life-threatening emergency was a legitimate, non-discriminatory reason to terminate her employment, even if she was disabled and even if it appeared at a superficial glance that she was the victim of age discrimination. **Lewis v. Genesis Healthcare, 2011 WL 5041348 (E.D. Pa., October 24, 2011).**

Arbitration: Patient Not Competent, Agreement Invalid.

The family sued the nursing home for negligence after the resident died. The nursing home insisted the claim belonged in arbitration, not in civil court.

The US Court of Appeals for the Eleventh Circuit agreed with the family that the case did not belong in arbitration. The arbitration agreement was invalid because the patient did not have the legal capacity to sign a contract when she signed it.

A person is presumed to be mentally competent when signing a contract. A contract is invalid only if there is evidence the person could not understand the nature and effect of the contract being signed.

On the portions of the intake form for cognitive status the nurse who admitted the patient noted that the patient was oriented only to person and was confused. She was distraught, anxious, frail and suffering from dementia, according to her initial nursing assessment.

She had been declining into a state of dementia for a couple of years and was on anti-psychotic medication to control her hallucinations. The reason for her admission was that she basically could no longer manage her own affairs independently or even take care of herself. **Gilmore v. Life Care Centers, 2011 WL 5089821 (11th Cir., October 27, 2011).**

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Patient Suicide: Nurse Not At Fault.

The patient, in addition to her psychiatric issues, was tachycardic and had had to be intubated for her breathing difficulties. Restraints were only appropriate as a last resort, in her physician's judgment.

The hospital's nurse was not required to advocate with the physician for restraints, as there was nothing the nurse knew that the physician did not know and had not considered.

The nurse fulfilled his legal responsibility by informing the ambulance crew of her recent suicide attempts. Beyond that he had no authority to order or any duty to advise the ambulance crew to restrain her, the physician not having ordered restraints for the trip.

A tragic outcome alone does not determine whether healthcare providers' judgment was appropriate before the fact.

NEW YORK SUPREME COURT
APPELLATE DIVISION
November 3, 2011

The patient was admitted to the hospital after a suicide attempt at home and then had two more attempts in the hospital.

Her physician decided to have her transported by ambulance to a mental health facility for treatment.

A hospital nurse told the ambulance crew who came to get her that the patient had made several suicide attempts and was expressing suicidal ideation.

Minutes into the trip the patient undid the seatbelts on the gurney, stood up, opened the back door, jumped out of the speeding ambulance and was killed.

Nurse Did Not Advise Restraining Patient For the Trip

The family's lawsuit tried unsuccessfully to fault the hospital's nurse for failing to tell the ambulance crew to restrain the patient above and beyond fastening the regular seatbelts on the gurney.

The New York Supreme Court, Appellate Division, pointed out that a nurse does not have the authority or the responsibility to order a patient restrained if the physician has not ordered restraints.

A thought-out decision was made not to restrain the patient in the hours before the transfer because she had been sedated and was calm and was not acting out as long as someone sat with her. Her tachycardia and breathing problems could threaten her physical wellbeing if she were to become agitated from being restrained.

Not restraining her was an appropriate exercise of professional judgment under the circumstances, the Court said, notwithstanding 20/20 hindsight as to the unfortunate ultimate outcome. **Dumas v. Adirondack Med. Ctr., __ N.Y.S.2d __, 2011 WL 5221270 (N.Y. App., November 3, 2011).**

Abuse, Neglect: Aide's Certification Revoked, Name Placed In Registry.

A nursing home resident was known for yelling out for help and for being combative with caregiving staff.

While being assisted into his wheelchair the resident repeatedly told the aide "easy does it" in a loud voice.

The aide became frustrated with the resident's repeated outbursts. She snapped the footrest down forcibly, grazing the resident's leg in the process.

The resident kept telling her "easy does it" and so she slapped the side of his head and told him to shut up.

Then she pushed his wheelchair into the hallway, left him there and told him to get himself to the dayroom on his own.

Another aide who witnessed the incident checked and found no injuries to the resident, on his leg or on his head, but she reported it to the charge nurse.

The director of nursing suspended the aide the next morning and reported her to the state Department of Health and Senior Services which revoked her certification to work with vulnerable adults.

Aide Guilty of Abuse and Neglect

The Superior Court of New Jersey, Appellate Division, ruled that the aide was guilty of physical and verbal abuse for striking the resident and telling him to shut up and was guilty of neglect for leaving a helpless total care patient in the hallway somehow to get to the dayroom on his own. **Dept. of Health v. Moise, 2011 WL 5041397 (N.J. Super., October 25, 2011).**

The aide's conduct fits both definitions, abuse and neglect of a patient.

A resident of a long-term care facility has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment and involuntary seclusion.

Residents are entitled to be treated with courtesy, consideration and respect for the individual's dignity and individuality.

Abuse is defined as willful infliction of injury, unreasonable confinement, intimidation or punishment with physical harm, pain or mental anguish resulting.

Neglect is defined as the failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
October 25, 2011

Sexual Assault: Patient Has The Right To Sue.

An adult female patient involuntarily committed to the psychiatric unit of an acute care hospital was sexually assaulted in her room by a male patient from the same unit.

Earlier that evening a mental-health aide caught the male patient in the female patients' room and told him he was not allowed to be there and had to leave.

That was all that was done.

COURT OF APPEALS OF MICHIGAN
November 10, 2011

The Court of Appeals of Michigan approved a jury verdict against the hospital in the patient's favor.

The Court accepted expert testimony from a nurse with twenty-four years experience as a psychiatric nurse. Psychiatric patients are a highly vulnerable population and a hospital has a special duty to keep them safe. The burden for seeing that what needs to be done is done falls on the hospital's professional staff, not the patients.

This Incident Called for Follow Up

Catching him in the females' room put the unit staff on notice that something was going on between the male patient and one or more of the females in the room.

The next step should have been to separate the patients, the male patient and each of the two female roommates and to question each of them individually in depth about what was going on.

As it turned out, the victim, her roommate and the male patient had gone for a walk on the grounds earlier that day. The female roommate was flirting heavily with him. He said more than once he was going to come to their room that night and get in bed with one of them.

He did return later that night after he was earlier told to leave the room. He committed a rape for which he was convicted of first-degree sexual assault. **Sloan v. Chelsea Comm. Hosp., 2011 WL 5454567 (Mich. App., November 10, 2011).**

Defamation: No Malice, Suit Dismissed.

Two insurance company telephone advice-line nurses got into an argument over use of a particular office cubicle which resulted in one of them being fired.

The fired nurse's defamation lawsuit was dismissed by US District Court for the Eastern District of Virginia even though there was reason to believe her former nurse manager erred writing up her termination based on information from coworkers who did not witness the incident.

The law gives personnel managers what the law calls a qualified privilege from being sued for defamation for statements placed in the personnel files of those they supervise, even if they are untrue.

Statements Placed in Personnel Files Are Covered By a Qualified Privilege

To sue for defamation over a statement placed in his or her personnel file an employee or former employee must not only prove the statement is false but must also jump over the much larger hurdle of proving that the false information was placed in his or her personnel file maliciously with the sole intent of unjustifiably harming his or her reputation.

If the employee or former employee is unable to prove malice, as in this case, his or her lawsuit will fail to prove defamation. **Shaheen v. Wellpoint Companies, 2001 WL 5325668 (E.D. Va., November 3, 2011).**

Depression: Nurse Was Disabled, But Not Terminated For Her Disability.

A nurse who had suffered from depression for years was terminated from her job in the hospital's mental health unit after issues were discovered relative to her documentation of a Schedule II drug.

On one particular day shift she did not log in the correct pill count for an order of Schedule II meds from the pharmacy to be kept as stock on the unit and did not document another nurse witnessing her wasting a single dose of the same medication that her patient, she said, had refused.

Recent amendments to the Americans With Disabilities Act make it easier for an individual with depression to prove being disabled.

Even if the impairment is short-lived, episodic, controlled by medication or in remission it can now count as a disability.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
November 10, 2011

The US District Court for the Eastern District of Pennsylvania agreed that her symptoms of not eating, not sleeping, having racing thoughts and just feeling helpless, hopeless and sad qualified as a substantial limitation of a major life activity, the touchstone definition of disability for purposes of disability discrimination law.

However, even if she was disabled by depression, the nurse was terminated because she committed two significant medication errors and did not bring those errors to her supervisor's attention. When they were discovered and she was confronted she was unable to explain how it happened.

The nurse had the burden of proof and could not explain how her depression, and not her medication errors, was the basis for the hospital's decision to terminate her. **Murray v. UHS Fairmount, 2011 WL 5449364 (E.D. Pa., November 10, 2011).**

Male Nurse: No Discrimination, Case Dismissed.

A male nurse who worked in the hospital's ICU and E.R. was fired after a series of angry outbursts involving use of profanity against co-workers in a patient-care area of the E.R.

After his termination he sued the hospital for gender discrimination.

A minority can prove discrimination by showing that he or she was disciplined more harshly than a non-minority for the same conduct, even if the discipline was in all other respects appropriate for the offense.

UNITED STATES DISTRICT COURT
MICHIGAN
November 1, 2011

The US District Court for the Eastern District of Michigan dismissed his case.

The Court pointed out that the US anti-discrimination laws were originally enacted to protect racial minorities and women from discrimination. Interpretation of the laws has evolved to the point that nowadays a Caucasian is considered a minority in a workplace predominated by minorities and a male is considered a minority in a workplace where co-workers and supervisors are predominately female.

Use of Profanity in the Workplace Was Not the Issue

The nurse claimed he was treated unequally and unfairly by being singled out for disciplinary measures based on his use of profanity, which he claimed was commonplace in his workplace.

The Court, however, said that the real issue was threatening and intimidating behavior which happened to involve use of profanity. Although his co-workers used profane language at times, he was not able to identify any non-minority, that is, a female nurse who was guilty of threatening and intimidating behavior, that sort of behavior being a legitimate, non-discriminatory reason to terminate a nurse. **Owczarzak v. St. Mary's, 2011 WL 5184225 (E.D. Mich., November 1, 2011).**

African-American Nurses Aide: No Discrimination.

An African-American nurses aide was terminated from her position in a rehab facility after a heated verbal exchange with a resident who complained that she had ignored him and made him wait an extended period of time for assistance to use the bathroom after he turned on his call light.

After her termination the aide sued the facility for racial discrimination.

A minority who sues for racial discrimination has the burden of proof to identify one or more non-minority co-workers who were treated more favorably, that is, disciplined less harshly for the same unacceptable conduct.

The co-workers so identified must have the same job responsibilities as the employee in question.

UNITED STATES DISTRICT COURT
OHIO
October 26, 2011

The US District Court for the Southern District of Ohio dismissed the case. She could not prove she was treated differently on account of her race.

Nurses Were Not Valid Basis for Comparison

In her lawsuit the fired aide raised the issue that two nurses were present at the time of the incident, knew that the man's call light was on and stood by and did basically nothing to see that the patient got to the bathroom in a timely fashion.

However, the Court ruled the nurses were not a valid basis for comparison. Even if they were not reprimanded, let alone not fired, for not helping the man to the bathroom, they were not nurses aides and it was not a priority for them to help patients to the bathroom. **Peacock v. Altercare, 2011 WL 5075831 (S.D. Ohio, October 26, 2011).**

Adoption: Nurse, Social Worker Misrepresented Baby's Health Status, Court Lets Parents Sue.

Four days after the baby's birth the prospective adoptive parents travelled from their home out of state to the hospital to meet with the hospital's director of nursing and social worker to discuss adopting a baby whose mother had planned prior to birth to give up for adoption.

The prospective adoptive mother had already told the social worker before making the trip that she had already turned down three infants who might have been special-needs children. She would be relying on the hospital's employees' judgment that this was a healthy child in making the decision whether or not to adopt this baby.

The nursing director and social worker expressly assured the mother that the child was healthy and normal in all respects except for being lactose intolerant.

Parents Not Told Child Had Severe Neurological Deficits

In fact, a large hypoechoic area in the fetus's brain had shown up on an outpatient prenatal ultrasound done at the hospital. It spelled a lifetime of developmental delays, mental retardation, paralysis and other severe neurological deficits.

The Court of Appeals of Indiana noted for the record that the biological mother's outpatient prenatal records were not in her inpatient maternity chart. It was not clear that the nursing director or the social worker knew about the prenatal ultrasound or the baby's true condition or deliberately tried to deceive the prospective parents. However, that did not change the fact the adoptive parents had the right to sue.

The hospital, through the actions of the nursing director and the social worker, took upon itself a legal duty to provide accurate information about the child to the prospective adoptive parents.

The hospital's policies for whether or not to include outpatient records in the inpatient chart were not relevant to the legal outcome. Nor could the hospital rely upon the Health Insurance Portability and Accountability Act (HIPAA) as a shield to civil liability for committing misrepresentation. **Jeffrey v. Methodist Hosp., __ N.E. 2d __, 2011 WL 5057721 (Ind. App., October 25, 2011).**

One who, in the course of a business or professional transaction, supplies false information for the guidance of others is subject to liability for the loss caused to them by their justifiable reliance upon the information if there has been a failure to exercise reasonable care in obtaining or communicating the information.

The hospital's employees knew the prospective adoptive parents would be relying on their knowledge and professional expertise in making the decision to adopt and that they would not want to adopt this child if they knew that the child was in fact a child with very special medical needs.

The biological mother had signed two separate authorizations, one for release of her own and one for release of her infant's medical records which fully satisfied the Federal medical confidentiality requirements of HIPAA.

The hospital has a master patient index which should have been consulted to determine if the biological mother had more than one chart, that is, an outpatient prenatal chart was well as an inpatient maternity chart.

COURT OF APPEALS OF INDIANA
October 25, 2011

Labor & Delivery: Mother's, Not Fetus's Heart Rate Was Monitored.

The fetus's heart rate reportedly went unmonitored for several hours because the monitor was picking up the mother's rather than the fetus's heart beat.

The fetus was in distress but the nurses and physicians did not know about it because of the problem with the monitor. Reportedly there also were no blood gasses being obtained.

Temporary loss of the fetal heart tone can occur due to fetal movement.

Labor and delivery nurses should know it is not difficult to tell when the instrument is measuring the mother's, not the fetus's heart rate. The mother's is significantly lower.

When in doubt, read the mother's with a pulse oximeter and the fetus's with a fetal scalp electrode.

UNITED STATES DISTRICT COURT
ALABAMA
November 3, 2011

The US District Court for the Middle District of Alabama accepted expert testimony to the effect that any trained labor and delivery nurse should be able to pick up on the fact the mother's rather than the fetus's heart rate is showing on the monitor. The evidence pointed not only to negligence by the nurses but also to a larger failure by the institution to train its nurses and evaluate their competence.

In the hospital's favor, the Court did rule that the statute of limitations on the parents' claims, but not the infant's, had run before the suit was filed, removing certain elements of damages from the jury's consideration when the trial comes up. **M.D.P. v. Houston Co. Healthcare, __ F. Supp. 2d __, 2011 WL 5244393 (M.D. Ala., November 3, 2011).**

Code: Defibrillator Should Have Been Used, Court Says.

A diabetic patient was receiving dialysis in an outpatient clinic when the technician noticed that her blood pressure was low. The technician started saline.

The patient passed out. The technician summoned the nurse. The nurse had the technician get an oxygen tank and once the O_2 was going they tilted the dialysis chair back so that her feet were higher than her head. The nurse told the technician to get the doctor. When the patient became unresponsive the nurse started CPR. When the doctor came she disconnected the dialysis line. Then 911 was called. The paramedics found the patient on the floor next to the dialysis chair with CPR underway. Their first note indicated "pulseless electrical activity" in the heart.

The patient died three weeks later without regaining consciousness. The widower sued the dialysis clinic.

A nurse trained in basic life support should have known to connect the automated external defibrillator. That could have led to a better outcome.

COURT OF APPEALS OF GEORGIA
November 16, 2011

The Court of Appeals of Georgia accepted a physician's expert opinion that the standard of care required the nurse also to connect the automated external defibrillator which was available in the clinic at the time of this incident.

CPR alone, assuming it was done correctly, had only a 35% chance of success in this situation. There was some question whether the nurse knew how to perform CPR correctly.

There was no guarantee, but the patient's odds of avoiding anoxic brain injury probably would have been better if the defibrillator had also been employed to monitor the heart, possibly give electrical stimulation and give guidance whether to continue CPR, the court believed. **Aleman v. Sugarloaf Dialysis, __ S.E. 2d __, 2011 WL 5557342 (Ga. App., November 16, 2011).**

Claustrophobia: Nurse Unable To Prove Disability Discrimination.

A registered nurse with an office job coordinating organ transplants had ongoing issues with a succession of supervisors over her chronic problem of coming in late for work, for which she was eventually terminated.

Being a minority and fifty-seven when she was terminated, the nurse filed a lawsuit for race and age discrimination.

She also alleged disability discrimination in her lawsuit, her disability being claustrophobia caused by being assigned to a small office without proper ventilation or adequate lighting and the bathroom for which had a very offensive smell.

Her assignment to this office, she claimed, was intended to provoke her to quit voluntarily and thereby resolve her issues with tardiness.

The nurse in this case does not have a disability. Merely having a note from a doctor that he or she is being treated for symptoms of claustrophobia does not entitle an employee to reasonable accommodation.

UNITED STATES DISTRICT COURT
NEW YORK
September 30, 2011

The US District Court for the Southern District of New York ruled that the ongoing problem with tardiness, repeated write-ups and failed corrective measures were fully documented and verified and were legitimate, non-discriminatory reasons to terminate a nurse in her position.

As to the claustrophobia, merely having a doctor's note that she was being treated for dizziness, nausea, headaches and malaise did not entitle her to reasonable accommodation. Claustrophobia, if sufficiently severe, can be a disability, but it was not proven to be so severe to the Court's satisfaction in this case. **Crawford v. New York Presbyterian Hosp., 2011 WL 4530193 (S.D.N.Y., September 30, 2011).**

Sleeping On The Job: Court OK's Aide's Firing.

A CNA was scheduled to report for work at 10:00 p.m. for the night shift where she would be the only person on duty in the nursing home's Alzheimer's unit.

Around 8:00 p.m. she began to experience what she believed was an allergic reaction to some seafood she had just eaten. Her throat felt like it was swelling shut. She took some Benadryl and tried to call in sick for work.

She was reminded she was the only staff member scheduled to work the night shift and it was too late to call in sick for her shift. She came to work anyway.

The charge nurse found her asleep at the front desk and woke her up. The charge nurse came back later during the night and found her sleeping again. The CNA was terminated.

The grounds given for her termination were that she had just arrived home earlier that evening from a long automobile trip out of state and did not get enough rest to be able to come in to work and also that she had taken medication which impaired her ability to do her job.

There was just cause to terminate this employee. However, there are extenuating circumstances. She was not guilty of intentional misconduct and will be entitled to unemployment.

MISSOURI COURT OF APPEALS
November 15, 2011

The Missouri Court of Appeals validated the facility's right to terminate the CNA.

However, the Court also saw extenuating circumstances which should not make her ineligible for unemployment benefits. It could not be explained what else she was supposed to do for her allergic reaction other than take a medication that causes drowsiness. **Richardson v. Division of Employment, __ S.W. 3d __, 2011 WL 5525351 (Mo. App., November 15, 2011).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

US False Claims Act: Nurse Practitioner's Accusations Against Doctor Dismissed.

A private citizen can file a civil lawsuit in the name of the US Government to recoup money the US Government has paid out for a false claim, for example, a fraudulent Medicare or Medicaid billing wrongfully collected by a healthcare provider.

There is a major incentive. If the civil lawsuit is successful, the private citizen is entitled to receive 15%-25% of all the money recouped by the US Government from the wrongdoer, depending upon the extent to which the citizen's involvement contributed to winning the case. Hypothetically that could mean millions.

In a recent case a nurse practitioner and several co-workers undertook a covert investigation of a physician's billings to Medicare for weekend visits to nursing home patients.

They reckoned the physician would have to put in at least nine hours on each weekend day to actually see all the patients, while his time records had him out of the office only five hours per day. The daughter of a resident told the nurse practitioner her mother told her that no doctor saw or treated her at the nursing home on the weekend in question.

The US District Court for the District of Massachusetts dismissed the nurse practitioner's case for recoupment of monies allegedly billed fraudulently by the physician and for damages for retaliation against her by firing her after she went public with her accusations.

False Claims Act Requires Specific Information

The Court pointed out that allegations in a successful False Claims Act civil lawsuit must include very specific details of the fraudulent practices committed, including dates, patients' identities, names of the nursing homes, exact contents of the claim forms, including billing codings for treatments claimed, identification numbers of the forms and the exact amounts of money involved.

Imprecise allegations are not sufficient that a provider's office time sheets do not match the level of his or her billing activity or that the daughter of a particular nursing home resident said that her mother told her that the doctor never came in that day. Without very specific, exact and precise details to support it, the lawsuit must be dismissed. **US v. Compass Medical, 2011 WL 5508916 (D. Mass., November 10, 2011).**

Incident Reports: Court Approves Jury Verdict Based On Inferences About Missing Evidence.

A case we reported in February 2009 was recently upheld on appeal: *Missing Incident Report: Jury Returns $9,000,000+ Verdict After Judge Instructs Jury On Spoliation Of The Evidence*. The patient experienced a substantial unexpected blood loss during surgery. The surgeons ordered a blood sample sent to the blood bank for typing and cross matching and blood sent back to the O.R. for transfusion.

What should have taken at most forty-five minutes took almost seventy. By the time the blood was transfused the patient had suffered major anoxic brain damage.

The nurse who was responsible for getting the blood for transfusion gave a pre-trial deposition stating she did not prepare an incident report.

If the nurse prepared an incident report containing important information about what really happened during the patient's surgery, and the hospital intentionally and in bad faith lost or destroyed the incident report, the jury is allowed to infer that the information in the incident report was damaging to the hospital's position on the liability issues in the lawsuit and favorable to the patient.

SUPREME COURT OF KENTUCKY
October 27, 2011

However, at trial she testified she did fill out an incident report when requested by her charge nurse and placed the report in the outgoing paperwork bin on the front desk.

No witness from the hospital was able to say anything further one way or the other about an incident report or its contents.

The Supreme Court of Kentucky ruled it was correct for the jury to have been instructed that they could decide whom to believe, whether or not there really was an incident report and, if there was, whether the missing incident report must have contained information damaging to the hospital, which is what the jury apparently decided. **University Med. Ctr. v. Beglin, __ S.W. 3d __, 2011 WL 5248303 (Ky., October 27, 2011).**