LEGAL EAGLE EYE NEWSLETTER

June 2007 *For the Nursing Profession* Volume 15 Number 6

Gentamicin Toxicity: Patient Ruled Entitled To Large Verdict For Medication Mix Up.

The seventy-five year-old patient developed a methicillin-resistant Staph aureus infection in the hospital following knee replacement surgery.

Her physician got a creatinine clearance test which showed her kidneys were functioning normally. After weighing the potential for harm from the infection versus the potential side effects from the medication, the physician decided to include gentamicin in her antibiotic treatment regimen.

Given its significant potential for toxicity to the kidneys, the course of the gentamicin was to be very short and was to be discontinued prior to her transfer to a nursing home. Her discharge antibiotics would be IV vancomycin and oral rifampin.

Discharge Orders Mixed Up

There was no question about the negligence of the hospital nurse who did the paperwork for the transfer to the nursing home. The hospital discharge nurse misread the chart and failed to see that the gentamicin had been discontinued.

The hospital discharge nurse did note that the nursing home physician was to contact a named infectious disease specialist to visit the patient and take over management of her antibiotic treatment.

The jury awarded the patient $3.2 million.

The patient is entitled to a new trial to assess the true amount to which she is entitled in all fairness.

The judge at the first trial erroneously excluded a physician from testifying that her future medical expenses could exceed $3.2 million, the sum awarded by the jury.

APPELLATE COURT OF ILLINOIS
May 4, 2007

Nurses Did Not Question Orders

At the nursing home the nurses accepted at face value the order to continue the gentamicin on an indefinite basis. The nursing home attending physician also did not think to question what appeared to be the hospital physician's order.

The Appellate Court of Illinois laid blame on the hospital discharge nurse, the nursing home nursing staff and the nursing home physician.

The nursing home staff nurses, in the court's opinion, should not have accepted without question and without investigation an order to continue a medication with high potential for life-threatening side effects.

In the nursing home the patient began having trouble urinating. The attending physician ordered a creatinine test and that came back abnormal. The gentamicin was continued for several more days even though the patient was having trouble urinating and her creatinine tests were coming back abnormal. They believed the gentamicin was necessary for the MRSA infection.

The nursing home did not stop the gentamicin until the patient had gone into irreversible renal failure.

The court ruled the patient's need for life-long dialysis for renal failure was a direct result of her caregivers' negligence. **Kunz v. Little Co. of Mary Hosp., __ N.E. 2d __, 2007 WL 1309558 (Ill. App., May 4, 2007).**

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IV Anesthetics: Court Faults Use Of Non-Licensed Personnel.

The Court of Appeals of Washington upheld sanctions imposed by the state Department of Health on two dentists practicing in the same office who routinely had "surgical assistants" start IV's and administer anesthetics through IV lines.

The court went through the language which defines the scope of practice of various non-licensed credentialed health care personnel. First, there is no such thing as a "surgical assistant" under state law in Washington. Second, other persons such as surgical technicians are not allowed to start IV's or to administer medications.

The bottom line was that starting IV's and administering medications, in this case pushing anesthetics through IV lines, is strictly within the scope of nursing and medical practice. **Lang v. Dept. of Health, __ P. 3d __, 2007 WL 1218011 (Wash. App., April 26, 2007).**

Nursing Expert: Basis For Opinion Must Be Disclosed.

According to the Supreme Court of Texas, each and every document that a nursing expert who will testify in court has been given to look at before formulating his or her opinion must be revealed to the attorneys for the other side.

This requirement includes documents a hospital later realizes it might have been better off to keep confidential as peer-review or attorney work product materials. Once given to the expert, it is too late to turn back. **In re Christus Spohn Hosp., __ S.W. 3d __, 2007 WL 1225351 (Tex., April 27, 2007).**

Perioperative Care: Nurses Ruled Not Negligent.

A patient sued the hospital where he had arthroscopic knee surgery.

His lawsuit alleged, among other things, that the circulating nurse was negligent for not seeing that his operative leg was securely strapped down.

The circulating nurse testified the operative record was correct in that his operative leg was, in fact, not strapped down. The operative leg is supposed to remain free so that the surgeons can articulate the knee joint as needed during the procedure.

The jury in the District Court, Harris County, Texas, returned a defense verdict absolving the hospital and the physicians from negligence. **Arnold v. Cupic, 2007 WL 816756 (Dist. Ct. Harris Co., Texas, January 18, 2007).**

Cardiac Arrest: Nurses Ruled Not Liable.

The family filed suit claiming that the nurses providing post-operative hospital care failed to notify the physician that their patient was having chest pains, shortness of breath, nausea and vomiting.

The patient went into cardiac arrest, a code was called, the patient could not be resuscitated and she died.

Both sides' expert witnesses agreed that nurses must be vigilant for signs and symptoms of an impending heart attack and must notify the physician and/or call a code. However, the jury in the Circuit Court, Madison County, Alabama accepted the nurses' testimony it started at 9:30 a.m., just before the physician was notified, not at 7:00 a.m. as the family claimed, and returned a verdict for the hospital. **Estate of Nayman v. Huntsville Hosp., 2007 WL 1248247 (Dist. Ct. Madison Co, Alabama, February 23, 2007).**

Corticosteroids: Physicians Failed To Read Nursing Notes.

While undergoing outpatient treatment for a flare-up of her multiple sclerosis the patient fell at home and had to be hospitalized for hip surgery.

Her physicians had her on IV and then po corticosteroids along with a po aspirin compound. It was not until the patient went into cardiac arrest that her physicians discovered her gastrointestinal bleeding.

Two days earlier the hospital nurses had documented in their nursing progress notes that they observed pallor in their patient. The physicians were faulted in the ensuing lawsuit for failing to read the nursing notes which could have alerted them in time that something was seriously wrong.

The family obtained a verdict of more than $7 million against the physicians in the Court of Common Pleas, Allegheny County, Pennsylvania. **Estate of Mahunik v. Hebron, 2007 WL 1296848 (Com. Pl, Allegheny Co, Pennsylvania, March 30, 2007).**

Civil Rights: Corrective Interview Was Refused.

When an employee refuses to attend a corrective interview designed to obtain the employee's response to allegations of misconduct, it is impossible for a court to determine whether the employee was guilty of misconduct or whether the allegations of misconduct were merely a pretext for illegal race discrimination.

The US District Court for the Eastern District of Arkansas had no choice but to dismiss a former employee's civil rights lawsuit against a nursing home. **Johnson v. Searcy Health Care, 2007 WL 1364684 (E.D. Ark., May 7, 2007).**

Duty To Warn: Nurse's Actions Vindicated.

After showing signs of anxiety and verbalizing suicidal thoughts, a manufacturing company employee was referred by his employee assistance program to a psychiatric nurse practitioner.

The patient told the nurse practitioner that he was hearing voices, which the nurse categorized as command hallucinations, telling him to harm the company's human resources director with whom he was having ongoing conflict over his job performance. He also revealed to the nurse practitioner that he had access to a gun.

The human resources director was a clearly identified potential victim. The nurse saw it as her legal duty to warn him notwithstanding her legal duty to maintain medical confidentiality.

The patient's psychologist confirmed later that the patient was highly irritable, was having suicidal thoughts and homicidal thoughts about the human resources director with whom he was in conflict.

The Supreme Court of Iowa dismissed the patient's lawsuit against the nurse, the human resources director and the company for being fired. **Evans v. Benson, __ N.W. 2d __, 2007 WL 1299261 (Iowa, May 4, 2007).**

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Combative Patient: Jury Rules Hospital Staff Not Liable.

The seventy-nine year-old patient was admitted to the hospital's intensive care unit for diabetic ketoacidosis.

The next evening she removed her monitor hook-ups, got out of bed and insisted that she would be leaving. Three nurses put her back to bed.

A few hours later her behavior became outright combative. Multiple staff members had to intervene. During the struggle the patient's arm got caught between the mattress and the side rail.

One of the nurses lowered the bed rail to release her arm, but her arm and both legs were broken. After surgery the patient died a week later from her injuries

The family filed suit against the hospital in the Supreme Court, New York County, New York.

No Haldol Given
After First Episode of Confusion

The jury apparently discounted the family's lawyer's argument that Haldol should have been given when the patient first exhibited signs of confusion.

Instead, the jury accepted the hospital's assertion that the first episode of mere confusion did not justify a chemical restraint. Nor would that episode necessarily lead staff to anticipate a full-blown combative episode would follow in which the elderly patient, suffering from advanced osteoporosis, would be badly injured. **Estate of Klein v. North Shore Univ. Hosp., 2007 WL 1247192 (Sup. Ct. New York Co., New York, March 29, 2007).**

Transport: Staff Must See That Vulnerable Patient's Belt Is Buckled.

The sixty year-old wheelchair-bound patient was diabetic and had had a stroke.

Because of his medical conditions he had had both of his legs amputated and could not use his right hand. He was basically helpless.

A nurses aide employed by the nursing home where he resided assisted the driver in loading him into a medical-transport van.

However, they neglected to fasten the belt securely around him to hold him safely in place.

When the van began to move, the patient fell out of the wheelchair and landed on his left hand. Due to compromised circulation, the minor abrasions on his left hand became gangrenous and four fingers had to be amputated.

He died from causes unrelated to the accident before his case went to court in the Supreme Court, Queens County, New York. The estate nevertheless obtained a $100,000 verdict against the nursing home and the medical transport company.

Employees of both companies negligently failed to anticipate the special vulnerability and special needs of this patient, the jury concluded. **Estate of Seenandan v. Dependable Ambulette Service, 2007 WL 1287730 (Sup. Ct. Queens Co., New York, February 2, 2007).**

IV Therapy: Nurses Faulted, Did Not Change, Rotate IV Sites.

The patient was a twenty-seven year-old auto mechanic who was burned on his face, neck and hands when gasoline he spilled on himself accidentally ignited.

He went to the intensive-care burn unit at the hospital after skin graft surgery for third-degree burns on the back of his hand. His temperature spiked and his white blood count became elevated. These signs are not uncommon after skin graft surgery.

Later, however, a blood culture linked the infection to Enterobacter cloacae, which most likely entered his system through an IV insertion site.

An IV started outside the hospital by emergency paramedics has to be removed within twenty-four hours.

IV's started in the hospital have to be rotated on a regular basis to minimize the potential for infection.

COURT OF APPEALS OF MICHIGAN
April 26, 2007

The Court of Appeals of Michigan accepted the testimony of two nursing experts who testified for the patient in his lawsuit against the hospital in reaching the decision he had grounds for his case.

An IV inserted outside the hospital has to be removed right away, once a new IV has been started, and that was not done here. The EMT's IV was left in the patient for an extended period of time. IV's started in the hospital have to be rotated every 72 to 96 hours to prevent infection.

The patient had to have the pus-filled basilic vein removed from his forearm and after the surgery was left with reflex sympathetic dystrophy in the underlying ulnar nerve. **Markabani v. Prasad, 2007 WL 1227709 (Mich. App., April 26, 2007).**

Breech Birth: Nurse's Prenatal Care Faulted.

A very complicated series of events resulted in a $2,450,000 settlement of a malpractice lawsuit filed in the Superior Court, San Joaquin County, California.

The settlement was reported with a stipulation that the names of the family and the hospital will be kept confidential.

Among other things that went wrong, the nurse practitioner who did two outpatient prenatal ultrasounds failed to report to the physicians that the fetus was in a breech position.

When the mother came to the hospital in labor a foot was already protruding and the umbilical cord was prolapsed. Despite the obstetrical team's efforts the baby was born with hypoxic ischemic brain damage.

The family's lawyers were prepared to argue to the jury that the nurse practitioner should have set things in motion for a planned admission for a cesarean. **Infant v. Hospital, 2007 WL 1287709 (Sup. Ct. San Joaquin Co., California, January 4, 2007).**

Angiogram: Nurse Did Not Watch For Signs Of A Stroke.

The Court of Appeals of Kentucky upheld the jury's verdict against a hospital over a nurse's failure to monitor the patient for signs of stroke after a bilateral carotid-artery angiogram. It was not until shift change almost six hours after the procedure that the new nurse on duty picked up on the patient's true condition.

The court discounted the hospital's argument that promptly giving tPA is effective in only 30 – 50% of cases in preventing ischemia after a CVA and is considered by some experts contraindicated after an incisional angiogram. **Lake Cumberland v. Dishman, 2007 WL 1229432 (Ky. App., April 6, 2007).**

Fall From Bed: Nursing Home Settles With Resident's Estate.

The ninety year-old patient fell out of bed while residing in a nursing home after undergoing surgery for a broken hip.

After she passed, her son as executor of her probate estate sued the nursing home in the Supreme Court, Rockland County, New York. The broken hip which put her in the nursing home in the first place and her passing from unrelated causes were not issues in the lawsuit.

Old Style Hospital Bed

The nursing home was faulted for still having in use an old-style hospital bed that was more than 25 years old.

The bed rails did not extend the full length of the bed, which could allow a resident to fall out the lower end.

The nursing home was faulted because the bed rails could be unlatched by the resident or unlatched by being bumped inadvertently from the outside.

Staff did not lower the bed as low as it would go while the resident was in bed, which the estate's lawyers contended would have minimized the potential for injury if the resident did fall out.

The lawsuit was broken down into two phases. After the first phase of the proceeding established that the nursing home was liable, a jury was being selected to determine the amount of damages that would be awarded to the estate.

At this point the nursing home agreed to settle for $300,000. Of that amount, however, most went to reimburse the resident's healthcare insurer and the state Medicare and Medicaid offices for the resident's medical care after the fall.

The son was also allowed to recoup more than $100,000 from the estate he had advanced for his mother's bill at the nursing home. **Shapiro v. Nyack Manor Nursing Home, 2007 WL 1364523 (Sup. Ct. Rockland Co., New York, April 12, 2007).**

Police Wanted Access To Patient: Court Finds Nurse's Actions Were Appropriate.

Two sheriff's deputies showed up at the nurse's station on a hospital acute-care unit at ten minutes to midnight and demanded to speak with the person in charge. They insisted they had to serve a protective order on one of the patients.

The nurse assigned to the patient told them she was in charge of the patient's care. She pointed out the door to the room where the patient was located.

Nurse Refused to Give Permission For Deputies to Contact Patient

The deputies asked the nurse's permission to go into the room to give the legal papers to the patient.

The nurse refused to give them permission. She stated she did not have the authority one way or the other to permit them or to deny them access to the patient.

The nurse explained that the patient was very ill and that it was not advisable for the deputies to bother him.

She told them it would be best if they came back first thing in the morning when the patient's doctor would be there. They could ask permission from the doctor or at least have the doctor present when they made contact with the patient.

The nurse called the staff physician on duty. He told her to call the director of nursing at home, and she did. The director of nursing called the hospital's chief operating officer, then called the nurse back and asked to speak with the deputies.

The director of nursing told one of the deputies over the phone that it would be best if they came back in the morning when the doctor would be there.

The patient's nurse never physically blocked the deputies from entering the room or tried to prevent them from doing what they perceived as their legal duty.

The nurse, however, did refuse to give the deputies her name when they asked.

The reaction of one of the deputies was to handcuff the nurse and place her under arrest. The charge was obstruction of service of process, a Class B misdemeanor in Illinois.

Nurse Sues for Violation of Constitutional Rights

The US District Court for the Southern District of Illinois stated that if a civil jury would accept the nurse's version of the story a law enforcement officer could in no way reasonably think that the nurse was trying to obstruct his efforts.

That is, the nurse's civil lawsuit against the deputy for false arrest in violation of her constitutional rights appeared to be on solid ground. **Shipman v. Hamilton, 2007 WL 1390620 (S.D. Ill., May 9, 2007).**

Verbal Abuse: Court Says Aide's Firing Was Justified.

A nurses aide used obscene and demeaning language with a patient while assisting him to the commode.

Although suffering from dementia and Korsakoff's psychosis, the patient was visibly upset afterward when others tried to assist him to the bathroom.

The Court of Appeals of Minnesota noted that mistreatment of a vulnerable adult includes disparaging, derogatory, humiliating, harassing or threatening language or gestures, and not just abusive physical contact like hitting, slapping, kicking, biting or imposing corporal punishment.

The court ruled the aide's name should be placed in the registry of persons barred from working with vulnerable adults. **Appeal of Staley, 730 N.W. 2d 289 (Minn. App., April 24, 2007).**

Continuous Bladder Irrigation: Court Faults Nurses.

The seventy year-old patient had just had a transurethral resection of the prostate and was placed on continuous bladder irrigation (CBI) by his physician to prevent or to flush out blood clots.

The nurses did not monitor his fluid intake and output as they should have.

The physician was faulted for not writing orders for the nursing staff to monitor input and output and for ordering water rather than saline solution for the CBI.

After eight hours on the CBI the patient's bladder ruptured. He also experienced hyponatremia from the use of water rather than saline. He went into kidney failure and respiratory failure and needed to stay in the hospital two extra months.

The verdict was $1.5 million for the patient in the District Court, Nueces County, Texas. **Vela v. Bay Area Healthcare Group, 2007 WL 1412614 (Dist. Ct. Nueces Co., Texas, April 2, 2007).**

Cervical Ripening Tied To Death Of Newborn.

The hospital and the midwife settled a lawsuit filed in the District Court, Johnson County, Kansas.

The jury went on to rule the patient's prenatal caregivers were not negligent.

No fetal monitor was used with a mother who was administered a cervical ripening agent known to be able to cause uterine hyperstimulation, in violation of published recommendations from the American College of Obstetrics and Gynecology. **Fitzhugh v. St. Luke's South Hosp., 2007 WL 1224005 (Dist. Ct., Johnson Co., Kansas, February 6, 2007).**

Post-Operative Care: Nurses Are Faulted.

The thirty-nine year old patient had just been transferred to an acute-care unit from post-anesthesia recovery following a gynecological procedure done under general anesthesia.

She unexpectedly went into respiratory arrest, could not be resuscitated and died.

The family's lawsuit in the District Court, Dallas County, Texas, faulted the nurses assigned to provide post-operative care for not taking and monitoring the patient's vital signs and for not setting up an EKG or attaching a pulse oximeter which would have alarmed if she went into respiratory arrest. The hospital reportedly settled the case for $110,000. **Johnson v. Methodist Hosp. of Dallas, 2007 WL 1438547 (Dist. Ct. Dallas Co., Texas, March 16, 2007).**

Bipolar Disorder: Employee Has A Disability.

In a very complicated published opinion the US Court of Appeals for the Ninth Circuit has ruled that bipolar disorder is a disability that is protected to some extent by the Americans With Disabilities Act.

According to the court, a person afflicted with bipolar disorder can be prone to erratic changes in mood and temperamental outbursts toward supervisors and coworkers.

Employers risk being targeted for legal action for disability discrimination when employees with bipolar disorder are handled differently than those not so afflicted based on negative reactions to their personalities as opposed to legitimate, objective concerns over their job performance. **Gambini v. Total Renal Care, Inc., __ F. 3d __, 2007 WL 1191929 (9th Cir., April 24, 2007).**

Intermittent Pneumatic Compression: Aides Did Not Detach Before Moving Patient.

The patient had just had total hip replacement surgery.

Two aides arrived with a gurney to take her to radiology. They moved the patient without realizing they first had to have a nurse or other knowledgeable person detach and remove the inflatable cuffs on both her legs.

Because the air lines were still attached to the cuffs the aides unknowingly dislocated the patient's hip, requiring a second surgery just twelve hours after her first to reinsert the dislocated femoral head.

The District of Columbia Court of Appeals ruled the patient did not need a medical expert to prove that improper handling by hospital employees was the cause of her injury. **Williams v. Lucy Webb Hayes National Training School, __ A. 2d __, 2007 WL 1434922 (D.C., May 17, 2007).**

Anxiety: Home Health Aide Is Not Disabled.

A home health agency was unable to accommodate an aide's anxiety disorder which prevented her from driving to clients' homes on any route involving bridges or tunnels.

The US District Court for the District of Maryland ruled the aide was unable to work in one particular job but not unable to work in a broad range of nursing jobs. Her condition, therefore, did not fit the legal definition of a disability under the Americans With Disabilities Act and she had no right to sue for disability discrimination. **Rose v. Visiting Nurse Assoc., 2007 WL 1306594 (D. Md., April 26, 2007).**

Meniere's Disease: Nurse Has A Disability, Is Entitled To Reasonable Accommodation.

A registered nurse employed in a nursing home suffered from a medical condition which made her prone to dizziness after climbing stairs.

She asked to be assigned to work only on the first floor. She offered to bring in a physician's note to document her condition. However, she was expressly told her disability would not be honored because she failed to list it in her employment application. Her supervisor discounted the legitimacy of her disability because, as long as gait and balance are not involved, a person with Meniere's disease is capable of engaging in vigorous physical activity.

Problems with gait and balance hamper an employee's ability to work in a broad range of jobs.

The nurse expressly asked for an accommodation that seems reasonable. She had documentation from her physician that, with the requested accommodation, she could perform her job.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
April 26, 2007

The US District Court for the Eastern District of Pennsylvania ruled the nursing home's arguments missed the mark.

An employment application is not the place to request reasonable accommodation. In fact, requiring an applicant to reveal a disability and request accommodation at that time is illegal. **Demshick v. Delaware Valley Conv. Homes, 2007 WL 1244440 (E.D., Pa., April 26, 2007).**

Living Will: Patient Was Intubated, Kept Alive Six Days, Jury Awards Damages.

Before her Alzheimer's got the better of her the elderly nursing home resident had signed a living will stating she did not want extraordinary life-saving measures in the event of a medical emergency.

When the resident experienced just such an emergency paramedics were called to the facility. In accordance with standard emergency protocols the paramedics inserted an endotracheal tube.

The tube was continued by the nursing home medical and nursing staff for six days until the family insisted they remove it. Then the resident quietly passed.

A jury in the Circuit Court, Palm Beach County, Florida awarded the resident's estate $150,000 for her pain and suffering as she lingered with the endotracheal tube in place.

The current trend is to allow lawsuits to go forward for pain and suffering when a living will is not honored.

CIRCUIT COURT, PALM BEACH COUNTY
FLORIDA
March 16, 2007

The nursing home's policy was to honor a resident's wishes. Nevertheless the nursing home was faulted for not having procedures in place to find out if a resident had a living will, healthcare directive, durable power of attorney, etc., and to note that fact conspicuously in the chart.

Further, the lawsuit alleged staff should have been trained specifically what to do and what not to do when a resident with a living will had a life-threatening emergency. **Estate of Neumann v. Morse Geriatric Center, 2007 WL 1159236 (Cir. Ct. Palm Beach Co., Florida, March 16, 2007).**

Patients' TV: Nurses Can Sue For Sexual Harassment.

The US Equal Employment Opportunity Commission (EEOC) filed suit on behalf of the nurses who worked for the contractor which provided kidney dialysis services to inmates of a state prison.

The prisoners sat and watched cable television while getting their dialysis treatments. The practice was for the corrections officer in charge to pick the channel and then take away the remote control to prevent the inmates from fighting over what to watch. One or more of the nurses objected to having to hear a sexually explicit stand-up routine performed by an African-American comic. The officer dismissed their objections as racially biased.

Nurses have the right under Title VII of the US Civil Rights Act not to be subjected to a sexually hostile work environment.

Nurses have the right to complain about having to work within earshot of sexually offensive programming content playing on a patient's television set.

UNITED STATES DISTRICT COURT
MICHIGAN
April 25, 2007

The US District Court for the Eastern District of Michigan ruled the EEOC's lawsuit on behalf of the nurses was on solid legal ground.

As a general rule, employees have a legitimate right to complain to their employers and their employers have to do something about conduct by customers which creates a sexually hostile work environment. This situation was basically no different, the court said. **EEOC v. Kidney Replacement Services, 2007 WL 1218770 (E.D. Mich., April 25, 2007).**

Patient's Falls: Skilled Nursing Facility To Pay Large Verdict.

The jury returned a verdict of more than $33 million. Of that sum $28.6 million was for punitive damages.

The judge threw out the punitive damages on the grounds that the facility, although guilty of negligence in management of the patient's care, was not guilty of intentional or reckless misconduct. The facility's exposure was fixed at $5 million plus.

The patient fell at least eight times, each time while trying to ambulate from his bed to his bathroom.

A toileting plan should have been implemented. Staff should have gone into the room regularly to get him up to the bathroom, rather than waiting for him to call for help, knowing that he might just get up on his own without assistance.

CIRCUIT COURT, WARREN COUNTY
TENNESSEE
February 22, 2007

He fell numerous times. Finally he fell and was injured badly enough to become completely immobile. From that point his skin care was at best only substandard. A bedsore progressed to a Stage IV decubitus ulcer on his heel.

On top of mismanaging his skin care the facility failed to appreciate his need for medication to control his pain from his hip injury and from his skin lesions.

The attorneys pointed a finger of blame at the facility's marketing efforts during the time in question designed to increase admissions and revenues while keeping staffing constant and neglecting this man's care. **Estate of Myers v. NHC Healthcare, 2007 WL 1247215 (Cir. Ct. Warren Co., Tennessee, February 22, 2007).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Shoplifting: Aide Disqualified From Working With Vulnerable Adults.

The individual in question had been convicted of shoplifting merchandise from a retail store where she once worked. That is known as "theft by swindle" and is classified as a gross misdemeanor in the state penal code.

Her criminal record came out in a background check for her clinical placement in a nursing home for an LPN program.

She was disqualified from working with vulnerable adults for a period of ten years following successful completion of her criminal sentence.

The Court of Appeals of Minnesota stated that her relatively minor criminal offense was a major drawback to being allowed to work in a position of trust with persons who are extremely vulnerable to thefts of their property. The court upheld her disqualification. **Iroabuchi v. Commissioner of Human Services, 2007 WL 1248177 (Minn. App., May 1, 2007).**

Misconduct: Too Many Absences Are Grounds For Firing.

A CNA worked for a staffing agency which supplied personnel to nursing homes.

She was terminated after calling and canceling her assigned shifts more often than agency policy allowed. Then she applied for unemployment compensation, was turned down and filed an appeal. Her appeal hinged on the question whether or not she was fired for misconduct.

The Court of Appeals of Minnesota went through the record of the aide's excuses such as a sick child, car would not start, no money until payday for car repairs, etc., only to rule that it was all fundamentally irrelevant.

A healthcare employer has the right to expect a direct-care employee to be present on the job. If the employer has set realistic attendance standards ahead of time the employer can hold an employee to those standards regardless of how compelling the employee's excuses may be. **Parsons v. Minnesota Care Staffing, Inc., 2007 WL 1247797 (Minn. App., May 1, 2007).**

US Family And Medical Leave Act: Nurse's Bonus Hours Do Not Count Toward Statutory Eligibility.

Nurses who agreed to work two twelve-hour shifts on weekends were paid by the hospital for sixty-eight hours each two-week pay period.

One of these nurses requested time off for carpal-tunnel surgery on one hand, was approved, took leave, had her surgery and returned to work.

Then she requested another leave for surgery on the other hand and was turned down. Her supervisors had decided in the mean time, although she was paid for more than 1,250 hours in the preceding twelve months, she had actually worked fewer hours than that and was, therefore, not covered by the FMLA as an eligible employee.

The nurse's case recently went against her in the US Court of Appeals for the Sixth Circuit.

To be eligible for FMLA leave an employee must have worked 1,250 hours in the preceding twelve-month period.

When nurses are paid for more hours than actually worked, as an incentive for weekend service, the extra hours for which they are compensated do not count toward the 1,250 hour threshold for the FMLA.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
May 2, 2007

The reference to 1,250 hours in the US Family and Medical Leave Act (FMLA) refers to hours actually worked, the court ruled.

The court also touched on the fact that the hospital could have gone back on its decision to approve her time off for the first surgery.

Department of Labor regulations do state that an employer cannot go back on a decision to approve FMLA leave even if it turns out the decision was made in error and the employee is actually ineligible for one reason or another. However, the US Circuit Courts of Appeal have ruled that particular regulation invalid as going beyond the rulemaking authority of the Secretary of Labor. **Mutchler v. Dunlap Mem. Hosp., __ F. 3d __, 2007 WL 1263968 (6th Cir., May 2, 2007).**