LEGAL EAGLE EYE NEWSLETTER

July 2012 *For the Nursing Profession* Volume 20 Number 7

Pulse Oximeter: Court Says Continuous Monitoring Would Have Saved Patient's Life.

The patient came in to the hospital's emergency department where he was diagnosed with diabetic ketoacidosis.

An ICU bed was not available so the physician admitted him to a step-down unit for critical patients who require more care than that provided on a regular med/surg floor.

On the step-down unit the patient was further diagnosed with pancreatitis, MRSA and pneumonia.

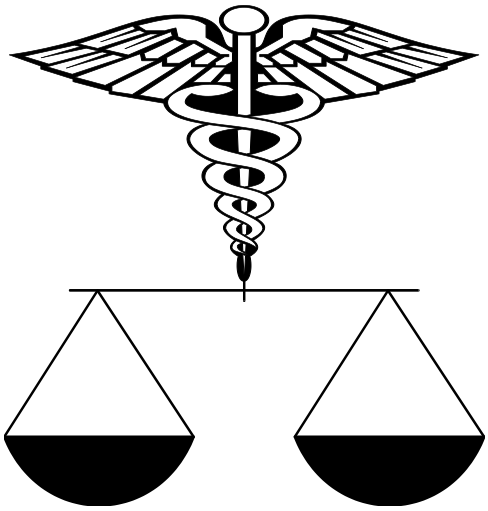
A physician ordered Ativan for restlessness, morphine for pain and Phenergan for nausea, all of these medications on a prn basis.

That same afternoon the patient became increasingly restless and agitated and began pulling his IV and O_2 lines, so Haldol was ordered by the physician and given by the patient's nurse.

Around 1:45 a.m. the next morning a nurse gave the patient morphine, Phenergan and Ativan at the same time.

When they checked on the patient at 3:40 a.m. his respirations were only 8 and his pulse and BP were barely detectable.

The patient was promptly intubated and sent to the ICU but had already sustained profound hypoxic brain damage. He died twelve days later soon after life support was withdrawn.



If the nurses had kept the pulse oximeter on the patient's finger continuously and set the alarm there was a reasonable probability the patient would have survived, even after the combination of respiratory-depressive medications he was given earlier that a.m.

The pulse oximeter is a simple, effective and non-invasive device.

COURT OF APPEALS OF TEXAS
May 22, 2012

No Pulse Oximeter
Court Upholds Family's Lawsuit

The Court of Appeals of Texas looked carefully at the complex technical legal and medical issues and validated the opinions of the family's medical expert as grounds for a lawsuit.

The patient's nurses should have recognized the patient's potential for respiratory complications from his medical diagnoses.

The nurses should also have appreciated the risk of respiratory depression from the combination of medications he was given during the night for restlessness, nausea and pain as well as from the Haldol he was given earlier that afternoon for sedation.

According to the family's expert, the patient's nurses should have left the pulse oximeter continuously on his finger and set the alarm on the equipment to sound if his O_2 sat dropped below an acceptable reading.

The Court was satisfied from one of the patient's nurse's testimony that an alarm from the pulse oximeter equipment would have brought a nurse to the bedside right away and that the nurse would have put the wheels in motion to have him intubated and sent to the ICU in time to have saved his life. **Constancio v. Shannon Med. Ctr., 2012 WL 1948345 (Tex. App., May 22, 2012).**

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July 2012

New Subscriptions See Page 3

Fall: Court Finds No Proof Of Negligence, Case Dismissed.

The sixty-three year-old patient was admitted to the hospital through the emergency department for chest pain, tachycardia and anemia.

She had a recent history of black tarry stools and chronic problems with osteoporosis, Type II diabetes and cardiac abnormalities.

She was first sent to the ICU and five days later transferred to a med/surg floor.

At that time she required assistance with her activities of daily living, basic hygiene and transfers.

She needed assistance because of generalized weakness and deconditioning related to poor oxygenation of the blood due to anemia which was probably related to a gastrointestinal bleed. She was on O_2 through a nasal cannula.

Her mobility was limited and she used a cane. A sign was posted in her room to alert her caregivers to her high fall risk.

Patient Fell In Bathroom

The evening of her first day on the med/surg floor an aide assisted her to the toilet in the bathroom and reminded her to call for assistance when she was done.

After that a nurse who was passing by the room heard the patient calling for help, went to help her and found her on the bathroom floor. She had a fracture of the left distal femur which required surgery.

The US District Court for the District of Arizona dismissed the lawsuit the patient filed against the hospital.

No Evidence of Negligence Committed By the Nurses Aide

The only facts the Court was given to consider were that the aide assisted the patient to the bathroom, reminded her to call for help when she was done, left her unattended on the toilet and the patient ended up on the floor with an injury.

There was no evidence that the aide's conduct fell below the standard of care in assessing the patient's needs, relying on others' assessments or not providing assistance that was called for. Nothing was in the nursing notes, physicians' orders or plan of care that stand-by assistance was necessary for this patient or any proof that a nursing or other assessment would have revealed such a need. **Mann v. US, 2012 WL 2131988 (D. Ariz., June 12, 2012).**

It is possible in some cases for the court to draw an inference of negligence just from the fact the accident happened, if the accident is the type which experience has shown does not normally occur when due care is exercised.

However, the general rule in medical negligence cases is that the patient must provide expert testimony to establish what was the caregiver's standard of care under the circumstances, show that the caregiver's errors or omissions fell below the standard of care and prove, again by expert testimony, that the caregiver's errors or omissions injured or harmed the patient.

A patient's fall is not a scenario where the courts depart from the general rule.

It is necessary for the patient to have expert testimony as to the assessments that were done or should have been done leading up to the incident.

Weighing the benefits versus the risks of leaving a particular patient on the toilet by herself is not a judgment that falls within the common experience of lay persons on a jury.

UNITED STATES DISTRICT COURT
ARIZONA
June 12, 2012

Fall: No Nursing Negligence, Case Dismissed.

The eighty-two year-old diabetic patient was admitted to the hospital for fluctuating blood-sugar levels.

She had been living alone at home and could walk without assistance.

After two days in the hospital the physician ordered her discharged. She wanted to shower before leaving. An RN helped her undress and the patient walked into the shower unassisted. The RN asked if she wanted a shower chair. She said she did so the nurse went and got one and placed it in the shower for her.

The RN left to take care of another patient and returned when the patient, still sitting in the shower, was just finishing. The RN turned off the water.

Two Versions of the Fall

The patient claimed she asked the nurse to turn off the water, which the nurse did, then asked for a towel, and the nurse gave her one. Then she asked the nurse, who was by this time standing in the doorway to the corridor, for assistance but the nurse did not assist her. The patient tried to walk barefoot from the shower back to her bed and fell.

The nurse testified she laid towels on the floor before the patient started showering, helped the patient dry herself, used dry towels to dry the floor, dried the patient's shoes and offered them to her, which she refused, then tried to lead her back to bed with one hand while she used her quad cane with the other hand. While they were trying to negotiate the narrow doorway from the bathroom to the hospital room itself, the patient fell.

The patient broke her hip in the fall.

The Supreme Court of Mississippi dismissed the patient's case.

Even if the patient's version of the events was true there was no solid evidence that the nurse's actions fell below the standard of care.

The mere fact that an accident happens in a healthcare setting does not lead to an inference that the accident was caused by negligent assessment or other error or omission by the patient's healthcare providers, the Court pointed out. **Crosthwait v. Southern Health, __ So. 3d __, 2012 WL 2044420 (Miss., June 7, 2012).**

End Of Life: Court Sees No Basis For Family's Lawsuit.

Following total hip replacement surgery the ninety-five year-old was admitted to a nursing facility with a history of hypertension and congestive heart failure.

She was found confused and on the floor by a CNA, was checked, was found not to be injured and was returned to her bed. Later that day during PT she became unresponsive and was transported to the hospital.

The diagnoses in the hospital included confusion, urinary tract infection, pneumonia, syncope, hypothyroidism, anemia and malnutrition.

The hospital physicians advised the family that the patient was in very poor health and was quickly approaching the end of her life. The physicians recommended a palliative approach to care and the family agreed.

The patient was discharged from the hospital back to the nursing facility where she passed away two days later from cardiac arrest from congestive heart failure.

The New York Supreme Court, Appellate Division, found no grounds for the family to sue the nursing facility for negligence involved in the patient's care and dismissed the case. **Domoroski v. Smithtown Center, __ N.Y.S.2d __, 2012 WL 1860898 (N.Y. App., May 23, 2012).**

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Respiratory Care: Court Upholds Civil Penalty.

A long-term care facility was found guilty of two violations of Federal standards involving its patients' respiratory care which posed immediate jeopardy to the health and safety of its residents.

The US Court of Appeals for the Fifth Circuit upheld a $9,500 civil monetary penalty levied against the facility.

Empty Portable Oxygen Tank

State surveyors found evidence that an eighty-one year-old's portable oxygen tank was allowed to empty, causing her O_2 saturation to drop. When her low O_2 saturation was discovered she was put to bed but her O_2 tube was not connected correctly to the wall. When it was finally connected correctly her O_2 saturation improved.

Breathing Machine Not Set Up

The surveyors also found problems with the way another resident's bi-level positive airway pressure machine was being set up, that is, his documented O_2 saturation levels during the night were not being maintained at the appropriate level.

The Court noted for the record that the facility had a history of non-compliance and had previously received lesser civil monetary penalties.

The facility's history of non-compliance was a legitimate factor, the Court said, in the Department's decision to assess these most recent incidents at the level of immediate jeopardy and justified the highest possible level of penalty assessment. **Cedar Lake v. US Dept. of Health & Human Services, 2012 WL 1850387 (5th Cir., May 22, 2012).**

Choking Death: Mix-Up With Dietary Orders.

After a mentally disabled adult choked to death while eating in the cafeteria at the county developmental center, it was discovered that orders had been faxed to the developmental center from the nursing facility where she had previously been housed indicating she was to be on a mechanical soft diet.

The problem was the patient's propensity to stuff her food rapidly and impulsively into her mouth which greatly increased her risk of choking on solids.

The deceased patient's nurse case manager admitted it could have been her handwriting where someone had penned the patient's name on the corners of two faxed documents containing the physician's orders for the soft diet.

The nurse's habitual routine would have been to forward any such dietary orders to the dietary department right away, but that was all that she could say given that the information apparently never was forwarded to the kitchen for action.

An unusual wrinkle in this case is that the patient's nurse manager was a county government employee in Ohio who could only be sued for "wanton or reckless" misconduct but not for the lesser offense of ordinary garden-variety negligence.

The Court of Appeals of Ohio dismissed the family's allegations of negligence out of hand and sent the case back to the county Court of Common Pleas for a ruling on the issue of wanton or reckless misconduct. **Lackey v. Noble, 2012 WL 2087227 (Ohio App., June 11, 2012).**

Conscientious Objections: Court Upholds Public-Sector Nurse's Right To Sue.

A nurse employed in a state university medical center complained to her supervisors that her religious beliefs prevented her from participating in abortions, contraception or sterilizations, acts which are considered morally wrong and gravely sinful by her Catholic faith.

The nurse's beliefs made it impossible for her to care for patients on the labor and delivery or post-partum units who came to the hospital for abortions and/or sterilization or for the nurse to dispense birth control or "morning-after" pills.

When the nurse requested accommodation from her employer she was assigned to a staff-nurse replacement pool which involved rotating days and nights, twelve-hour shifts and Saturdays and Sundays. That was not as advantageous as the hours she would have been able to work if she were allowed to stay in labor and delivery and simply did not have do things that were morally objectionable to her.

The US Civil Rights Act gives a victim the right to sue when Constitutional rights are violated by persons acting under authority of state law.

UNITED STATES DISTRICT COURT
MISSISSIPPI
May 31, 2012

The US District Court for the Southern District of Mississippi ruled the nurse as an employee of a public-sector institution had valid grounds for a lawsuit.

The evidence would have to go before a jury to determine if the less favorable shift assignments were in fact punitive action by her employer based on her religious beliefs, but the basic premise of the Constitutional rights lawsuit was on solid ground, the Court said. **Britton v. Univ. of Miss. Med. Ctr., 2012 WL 1969136 (S.D. Miss., May 31, 2012).**

Sexual Harassment: No Basis For Nurse's Lawsuit.

Two female staff nurses, each of them married, discovered that they both were involved in extramarital affairs with the same male staff nurse who worked at the same hospital where all three were employed. He was likewise married.

One of the female nurses broke off her affair without complications.

The other female nurse, however, started upon a course of action which resulted in the male nurse having to file charges of sexual harassment against her with the hospital's human resources department which, after she did not cease and desist, resulted in her termination.

She repeatedly followed the male nurse around the hospital insisting that he talk with her about their relationship. Once she forced him to have to lock himself in the bathroom but waited for him to come out and continued bothering him.

The female nurse was not a victim of discrimination as she alleged for being terminated herself while the male nurse was not.

She was guilty of sexually harassing him and he did not harass her.

They were treated differently, but their situations were not the same. There was no discrimination.

COURT OF APPEALS OF TEXAS
June 5, 2012

The Court of Appeals of Texas ruled she was not a victim of sexual harassment by her co-worker or a victim of gender-based discrimination by her employer.

Both were at the same level in the personnel hierarchy and she, the female, was the one harassing him in violation of the facility's anti-harassment policy. **UTMB v. Pettaway, __ S.W. 3d __, 2012 WL 1995776 (Tex. App., June 5, 2012).**

Racial Bias: Court Dismisses Nurse's Discrimination Lawsuit.

A recent nursing graduate filed an employment discrimination lawsuit against the parent corporation which owned several nursing facilities over the fact her application for employment did not result in her being hired.

The nurse was a minority and was qualified for the jobs for which she was applying.

The facility allegedly hired ten Caucasian and no minority nurses around that same time.

UNITED STATES DISTRICT COURT
ALABAMA
June 13, 2012

The US District Court for the Northern District of Alabama ruled there was a *prima facie* case of discrimination but after looking deeper dismissed the minority nurse's race discrimination case.

Although she was qualified for the positions in question as a graduate of a community-college nursing program and had passed her boards, all of the nurses who were hired had considerably more nursing experience than she. She had a total of four months work experience as an RN while every one of the nurses who was hired had at least two years critical-care nursing experience.

Past Working Relationship Is a Legitimate Factor in Hiring

The Court also pointed out that each of the nurses who was hired had previous experience working with one or more of the persons responsible for the hiring decisions in question.

A prior satisfactory working relationship is a legitimate, non-discriminatory factor in hiring decisions, the Court said.

It also came out that one of the hired nurses, contrary to what was alleged in the nurse's lawsuit, was a minority male nurse. **Seay v. Noland Health, 2012 WL 2153208 (N.D. Ala., June 13, 2102).**

Diversion Of Narcotics: No Basis For Nurse's Defamation Suit.

A registered nurse working in long-term care was reported to the State Board of Nursing by her nursing director after a physician reported his concerns to the director over suspicious requests by the nurse for narcotics for her patients.

On the same p.m. shift the nurse phoned the physician twice for orders for narcotics, once for a patient who was comatose and once for another who was not on pain medication.

The Board suspended the nurse's license pending satisfactory completion of certain requirements. Despite her license suspension being affirmed by the Court of Appeal of Louisiana the nurse filed a separate lawsuit against her employer alleging conspiracy and defamation.

The nurse's supervisors reported her conduct to the Board based on a reasonable belief that the information was true and did so without personal malice.

COURT OF APPEAL OF LOUISIANA
June 8, 2012

The Court pointed out that persons who report nurses' conduct to the Board by law are immune from civil lawsuits if they provide information with a reasonable belief the information is accurate and do so without the malicious intention to harm the nurse's reputation.

Burden of Proof

The nurse in question has the legal burden of proof that the person reporting her had no reasonable belief in the accuracy of the report and made the report with malicious intent to harm her reputation.

The information provided to the Board was simply that nurse tried to obtain narcotics for patients of hers who did not need narcotics. The Board's own investigation established to the Board's satisfaction that there was a problem with diversion and/or dependency. **Lewis v. Morgan, __ So. 3d __, 2012 WL 2060870 (La. App., June 8, 2012).**

Narcotics Diversion: Nurse's Defamation Lawsuit Dismissed.

A person suing for defamation must prove that the person whom they are suing made a statement to others that harmed the person's personal or professional reputation in the community.

The nurse was told she was being fired for failing to document controlled substances.

That might lead some people to infer that the nurse was diverting the missing controlled substances to her own use.

However, no one ever said the nurse was being fired for drug abuse.

It was the nurse's own union representative who asked if it would be an option to check herself into drug rehab rather than lose her job, but no one from the hospital ever directly accused her of using the drugs herself that turned up missing on the audit.

The nurse never questioned the fact that discrepancies did turn up during the pharmacy director's audit between the quantity of narcotics she checked out of the machine and the narcotics that were given to her patients or correctly documented as wastings by the nurse herself.

UNITED STATES DISTRICT COURT
KENTUCKY
June 5, 2012

The hospital's pharmacy director decided to conduct an audit of the drugs dispensed from the hospital's AcuDose machines which stored and distributed the facility's controlled substances.

The audit basically involved looking back at the most frequently dispensed narcotic medications and cross-checking them with the patients' medical records.

The nurse in question's name was among three who on numerous occasions had taken out controlled substances but never documented giving, wasting or returning them. She had thirteen discrepancies identified in the preceding thirty days. The director of nursing, risk manager and human resources manager met and conferred and decided to suspend her.

After she served her suspension she was granted a hearing for them to consider taking her back. Her union representative floated the idea of drug rehab but the risk manager nixed it and the nurse was fired for an unacceptable number of medication errors involving controlled substances.

The nurse sued her former employer for defamation and retaliation. The US District Court for the Eastern District of Kentucky dismissed her lawsuit.

No Retaliation

Among other issues raised in the lawsuit the nurse claimed that three weeks before the medication audit she had complained that her unit was not adequately stocked with snack boxes for patients who did not, could not or would not eat their meals at meal times and that the supplies of fresh bed linens were insufficient.

The Court was not willing to give the nurse protected legal status as a whistleblower on the basis of those complaints. As a general rule, the Court said, if there is a significant time lag between an employee's complaints and the action taken back against the employee, retaliation is not assumed to be the employer's motivate.

The pharmacy director, not a nursing supervisor, did the audit three weeks later and did so with no foreknowledge that this nurse's name would come up. The records did not lie that the nurse's documentation did not match the narcotics she checked out. **Fields v. Appalachian Reg. Healthcare, 2012 WL 2021827 (E.D. Ky., June 5, 2012).**

HIPAA Violations: Nurse Looked At Her Mother's, Sister's Charts, Termination Upheld.

A registered nurse worked as a clinical affiliate in the hospital's cardiology department. Her position required her, among other things, to access patients' medical records to review lab values and other diagnostic test results ordered by the physicians and to write progress notes in the charts.

When she was hired she signed an agreement she would protect patient confidentiality by not seeking or obtaining information regarding a patient which was not required to perform her duties.

When the US Health Insurance Portability and Accountability Act (HIPAA) went into effect she signed a revised confidentiality agreement that she would not access or view information other than what was required to do her job, would immediately ask her supervisor for clarification if she had any questions whether information was required for her job and acknowledged that violation of the facility's confidentiality policy could result in disciplinary action up to and including termination.

Nurse Accessed Family Members' Charts

An anonymous complaint prompted an investigation by the facility's HIPAA compliance officer. The nurse was found to have accessed her mother's and sister's charts on forty-four and twenty-eight separate occasions respectively.

They were never cardiology department patients. There were no guardianship papers, HIPAA releases or power of attorney releases in the files giving the nurse legal authority to access their charts.

When confronted by human resources, the nurse admitted she did it but did not believe it was wrong. She was fired for violation of the patient-privacy policy.

After her termination the nurse sued for age discrimination, discrimination on the basis of association with a disabled person (her sister), intentional infliction of emotional distress, defamation, negligence and invasion of privacy.

The US District Court for the Northern District of Ohio dismissed her case. **Somogye v. Toledo Clinic, 2012 WL 2191279 (N.D. Ohio, June 14, 2012).**

The nurse explained that the two individuals whose medical records she accessed were her mother and her sister.

Her mother has Parkinson's, takes a number of meds and frequently falls. Her sister, who lived with her, has Down syndrome.

When asked if she needed to access information from their medical charts to do her job as a clinical affiliate in the cardiology department, the nurse had to admit she did not.

The nurse's age discrimination case is not on solid ground, one reason being that system-wide the hospital had terminated a number of employees for HIPAA violations, more than half of the individuals terminated being under forty years of age at the time.

Some of the younger individuals were terminated specifically for accessing their own family members' medical charts.

The facility had a strict policy on its books and enforced it uniformly that intentionally accessing a family member's chart not required to do one's job was grounds for termination.

UNITED STATES DISTRICT COURT
OHIO
June 14, 2012

Jail Nursing: No Deliberate Indifference.

The patient was a detainee not yet proven guilty who was being held in the county jail pending trial on felony charges of dealing controlled substances and creating a public nuisance.

The patient suffers from a blood clotting disorder which causes him chronic pain. He was on OxyContin. The jail physician instead put him on Vistaril, clonidine and Donnatal to manage his narcotic withdrawal, started ibuprofen and Tylenol for his pain and continued the metoprolol, Coumadin and Nexium he had been taking. The jail nurses administered his medications per the physician's orders.

The inmate sued the county sheriff, jail physician and jail nurses for violation of his Constitutional rights.

Nurses cannot blindly defer to the physician's judgment in circumstances in which following the physician's chosen course exposes the patient to apparent and imminent harm.

Doing so in the corrections context could amount to deliberate indifference to an inmate's serious medical needs, a violation of the inmate's Constitutional rights by a nurse.

UNITED STATES DISTRICT COURT
INDIANA
June 5, 2012

The US District Court for the Southern District of Indiana acknowledged that nurses in the corrections context have the same obligation as nurses elsewhere to advocate for their patients when there is an obvious problem with how the physician's action or inaction is not meeting the patient's needs. However, although the patient disagreed, there was nothing wrong with the physician's plan and no problem here with the nurses following his orders. **Holloway v. Delaware Co., 2012 WL 2013214 (S.D. Ind., June 5, 2012).**

Jail Nursing: No Deliberate Indifference.

The patient was picked up and taken to the county jail by a detective for allegedly failing to send in his monthly report form to his probation officer.

The day after he was booked into the jail he came to the dispensary requesting medical attention for chest pains. He asked for Norco (hydrocodone) and Xanax. The nurse took his vital signs and gave him two .4 mg nitroglycerine tablets. After five minutes he said his chest pain was gone, so the nurse sent him back to his cell with additional sublingual tablets.

The next day another inmate got a guard to escort the man to the infirmary. He said his chest pain was radiating into his left arm and the nitroglycerine was not working. The nurse called the physician who ordered an EKG. The EKG was not definitive so he was transferred to a nearby university hospital for further evaluation.

The nurses properly screened and evaluated the patient when he was booked into the jail and cared for him appropriately on two later occasions.

The fact the patient was given different medication than he requested does not amount to deliberate indifference to an inmate's serious medical needs.

UNITED STATES DISTRICT COURT
CALIFORNIA
June 6, 2012

The US District Court for the Eastern District of California dismissed the inmate's lawsuit. His care was appropriate in all respects.

A nurse checked his vital signs and gave him nitroglycerine, which seemed to alleviate his symptoms, then when his symptoms persisted they contacted the physician, got an EKG and had him transferred out for a more complete evaluation. **Quinn v. Fresno Co., 2012 WL 2052162 (E.D. Cal., June 6, 2012).**

Repeated Falls: No Review Or Modification Of The Care Plan.

State nursing-facility regulations require residents to be provided with nursing services in accordance with their needs which must include:

Development of a written plan of care for each resident to provide nursing services as part of the total rehabilitation program;

Periodic reevaluation of the type, extent and quality of services and programming; and

Modification of the resident care plan as needed, in terms of the resident's daily needs.

Failure to notify the consulting RN of the patient's repeated falls, and the resultant failure of the RN to investigate them mounts to failure of the facility to provide the resident with nursing services in accordance with her needs.

The facility had an adequate initial care plan for this resident, but it was not updated as necessary to address her problem with falling which was becoming a pattern with her.

The facility failed to provide adequate care and that failure directly resulted in injury to the resident. The penalties and other sanctions were appropriate.

APPELLATE COURT OF ILLINOIS
June 12, 2012

A sixty-three year-old woman with diagnoses of Down syndrome, Alzheimer's disease and osteoporosis was a resident of an intermediate care center for developmentally-disabled adults. Her cognitive level was that of a twenty-three month-old child.

Over a four-month period she fell in the facility at least eleven times, sustaining various bruises, hematomas and abrasions.

A complaint led to an investigation which resulted in citations for violations of the state's Nursing Home Care Act as well as the facility's operating license being placed on probationary status. The Appellate Court of Illinois upheld the penalties and other sanctions imposed on the facility.

Facility Staff Ignored Internal Policies Designed to Trigger Care Plan Update

In accordance with state law, the facility had a policy which required staff on duty when a resident sustained an injury to make observations and take appropriate action to obtain basic information necessary for nurses and physicians to make further clinical judgments and notify the house manager or administrator so that the house manager or administrator could, in turn, notify the nursing staff.

On numerous occasions the resident was seen falling or found on the floor or in between items of furniture. Her vital signs were taken and/or she was visually looked over, but no one else was notified so that a medical evaluation could be obtained.

Further, when a resident falls repeatedly it is necessary, pursuant to state regulations, for the multidisciplinary quality assurance committee at its regular meetings to review the patient's medical, nursing, medication and pharmacy records with a view toward making appropriate modifications of the care plan.

In addition, bruising found on a patient's body on an ongoing basis is an incident which must be reported to the Department of Public Health. The occurrence of repeated injury from falling can be considered abuse or neglect, which is a violation of nursing facility standards itself and the failure to report abuse or neglect is a separate violation, the Court said. **UDI No. 2 v. Dept. of Public Health, __ N.E. 2d __, 2012 WL 2108491 (Ill. App., June 12, 2012).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Power Of Attorney Not Valid: Patient Was Competent To Make Her Own Decisions.

The day before the patient was admitted to a skilled nursing facility she signed a Durable Power of Attorney for Health Care naming her son as her attorney-in-fact.

The wording of the document was taken directly from the state's durable power of attorney statute. The statute allows an individual to sign a document authorizing another to make his or her health care decisions after he or she has been determined to be incapable of making such decisions on his or her own.

At the time of her admission to skilled nursing the son signed all the admission documents on his mother's behalf, including financial responsibility forms and an arbitration agreement.

After his mother died the son was appointed personal representative of her probate estate and on behalf of the estate filed a lawsuit against the facility seeking damages for alleged negligence in his mother's care.

The facility's first line of defense to the lawsuit, before delving into the negligence allegations, was to insist the case belonged in arbitration, not on the local county court's jury trial docket. The nursing facility filed suit in the US District Court for the District of Nebraska to enforce the arbitration agreement signed by the patient's son. The suit cited the US Federal Arbitration Act which creates a strong Federal public policy in favor of arbitration.

Patient Was Not Incompetent
Power of Attorney Was Not In Force

The Court was forced to rule against the nursing facility.

The durable power of attorney by its express wording gave authority to the son to make decisions for his mother as her attorney-in-fact only after her physicians had certified that she was incompetent to make her own decisions.

She was competent and was fully capable of making her own decisions when the arbitration agreement was signed by someone else, albeit a close family member, who at that point had no legal authority. She never agreed to arbitration. She never signed anything to that effect.

Arbitration is strongly favored by the law for resolution of civil damages cases in and out of the health care arena, but only when both sides have validly agreed to arbitration, which was not the situation here. **GGNSC v. Payich, 2012 WL 2121868 (D. Neb., June 5, 2012).**

Dishonesty: Court Sees No Pretext For Illegal Discrimination Behind Nurse's Termination.

Some of the workers on the night shift complained that two patient care techs routinely slept at the nurses station, sometimes for hours at a stretch.

Questioning of a number of other personnel on the unit confirmed to management's satisfaction that the accusations were true and the two techs were terminated.

One of the charge nurses, when confronted, denied she was letting employees under her direct supervision get away with sleeping for hours at a time at the nurses station.

Her superiors, however, trusted that the evidence gathered in their investigation was overwhelming to the contrary and believed that the charge nurse must be lying. She was terminated for dishonesty.

The nurse was fired for her dishonesty in responding untruthfully to a complaint about her performance.

The Court will not quibble with the wisdom of the employer's decision to fire her.

The issue for the Court is only to look to see if there is a plausible business justification behind the employer's action.

Suffice it to say it was not a pretext for discrimination.

UNITED STATES DISTRICT COURT
ALABAMA
May 24, 2012

The fired charge nurse sued her former employer for age and disability discrimination. The US District Court for the Northern District of Alabama dismissed her case.

Another charge nurse on the same unit admitted she let subordinates sleep on the job. She was written up but not fired. According to the Court, that did not lend credence to the fired nurse's case but corroborated that dishonesty was the real reason for her termination.

The Court refused to substitute its own judgment as to whether the facility should have fired the charge nurse.

A court deciding a case where discrimination is alleged looks only to see if the explanation offered by the employer is so flimsy that it can only be a pretext for discrimination. **Henson v. Healthsouth, 2012 WL 1952382 (N.D. Ala., May 24, 2012).**