LEGAL EAGLE EYE NEWSLETTER

March 2003 *For the Nursing Profession* Volume 11 Number 3

Tuberculous Meningitis: Diagnosis Delayed, Nurses Ruled Not Negligent.

The sixty-two year-old patient was admitted to the hospital by her primary-care physician for treatment of rheumatoid arthritis.

The admitting note and history provided by the primary-care physician did not mention that the patient had come into contact with infectious pulmonary tuberculosis as a supervisor at a social services halfway house or that she was prone to testing positive for tuberculosis on PPD tuberculin tests.

Nurse's Admitting Assessment

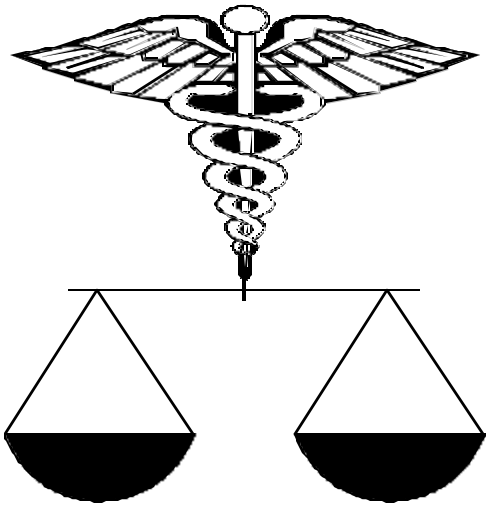
The nurse's admitting note included the patient's history of arthritis, stomach problems and ulcers, but did not mention many of her other past problems including diabetes, kidney disease and exposure to tuberculosis.

The Court of Appeals of Ohio noted for the court record there was no dispute that the patient exhibited no signs whatsoever of a currently active tuberculosis infection when she was admitted to the hospital.

The patient's primary care physician ordered medication for her arthritis and tests including a PPD.

Nurse's Chart Review

Four days into her hospital stay her nurse reviewed her chart and noted that various tests, including the PPD, had not been performed as ordered.



In a negligence action involving the professional skill and judgment of a nurse, expert testimony must be presented to establish the prevailing standard of care, a breach of that standard, and that the nurse's negligence, if any, was the proximate cause of harm to the patient.

The court properly directed a verdict in favor of the hospital.

COURT OF APPEALS OF OHIO
January 28, 2003

The nurse verified with the patient that the tests in fact had not been done. The patient stated she always tested positive on PPD's and usually had follow-up chest x-rays to determine the current activity status of a dormant tuberculous condition from her past occupational exposure.

Nurse's Progress Note

It was a Sunday and the nurse charted a progress note that the tests ordered by the primary-care physician had not been done, including the PPD, and charted the patient's past history with tuberculosis as indicated above.

Over the next ten days the primary-care physician and two infectious-disease specialists ran various tests and tried various antibiotics while the patient's status deteriorated. A spinal tap they ordered finally revealed there was tuberculous meningitis. She went into coma two days later and the family terminated life support.

Hospital Ruled Not Negligent

The court ruled the nurses fully performed their professional duties and were not negligent for not making the definitive medical diagnosis. That was the physicians' responsibility. **Sullins v. University Hospitals of Cleveland, 2003 Ohio 398, 2003 WL 195076 (Ohio App., January 28, 2003).**

Inside this month's issue ...

March 2003

Decubitus Ulcers: Court Finds Nursing Care Substandard, Imposes Liability For Nursing Negligence On Corporate Licensee.

A recent case from the District Court of Appeal of Florida involved issues of nursing negligence in the care of an elderly Parkinson's patient who developed and eventually died from her decubitus ulcers, as well as issues of corporate responsibility for payment of the damages awarded by the jury.

Corporate Responsibility

The nursing home's physical premises were owned by an out-of-state corporation which held the license from the State of Florida to operate the nursing home under the d/b/a *(doing business as*) name by which the nursing home was known in the community.

The licensee and two sibling corporations were owned by a large national corporation which owns hospitals, nursing homes and other healthcare facilities around the US.

The nursing home licensee corporation had a contract with a management company. The management company was to have the sole right and responsibility for operating the nursing home, including sole discretion to recruit, retain, train, promote, supervise and terminate staff and to establish and maintain standards and practices for appropriate patient care.

The District Court of Appeals of Florida, looking at prior legal cases involving hospitals in Florida and a case involving a nursing home in California, ruled that a nursing home licensee has a non-delegable responsibility for patient care.

When an activity can only be legally conducted pursuant to a state licensee, the performance of legal duties entrusted by the state to the licensee cannot be delegated to others. That is, others, be they employees or independent contractors can be brought in to provide services to the licensee's clients, but the licensee retains full legal responsibility at all times.

The licensee's parent corporation, unlike the licensee, was not affected by the ruling.

The nursing home was owned by a Delaware corporation which had the state license to operate a nursing home.

The Delaware corporation and its siblings were owned by a larger parent corporation which owns many healthcare facilities around the country.

The Delaware corporation had a contract with another corporation which actually managed the nursing home.

The Delaware corporation, its property division and its asset holding company did not hire or fire employees of the nursing home, pay wages or salaries or exert any control whatsoever over the employees of the nursing home.

All functions at the nursing home were managed by the management company.

However, any company that holds a license to operate a nursing home cannot delegate responsibility to an independent contractor.

The nursing home licensee is liable for all acts of negligence by employees of the contractor managing the nursing home.

DISTRICT COURT OF APPEAL
OF FLORIDA
February 12, 2003

Nursing Negligence

The resident was admitted with mid-stage Parkinson's Disease. She was incontinent of bowel and bladder, had moderate to severe dementia, memory problems and limited mobility. She was totally dependent on the nursing home's personnel for mobility, toilet needs and bathing.

Two years later she had to go into the hospital for tests for colon cancer, then was re-admitted to the nursing home. At that time she had no decubitus ulcers or pressure sores anywhere on her body.

Two months after re-admission the nursing home's nursing documentation, or lack thereof, revealed a disturbing pattern of inattention to the resident's needs.

She was not being bathed on a daily basis, or at least there was no documentation of her care for a two week period. Then she needed treatment for redness on her hip and buttocks and a few days later had a Stage II decubitus ulcer on her coccyx. The decubiti kept getting worse and more appeared.

Finally the physician was notified. By that time there were gangrenous State IV ulcers in various locations. She had to be taken to the hospital and then to a hospice where she died from acute bronchopneumonia secondary to her decubitus ulcers.

Nursing Documentation Lacking

The court noted it was the nurses' responsibility to complete pressure-sore reports and to document bathing, turning, dressing changes, changes in skin status and to notify the physician in a timely manner. No documentation of competent nursing care could be found after the fact despite clear evidence her condition was deteriorating significantly and rapidly.

The court believed it was so bad that punitive damages of $800,000 were indicated in addition to $150,000 compensation to her probate estate for her conscious pain and suffering. **NME Properties, Inc. v. Rudich, __ So. 2d __, 2003 WL 289415 (Fla. App., February 12, 2003).**

Labor Law: US Court Looks At Nurses' Rights, Obligations In Private Sector.

In a recent decision the US Court of Appeals for the District of Columbia Circuit had to look at and rule upon a number of difficult issues that came up in a labor dispute between a nurses' union and a major corporation that owns and operates nursing homes across the country.

National Labor Relations Act
National Labor Relations Board

As employees of a private corporation in the private sector, the rights and obligations of the nurses in this case came under the US National Labor Relations Act (NLRA).

Under the NLRA the core issues of wages, benefits, work rules, etc., are resolved by collective bargaining between management and representatives of the employees' union.

The integrity of the collective-bargaining process itself is maintained by the National Labor Relations Board (NLRB) through its local field offices and the Board itself in Washington.

When one side or the other believes the rules of the collective-bargaining process are being violated, it files a complaint of unfair labor practices with the NLRB through the appropriate local field office.

The nurses' union did not give proper ten-days notice of its intent to strike the nursing homes as required by the National Labor Relations Act.

That made it an illegal strike. When a strike is illegal the company has no obligation to rehire the striking nurses who were replaced with non-striking nurses.

The union gave fifteen days notice of a strike on March 29, then on March 27 unilaterally extended the deadline to April 1.

The three-day strike did not begin on the date and time indicated in the first notice which was more than ten days before the fact, while the second notice accurately stated the date and time of the strike, but was less than ten days before the fact.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
January 31, 2003

The NLRB as an agency allows internal administrative appeals up to the Board itself. Then the process goes to the US Circuit Courts of Appeal to interpret and apply the accepted rules for the collective-bargaining process by ordering or declining to order enforcement of the NLRB's decision.

State Labor Law

Employees of state and local government as a general rule are not covered by the NLRA and must work with state and local agencies under the rules set down by state labor laws.

Often the process runs parallel to the process under the Federal NLRA, but strictly speaking the NLRA does not apply and the NLRB has no jurisdiction over labor disputes in the public sector.

Strikes At Healthcare Facilities
Ten-Day Notice Requirement

The NLRA allows private-sector healthcare employees to go on strike against their employers.

However, the NLRA has special language that applies only to strikes at healthcare facilities, requiring a labor organization representing employees at a healthcare institution to give at least ten-days notice prior to a strike, picketing or other concerted refusal to work.

The union's notice must state the exact date and time that the strike, picketing or other concerted refusal to work will begin at a healthcare facility. The court followed the strict letter of the law on this issue, to the ultimate detriment of the nurses who went out on strike.

(Continued on page 7)

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

Indexed in
Cumulative Index to Nursing & Allied Health Literature™

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

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Latex Allergy: Court Looks At Timing Of Occupational Exposure versus Filing Of Worker's Comp Claim.

A nurse was exposed to latex products on the job starting in 1981 when she began working as a surgical nurse.

By 1992 she began having intermittent rashes, hives and wheezing. In 1992 a particular episode required her to leave a med/surg floor and go to the emergency room for a shot of epinephrine. She was not just wheezing but had actual difficulty breathing.

She left the hospital in 1993 and went to work in a doctor's office. In 1994, during her employment in the doctor's office, she was diagnosed with a latex allergy. She left the doctor's office to find another situation involving less latex exposure and went to work part-time for a nursing agency. Then she went to work on-call in a pediatrician's office.

Finally she stopped work altogether, due to her hypersensitivity to latex, and she filed for worker's compensation.

Latex Allergy Matured With Anaphylactic Reaction in 1992

In an opinion not designated for publication, the Court of Appeals of Nebraska ruled in favor of the nurse's two most recent employers. They were not responsible for payment of worker's compensation.

According to the court, for worker's compensation purposes the nurse's latex allergy, as an occupational disease, occurred when she had the anaphylactic reaction requiring epinephrine in 1992. The cumulated effect of latex exposure reached its culmination at that time.

The latex allergy as an occupational disease did not progress further beyond that point, even though it took nine more years for the nurse finally to give up her efforts to accommodate her disability and keep working as a nurse. Her disability was not her most recent or next most recent employer's responsibility. **Ludwick v. Tri-West Healthcare Alliance, 2003 WL 282588 (Neb. App., February 11, 2003).**

When an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, the afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves.

In occupational disease cases the date of injury is the date on which the effects of the occupational disease manifest themselves in disability, which occurs when the employee's diagnosed condition progresses to the point where his or her employment or type of employment ceases.

An employee is entitled to partial compensation when an occupational disease forces him or her to cease one type of employment, even though the employee is able to perform other types of employment, if the employee has actually ceased employment or one type of employment.

COURT OF APPEALS OF NEBRASKA
NOT DESIGNATED FOR PUBLICATION
February 11, 2003

On The Job Injury: Nurse Can Sue In Some Cases.

An employee of the emergency-room physician who saw his own patients at the hospital while he was on emergency-room duty spilled ice on the floor and the nurse manager fell.

Worker's Comp As Exclusive Legal Remedy

In most cases a worker injured on the job does not have the right to sue the worker's employer or a co-worker who is also an employee of the employee's employer.

The exclusive legal remedy in most cases in worker's comp. Unless the injured worker has intentionally inflicted his or her own injuries, the injured worker gets compensation without having to prove the employer was negligent, even if the worker was negligent.

A lawsuit against another party who is not a co-employee requires proof of negligence, but, unlike a worker's comp claim, compensation for pain and suffering can be awarded. **Robinson v. Fontenot, __ So. 2d __, 2003 WL 327463 (La., February 7, 2003).**

The jury ruled the nurse's second injury at home was not an aggravation of her first injury on the job and assessed damages only to the point when she returned to work.

If the second injury was an aggravation of the first the damages would have been a lot more.

However, the judge was in error to substitute his judgment for the jury's.

SUPREME COURT OF LOUISIANA
February 7, 2003

Fatal Stroke: Not Industrial Injury For Nurse, No Compensation.

A forty-seven year-old nurse had worked in intensive care and in the emergency room at the same hospital for ten years. She passed out while responding to a code. She herself went into intensive care and died ten days later.

The cause of death was a pre-existing cerebral aneurysm that apparently burst during the code. The surviving spouse and children filed for worker's compensation. The Supreme Court of Kansas overruled the Worker's Compensation Board and denied their claim.

Cardiovascular events caused by pre-existing medical conditions are compensable only after there has been an unusual event or significant exertion on the job. **Mudd v. Neosho Memorial Regional Medical Center, __ P. 3d __, 2002 WL 31958291 (Kan., January 24, 2003).**

When a worker has a heart attack or stroke on the job, it is not an industrial injury, and there is no worker's compensation, unless there was an unusual event or sudden exertion on the job that caused it.

Even though it requires significant physical exertion and causes serious emotional stress, responding to a code is not an unusual event or sudden exertion for an experienced intensive care nurse.

SUPREME COURT OF KANSAS
January 24, 2003

Hepatitis C: Occupational Disease For Nurse, Compensation Approved.

Worker's compensation provides benefits for industrial injuries and occupational diseases.

Once a worker establishes that he or she is suffering from an occupational disease, the law presumes the occupational disease arose out of and in the course of the worker's employment and the law presumes the worker is entitled to worker's comp benefits.

This presumption of entitlement to worker's compensation is rebuttable.

That means the employer has the option of trying to establish just how the worker actually contracted the disease, to prove that, in fact, it did not arise out of and in the course of the worker's employment with the employer.

Since the worker has the advantage of a rebuttable presumption and the employer has the burden of proof to rebut the presumption, the worker is entitled to worker's compensation benefits unless the employer can prove the employee did not contract the disease on the job.

COMMONWEALTH COURT
OF PENNSYLVANIA
January 30, 2003

A nurse worked in home health for a visiting nurse service for more than seven years.

Over that time she had six or seven needle sticks on the job, only one of which she actually reported to her employer. She had also been stuck twice at a previous nursing job, five and four years before starting with the visiting nurse service.

According to the Commonwealth Court of Pennsylvania, there were no other exposures to blood in her history, such as a blood transfusion, organ transplant, tattooing or intravenous drug abuse.

The point came where the nurse had to stop working due to nausea, vomiting, severe fatigue and frequent infections caused as side effects of her medications. There was no doubt she had Hepatitis C. She filed for worker's compensation, claiming she had an occupational disease.

Etiology of Hepatitis C Disputed

To dispute her claim her employer presented a sworn expert-witness deposition from a board-certified internist who specializes in liver diseases. He noted that Hepatitis B is the variant which more commonly arises from exposure to blood and blood products. Routes of transmission of Hepatitis C, on the other hand, are not well understood and are virtually impossible to prove in individual cases.

Court Rules Based On Burden Of Proof

Medical etiology and legal cause-and-effect are completely different concepts. For reasons of public policy the law places the burden of proof on the employer in these situations. When a healthcare worker comes down with an illness known to be transmitted in some cases by exposure to bloodborne agents, the employee is presumed to have a compensable occupational disease unless the employer can prove otherwise, which would be impossible here according to the employer's expert **Sun Home Health Visiting Nurses v. Workers' Comp Appeal Board, __ A. 2d __, 2002 WL 31968334 (Pa. Cmwlth., January 30, 2003).**

Quality Assessment: New CMS Regulations For Hospitals.

SUMMARY: This final rule requires hospitals to develop and maintain a quality assessment and performance improvement (QAPI) program.

EFFECTIVE DATE: These regulations are effective on March 25, 2003.

42 CFR PART 482--CONDITIONS OF PARTICIPATION FOR HOSPITALS

Sec. 482.21 Condition of participation: Quality assessment and performance improvement program.

The hospital must develop, implement, and maintain an effective, ongoing, hospital-wide, data-driven quality assessment and performance improvement program. The hospital's governing body must ensure that the program reflects the complexity of the hospital's organization and services; involves all hospital departments and services (including those services furnished under contract or arrangement); and focuses on indicators related to improved health outcomes and the prevention and reduction of medical errors. The hospital must maintain and demonstrate evidence of its QAPI program for review by CMS.

(a) *Standard: Program scope.* (1) The program must include, but not be limited to, an ongoing program that shows measurable improvement in indicators for which there is evidence that it will improve health outcomes and identify and reduce medical errors.

(2) The hospital must measure, analyze, and track quality indicators, including adverse patient events, and other aspects of performance that assess processes of care, hospital service and operations.

(b) *Standard: Program data*. (1) The program must incorporate quality indicator data including patient care data, and other relevant data, for example, information submitted to, or received from, the hospital's Quality Improvement Organization.

(2) The hospital must use the data collected to--

(i) Monitor the effectiveness and safety of services and quality of care; and

(ii) Identify opportunities for improvement and changes that will lead to improvement.

On January 24, 2003 the Centers for Medicare and Medicaid Services (CMS) announced a new condition of participation, effective March 25, 2003, that hospitals develop and maintain a quality assessment and performance improvement program that meets CMS guidelines.

The full text of the CMS announcement is on our website at http://www.nursinglaw.com/quality.pdf.

The focus is not on new standards for hospitals, but on the process by which institutions systematically examine themselves.

FEDERAL REGISTER, January 24, 2003
Pages 3435 – 3455

(3) The frequency and detail of data collection must be specified by the hospital's governing body.

(c) *Standard: Program activities.* (1) The hospital must set priorities for its performance improvement activities that--

(i) Focus on high-risk, high-volume, or problem-prone areas;

(ii) Consider the incidence, prevalence, and severity of problems in those areas; and

(iii) Affect health outcomes, patient safety, and quality of care.

(2) Performance improvement activities must track medical errors and adverse patient events, analyze their causes, and implement preventive actions and mechanisms that include feedback and learning throughout the hospital.

(3) The hospital must take actions aimed at performance improvement and, after implementing those actions, the hospital must measure its success, and track performance to ensure that improvements are sustained.

(d) Standard: *Performance improvement projects.* As part of its quality assessment and performance improvement program, the hospital must conduct performance improvement projects.

(1) The number and scope of distinct improvement projects conducted annually must be proportional to the scope and complexity of the hospital's services and operations.

(2) A hospital may, as one of its projects, develop and implement an information technology system explicitly designed to improve patient safety and quality of care. This project, in its initial stage of development, does not need to demonstrate measurable improvement in indicators related to health outcomes.

(3) The hospital must document what quality improvement projects are being conducted, the reasons for conducting these projects, and the measurable progress achieved on these projects.

(4) A hospital is not required to participate in a QIO cooperative project, but its own projects are required to be of comparable effort.

(e) Standard: *Executive responsibilities.* The hospital's governing body (or organized group or individual who assumes full legal authority and responsibility for operations of the hospital), medical staff, and administrative officials are responsible and accountable for ensuring the following:

(1) That an ongoing program for quality improvement and patient safety, including the reduction of medical errors, is defined, implemented, and maintained.

(2) That the hospital-wide quality assessment and performance improvement efforts address priorities for improved quality of care and patient safety; and that all improvement actions are evaluated.

(3) That clear expectations for safety are established.

(4) That adequate resources are allocated for measuring, assessing, improving, and sustaining the hospital's performance and reducing risk to patients.

(5) That the determination of the number of distinct improvement projects is conducted annually.

FEDERAL REGISTER, January 24, 2003
Pages 3435 – 3455

Labor Law: US Court Looks At Nurses' Rights, Obligations In Private Sector.

(Continued from page 3)

In other industries outside the healthcare field the union must give thirty-days notice if it may be calling a strike at the expiration of the term of the existing collective-bargaining agreement. However, once having given thirty-days notice, there is a lot of flexibility in other industries whether and when the union may call a strike as a bargaining tactic in eleventh-hour brinkmanship.

Not so in the healthcare field, as the US Circuit Court of Appeals pointed out in this case. The courts strictly enforce the ten-days notice of the exact time and date of a labor stoppage at a healthcare facility.

The union in this case at first gave fifteen days notice. Then the union sent a letter unilaterally extending the strike deadline seventy-one hours longer, which itself was invalid and rendered the first notice invalid, the court ruled.

A new strike deadline requires a full new ten-day period unless management agrees to accept short notice.

Unlike abruptly shutting down the assembly line in a factory or canceling scheduled airline flights at the last moment, a healthcare facility has to take into consideration the health and safety of vulnerable patients.

A healthcare facility must be able to move, reschedule or discharge patients, decline non-emergency admissions, hire replacement or agency employees, etc.

Illegal Strike
No Right To Reinstatement

The upshot for the nurses in this case was that their strike on short notice was ruled illegal. To make the right to strike have any meaning, the NLRA normally gives employees the right to be reinstated in favor of temporary replacement workers hired to work during a strike, assuming the strike was not an illegal strike.

The nurses in this case had no right to reinstatement. The Circuit Court of Appeals overturned the NLRB and gave management the discretion whether to rehire the nurses who had gone on strike.

The company was under no obligation to rehire the workers who participated in the unlawful strike.

Section 8(g) of the National Labor Relations Act provides for notification of intention to strike or picket at any health care institution:

"A labor organization before engaging in any strike, picketing or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention ... The notice shall state the date and time that such action shall commence. The notice, once given, may be extended by the written agreement of both parties."

The meaning of this mandatory language could not be plainer or the Congress's intent in enacting it clearer.

The three-day strike-deadline extension accurately identified the time and the date of the strike, but it did not afford the company the requisite ten-days notice.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
January 31, 2003

Advertising For Replacement Workers Above Union Scale
Unfair Labor Practice

When the strike appeared likely, the company began to advertise for replacement workers, which normally is the company's prerogative.

However, citing a notice posted at one of the company's nursing home facilities, the NLRB found the company guilty of an unfair labor practice for promising wages to replacements above the union wages being paid under the expiring collective bargaining agreement.

The Circuit Court of Appeals agreed with the NLRB that an employer cannot use its right to advertise for and to hire replacements as a tactic to undermine the union's standing with employees in the bargaining unit, and upheld the charge of an unfair labor practice by the company.

Videotaping Of Picketers
No Unfair Labor Practice

The Circuit Court of Appeals pointed out that photographing or videotaping of picketers by management agents is usually seen as an intimidation tactic and as such is usually ruled an unfair labor practice.

However, in this case there was a legitimate dispute whether union employees were picketing on public or private property. While the question was being resolved with the local authorities where the public right of way easement actually began and ended, a security guard videotaped the union picketers in anticipation of filing trespass charges against them if it proved true they were still on company property after being told to move off.

However, when local authorities confirmed the picketers were on public rather than private property, the security guard promptly stopped it at the direction of the administrator of the nursing home facility in question.

That was not an unfair labor practice by the company, the court ruled. **Beverly Health & Rehabilitation Services, Inc. v. National Labor Relations Board, __ F. 3d. __, 2003 WL 203139 (D.C. Cir., January 31, 2003).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Labor Relations: Court Upholds Hospital Nurses' Safe-Care Campaign.

In June, 2002 the US Circuit Court of Appeals for the District of Columbia Circuit ruled nurses had the right, as part of their union's negotiations with the hospital, to publicize a safe-care campaign.

The nurses could tell the media how hospital nursing-staff cutbacks in general can affect the quality of care, as long as the nurses did not make disparaging comments about the quality of care specifically at the hospital where they worked, which would be an unfair-labor practice by their union.

See *Labor Relations: Court Upholds Hospital Nurses' Union's Safe-Care Campaign.* Legal Eagle Eye Newsletter for the Nursing Profession (10)8, Aug. '02 p.5.

The US Supreme Court will not hear the hospital's appeal of the Court of Appeals' ruling. **Brockton Hospital v. National Labor Relations Board, 123 S. Ct. 850, 71 USLW 3470, 171 L.R.R.M. (BNA) 2768, 2003 WL 95366 (U.S., January 13, 2003).**

Skilled Nursing: Ventilator-Dependent Residents, Inadequate Nursing Care.

In August, 2002 the US Circuit Court of Appeals for the Seventh Circuit upheld civil monetary penalties imposed on a nursing home for inadequate practices and procedures for monitoring ventilator patients by professional nurses as required by Centers for Medicare and Medicaid Services regulations. For example, no one had to check or did check after an aide suctioned a trache, the ventilator was not turned back on and the patient died.

See *Skilled Nursing: Court Finds Immediate Jeopardy Existed To Health And Safety Of Ventilator-Dependent Patients, Upholds Substantial Civil Penalty Imposed By CMS.* Legal Eagle Eye Newsletter for the Nursing Profession (10)9, Sept. '02 p.7.

The US Supreme Court will not hear the nursing home's appeal of the Court of Appeals' ruling. **Fairfax Nursing Home, Inc., v. Department of Health and Human Services, 123 S. Ct. 901, 71 USLW 3471, 2003 WL 98478 (U.S., January 13, 2003).**

Discrimination: Medication Errors Grounds For Dismissal, Especially When Narcotics Involved.

The US District Court for the District of Kansas threw out a nurse's case and exonerated her employer from charges of racial discrimination.

As a general rule, repeated medication errors by a nurse who fails or refuses to respond to instruction and corrective action are grounds for dismissal.

And when the employer has legitimate grounds for dismissal the employer has a defense to charges of discrimination, as a general rule.

The court indicated that a hospital has special legal responsibilities with narcotics and can demand the highest standards of its nurses who dispense narcotics, in the interests of safe and effective patient care and to prevent diversion and abuse by its nurses.

Documentation of witnessing of narcotics wastage is especially important, that is, a nurse who is deficient in this area can be singled out for disciplinary action more severe than that handed out for less serious garden-variety medication errors.

When minority nurse complains of discrimination, the employer has to be able to show a legitimate non-discriminatory reason for how it treated the nurse.

Medication errors can be grounds for termination, and errors with narcotics are more serious than other offenses. The employer did not tolerate non-minority nurses any differently.

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
January 13, 2003

The court was impressed with the fact the hospital carefully documented the alleged medication errors, corrective action, lack of response to corrective action and discipline meted out to all of its nurses for medication errors.

It appeared from this documentation that at least two non-minority nurses had also been terminated for essentially the same conduct, the court noted in throwing out this lawsuit. **Kelly-Koffi v. Wesley Medical Center, __ F. Supp. 2d __, 2003 WL 141058 (D. Kan., January 13, 2003).**