LEGAL EAGLE EYE NEWSLETTER

March 2007 — *For the Nursing Profession* — Volume 15 Number 3

Faulty Shower Chair: Court Lets Patient Sue For Violation Of JCAHO Safety Standards.

The shower chair collapsed while a hospital patient was showering with the assistance of a CNA. The patient sued the hospital for her injuries.

The patient's lawsuit was based on a registered nurse's expert witness report. The hospital challenged the report as insufficient to establish legal liability, but the Court of Appeals of Texas overruled the hospital's challenge. The nurse/expert's report correctly stated the legal standard of care, the court said.

JCAHO Safety Standards

The standard of care requires the effective management of the environment of care to control and reduce environmental hazards and risks, prevent accidents and injuries and maintain safe conditions.

This translates to a requirement for a hospital to perform periodic inspections of equipment used in direct patient care by performing regular, periodic environmental tours and by seeing that safety policies and procedures are followed to ensure proper maintenance of all safety equipment.

All equipment used in patient care must be inspected to insure that it is in good repair and a policy should exist to remove, repair or dispose of equipment not in good repair.

The injured patient has the right to allege the hospital breached the standard of care by failing to provide a shower chair that was safe and in good working order.

The hospital failed to have a system for periodic and routine inspections and failed to enforce procedures for the removal of unsafe equipment by nursing personnel.

COURT OF APPEALS OF TEXAS
February 15, 2007

Patient Safety is Nursing Responsibility

The patient's nurse/expert laid blame for this unfortunate occurrence squarely on the hospital's nursing staff.

Nursing staff are responsible for patient safety while nursing care is being performed. Failing to provide safe equipment for use in nursing care is negligent and sub-standard care, the court said.

Routine Safety Inspection

The hospital had apparently never developed or implemented standard procedures for periodic or routine safety inspections of direct patient care equipment.

Staff Orientation

It therefore went without saying that there could have been no effort taken, before this incident, to orient staff to the necessity of carrying out the hospital's procedures for periodic inspection, correction, repair or removal of unsafe equipment.

Check Equipment Before Use

The most direct way the hospital could have prevented this incident and the ensuing lawsuit, the court said, would have been for the personnel involved in direct care to have been instructed to perform very simple, basic safety checks of anything they intend to use, right before use, in addition to whatever routine environment inspections that take place. **Christus Health v. Lanham, 2007 WL 473301 (Tex. App., February 15, 2007).**

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March 2007

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Sexual Abuse: Nurse Has Duty To Report, Cannot Suffer Retaliation From Employer.

A nurse with almost thirty years of professional experience was working the night shift in a nursing home.

Early in the morning an elderly female dementia patient told her that a certain male CNA had entered her room that night and exposed himself. The nurse told the CNA to stay out of her room the rest of the shift and began phoning her supervisors at home for guidance what to do next.

The problem was twofold. The resident had a lengthy history of complaints of sexual misconduct against her male caregivers, none of which to date had ever been substantiated. The CNA in question had a lengthy history of service with no blemish on his record.

Staff had already taken the stance that the resident in question was not credible and was not to be believed. The nurse, however, believing it was her legal duty, interviewed the resident, charted what she had to say and wrote an incident report relating it at face value, even though she, like the others, did not actually believe it herself.

The nurse was fired the next day for insubordination. She sued for retaliation. The Court of Appeals of Texas upheld a civil jury's verdict awarding her monetary damages from the nursing home but not from the nursing home's parent corporation.

Subjective Belief is Not Relevant To Duty to Report

The basis for the court's ruling was that the law that mandates reporting of sexual abuse by caregivers does not say the duty to report exists only when the caregiver subjectively believes the alleged victim's complaints can be substantiated.

Nor does the law say protection for caregivers against retaliation for doing their legal duty as they understand it, to report any patient's complaint of abuse, exists only when they themselves actually believe it. **Town Hall Estates-Whitney, Inc. v. Winters, __ S.W. 3d __, 2007 WL 416325 (Tex. App., February 7, 2007).**

A nurse is, by law, a mandatory reporter of sexual abuse of any patient under the nurse's care.

A mandatory reporter of sexual abuse faces a myriad of legal repercussions for failing to report.

The other side of the coin is that a mandatory reporter of sexual abuse cannot suffer retaliation from his or her employer for fulfilling the reporter's legal duty.

The abuse-reporting statute is silent on the relevance of whether the reporter subjectively believes the alleged victim.

That is, there is no exception to be found in the law to the mandatory duty to report when the caregiver thinks the victim's allegations of abuse are the product of malice, dementia or delusion.

Likewise, there is no exception to be found in the law to a mandatory reporter's right to be free from retaliation even when the reporter himself or herself has reason not to believe and does not believe what the alleged victim is saying.

COURT OF APPEALS OF TEXAS
February 7, 2007

Nurse Did Not Follow Orders: Termination Justified.

The reason a nurse was given for her termination was that she had failed to follow the patient's physician's orders and the physician had complained about it.

The nurse, on the other hand, believed that was just a pretext to get her out of the way to stop her complaints of nurse understaffing.

She sued the facility for retaliation.

A nurse cannot be disciplined for voicing complaints about understaffing.

However, the nurse bears the burden of proof that retaliation was the motive behind disciplinary action.

COURT OF APPEALS OF TENNESSEE
January 29, 2007

The Court of Appeals of Tennessee agreed with the premise of her lawsuit, but only in general terms.

A healthcare employee cannot be terminated in retaliation for complaints of illegal activity within the facility where he or she is employed.

This court, however, was not satisfied that retaliation was the motive behind this nurse's termination. The facility successfully argued she was guilty of misconduct justifying termination.

A physician's standing orders included a certain narcotic prn for pain, but for one patient he had written a specific order to call first. The nurse called, left a message and then gave the narcotic without actually talking to the physician.

The nurse also removed a tegaderm dressing, let the patient shower, then reapplied the dressing, without a physician's order and in violation of the implied order to leave the dressing alone. **White v. Fort Sanders-Park West Medical Center, 2007 WL 241024 (Tenn. App., January 29, 2007).**

Employment References: Nurse Sues Former Supervisor For Defamation, Lawsuit Thrown Out.

After an LPN was suspended from her position at a nursing home she resigned to avoid further disciplinary issues. She had been accused of failing to dispense medications to her patients.

After working at several other nursing homes for more than two years she put in an application at a nurses' placement agency.

The agency said they needed to contact the nursing home from which she had resigned two years earlier. She agreed to let the agency contact them.

The agency faxed a reference form to the nursing home. Where the form asked, "Would you rehire?" the LPN's former supervisor checked "No" and where it asked the reason she wrote in, "Unacceptable work practice habits."

The agency forwarded her paperwork and sent the LPN on lots of interviews with potential employers, but there were no job offers.

She insisted on seeing the references the agency had on file from her former employer and then sued her former employer for defamation. Relying on the principle of qualified legal privilege, the Supreme Court of Rhode Island ruled there were no grounds for her lawsuit.

A supervisor's statements to a prospective employer about the work characteristics of a current or former employee are privileged communications.

A privileged communication cannot be grounds for a civil defamation lawsuit, even if the employee's personal reputation or job prospects are hurt.

This legal privilege is meant to serve and protect the public.

However, it is only a qualified, as opposed to an absolute, legal privilege.

A qualified legal privilege is valid only if the communicator is acting to protect his or her own, or others' legitimate interests, or the public interest.

A qualified legal privilege does not apply to statements that are known to be untrue or statements which happen to be true but are communicated with malicious intent.

SUPREME COURT OF RHODE ISLAND
January 22, 2007

Statements to Prospective Employers Qualified Legal Privilege

The common law defines defamation as making a false statement about a person which harms the person's reputation in the eyes of others.

The common law, however, goes on to say that a qualified privilege protects the person making the statement from being sued for defamation if he or she acted in good faith and also had reason to believe that he or she had a legal, moral or social obligation to speak out to protect his or her own interests or the interests of the public.

Job references are an area where the courts have frequently applied the common-law concept of qualified privilege. The rationale is to promote candid communication of objective as well as subjective assessments of potential employees' character, qualifications and suitability.

A current or former supervisor can usually provide a reference, good or bad, to prospective employers with reasonable certainty of legal protection.

That is, if the employee turns around and sues for defamation, the issue in the employee's lawsuit will not be whether the supervisor spoke the truth, but whether the supervisor believed in good faith that he or she was speaking the truth, without malice or other ulterior motivation.

The employee must prove his or her current or former supervisor was motivated by ill will or malice, another person's state of mind always being a difficult matter to prove in court, or the employee's lawsuit will have to be dismissed, as happened in this case. **Kevorkian v. Glass, 913 A. 2d 1043 (R.I., January 22, 2007).**

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Mental-Health Hold: Nursing Documentation Can Be Crucial.

A recent case from the California Court of Appeal pointed out the importance of good documentation by a patient's nurse.

The patient was able to get necessary mental health treatment and the patient's caregivers were able to defend against the patient's lawsuit after the fact.

The patient's nurse, filling out the papers for the 72-hour involuntary mental-health hold, noted the patient was confused and disoriented and did not even know her own address. Her memory was fair to poor and she was argumentative and paranoid.

All the nursing and mental health personnel involved acted in good faith

CALIFORNIA COURT OF APPEAL
February 15, 2007

Caregivers who provide input or otherwise participate in implementing an involuntary mental-health hold are, by law, immune from a patient's lawsuit after the fact, if they acted in good faith based on how they realistically perceived the patient's condition at the time.

In this case the basic data came from the hospital nurses who charted the sharp deterioration of her mental status post-surgery, in their judgment requiring her to be held and treated as a psychiatric case even if she did not expressly consent.

The court ruled irrelevant the argument her mental condition could have just been a reaction to pain medication. If she was gravely disabled, she needed to be held and cared for. **Skobin v. Cunningham, 2007 WL 475756 (Cal. App., February 15, 2007).**

Excessive Heat: Suit Against Nursing Home Not Covered By Insurance.

During a spring heat wave the administrator of the nursing home made the decision not to turn on the air conditioning. Four elderly residents died from the heat.

One of the deceased resident's daughters sued the nursing home and obtained a civil court judgment for $275,000. She filed a second lawsuit against one of the nursing home's insurance companies to collect payment on the judgment.

The insurance company refused payment on the grounds the judgment in the underlying lawsuit was for professional liability and the insurance company did not cover the nursing home for professional liability.

The US Court of Appeals for the Eighth Circuit agreed with the insurance company that the decision of the nursing home administrator, a former nurse who was familiar with the health status and care needs of her patients, was an exercise professional judgment, and was not covered under the general liability policy the company had issued. **American Economy Ins. Co. v. Jackson, __ F. 3d __, 2007 WL 464917 (8th Cir., February 14, 2007).**

Iodine Allergy: Suit Upheld.

The Court of Appeals of Ohio has ruled that it is professional negligence for a visiting registered nurse to apply a dressing containing an iodine preparation when the physician has expressly ordered a plain dressing because the patient has an iodine allergy. Because it is professional treatment, the medical malpractice statute of limitations applies. **Sliger v. Stark Co. Visiting Nurse Service, 2007 WL 475331 (Ohio App., February 12, 2007).**

Service Of Process: Default Upheld.

A deceased resident's probate administrator filed suit on behalf of the family against the nursing home for medical malpractice, negligence and violations of the nursing-home residents' rights law allegedly leading to the resident's death.

The court papers for the lawsuit apparently were misplaced or misdirected such that the nursing home's legal counsel, unaware of the lawsuit, was not able to file a formal response within the short time frame granted by state law.

Not having received a response to the lawsuit, the court decided the case in favor of the patient's family by default.

The Court of Appeals of Arkansas was unable to find any excuse for the defendant's neglect and ruled that resolution of the case by default should stand.

If Legal Court Papers Are Delivered Prompt Action is Required

The case points up the importance of all healthcare personnel being trained that legal court papers cannot be ignored.

Staff should already know where such papers are to be sent and appreciate the dire importance of taking action immediately if court papers should appear.

State laws generally provide very short deadlines, fourteen to thirty days, for the defendant to file a response to a civil lawsuit, after which the ability to defend the lawsuit can be forfeited altogether.

Coverage under a professional liability insurance policy can potentially be voided by the insurance company under the non-cooperation clause if the insurance company's ability to defend the lawsuit is compromised by neglect in promptly forwarding the lawsuit papers.

It is not for non-legal personnel to judge the validity of a lawsuit filed against the facility where they work. Even if the lawsuit is not valid, say because the statute of limitations has expired, that must be presented to the court as a defense by qualified legal counsel in the manner and within the time frame allowed by law. **Beverly Enterprises v. Jarrett, 2007 WL 466810 (Ark. App., February 14, 2007).**

Alzheimer's: Facility Must Appreciate Elopement Risk.

An elderly Alzheimer's patient exited the nursing home building into an enclosed courtyard. Either the door was left unlocked or he unlocked it himself.

In the courtyard he fell and sustained a serious head injury while he was being chased down by facility staff.

His legal guardian sued the facility for negligence.

A facility serving Alzheimer's patients must be aware of the patient's propensity for elopement.

This patient still had the presence of mind to watch staff open the door and remember the keypad code even while his dementia made him prone to nighttime elopement attempts with little, if any, appreciation for his own safety.

UNITED STATES DISTRICT COURT
MICHIGAN
January 22, 2007

The US District Court for the Eastern District of Michigan ruled this was not a professional negligence case and should not be dismissed for failure of the patient's attorney to provide an expert's opinion.

True, a nursing home must provide ongoing professional assessment of the degree of an Alzheimer's patient's dementia and the of consequent need for close monitoring, especially on days when the patient has been agitated and acting out.

However, this patient's injuries were caused by being chased down by staff, which is not a professional caregiving function. **Ostrom v. Manorcare Health Services, Inc., 2007 WL 188132 (E.D., Mich., January 22, 2007).**

Patient Transport: Hospital Failed To Assess Need For Restraint, Patient Fell.

A medical facility has the responsibility to train non-licensed personnel to appreciate safety concerns involved in transport.

That is, non-licensed staff transporters must realize that patient assessment by a professional staff member and instructions from that staff member for a stroke patient's safety should be sought out before patient transport is undertaken.

Prior to transporting a patient from one area of the facility to another facility personnel must assess the patient's need for restraints to keep the patient safe during the transport.

The professional staff person making that assessment must be familiar with the particular patient's history and with the general safety needs of recent stroke victims.

SUPERIOR COURT OF PENNSYLVANIA
January 8, 2007

The patient came to the hospital's emergency department following a stroke. The decision was made to admit her on an acute-care unit.

While being transported in a hospital bed from the emergency department to the unit by non-licensed personnel the patient fell out of bed, struck her head and suffered an orbital fracture and a closed head injury. She died from a subdural hematoma three days later.

Professional Negligence versus Ordinary Negligence

The family sued for negligence. Paradoxically, the case was decided in favor of the hospital. The Superior Court of Pennsylvania ruled it was a case of professional negligence, not ordinary negligence. That is not an idle distinction.

In Pennsylvania, like many US jurisdictions, a case of professional negligence requires an affidavit from the patient's or family's lawyer that an expert witness's testimony is available to support the case.

The family's lawyer characterized the case in the court papers as one of ordinary negligence, like a slip-and-fall due to an over-waxed slippery fall, and did not provide any indication that a medical expert had been consulted.

The court ruled it was basically a professional negligence claim, that expert testimony was necessary but was not provided, so the case should be dismissed. **Ditch v. Waynesboro Hosp., __ A. 2d __, 2007 WL 38387 (Pa. Super., January 8, 2007).**

CNE: Worker's Comp Coverage

The New York Supreme Court, Appellate Division, has ruled that a hospital nurse practitioner is covered by worker's compensation for injuries from a motor vehicle accident while traveling to a continuing education conference. The hospital required the nurse practitioner to get a certain number of hours to keep his position, his preceptor had encouraged him to attend this conference and he was paid by the hospital for conference days for continuing education attendance. **Murphy v. Mt. Sinai Hosp., __ N.Y.S.2d __, 2007 WL 414277 (N.Y. App., February 8, 2007).**

Confidentiality: Charts, Incident Reports Have Different Roles In Patients' Lawsuits.

The patient's lawsuit against the hospital raised allegations of sub-standard care by the nursing staff during her post-surgery recovery.

The patient claimed the nurses generally treated her in a rude, disrespectful and unprofessional manner and made derogatory references to her behind her back. She also claimed to have been treated roughly on one occasion while vital signs were taken.

The patient also insisted the nurses on one occasion injected an unknown substance into her IV line which caused her severe gastrointestinal distress.

The Court of Appeals of Michigan, while affirming a lower court's decision to dismiss the case, considered issues in this patient's case which have come up time and again in patients' lawsuits.

Medical Charts vs. Incident Reports

The Court of Appeals ruled the patient's lawyer had no right to the hospital's internal incident reports that caregivers filled out when the patient complained to them while she was still hospitalized.

The patient or a representative is not allowed to see the internal incident reports, let alone use whatever happens to be in them as evidence in a lawsuit.

The patient's medical charts, on the other hand, as a rule are opened up in their entirety in malpractice cases.

The patient has the right to use everything in the patient's chart for what it may be worth in a lawsuit against caregivers.

Caregivers cannot assert the principle of medical confidentiality against the patient. The information in the chart belong to the patient, not the caregivers.

By the same token a patient suing caregivers cannot hide relevant portions of the patient's current, prior or later treatment records that may be detrimental to the patient's lawsuit, like the patient's psychiatric records in this case, under the guise of medical confidentiality. **Lindsey v. St. John Health System, 2007 WL 397075 (Mich. App., February 6, 2007).**

Healthcare facility incident and occurrence reports are protected by a principle sometimes called the peer-review or the quality-review privilege.

The facility can refuse to turn over incident or occurrence reports in response to a patient's request or a patient's attorney's demand and can even decline to honor a court subpoena.

This is true for records, data and knowledge collected by or for individuals or committees assigned an internal quality review function within a healthcare facility.

As to the patient's treatment records, the patient waives the right to medical confidentiality when the patient brings his or her own treatment records into the lawsuit as evidence.

Having waived medical confidentiality by bringing his or her records into the case, the patient cannot complain when current, prior or subsequent treatment records, not favorable to the outcome of the patient's lawsuit, are used against the patient by caregivers in a court of law.

COURT OF APPEALS OF MICHIGAN
February 6, 2007

MRSA: Court Discusses Liability For Post-Op Infection.

A patient came down with methicillin resistant Staph aureus (MRSA) after heart bypass surgery.

The patient sued the hospital and the surgeon. The doctor who treated the patient for the MRSA infection was overheard saying that the surgeon had mentioned a break in sterile technique during the procedure.

The mere fact that an infection has occurred in a hospital is not enough to open the door to a court awarding damages.

The patient must point to specific facts proving what caused the infection.

Without specific factual proof, the patient's lawsuit must fail.

COURT OF APPEALS OF ARKANSAS
January 31, 2007

The Court of Appeals of Arkansas agreed to dismiss the case. The surgeon's hearsay remark was not conclusive. It could be interpreted as an admission that sterile technique was broken, or just that such a break, in general, is a theoretically plausible explanation for a post-surgical infection.

A hospital's best defense to a lawsuit over a post-surgical infection is to be able to document that sterile technique was employed in the O.R. and that current accepted infection-control practices have been followed in the hospital at large. A post-surgical infection happening, in and of itself, does not prove the hospital or its staff were negligent. **Crist v. Dean, 2007 WL 266444 (Ark. App., January 31, 2007).**

Nursing Home Admissions: Fairness Of Arbitration Questioned.

In an effort to control litigation costs and prevent runaway jury verdicts, many healthcare facilities include arbitration agreements in their admissions paperwork.

If a patient's claim for damages for medical or nursing malpractice or other wrongful treatment qualifies for arbitration, it is heard and decided by an agreed-upon arbitrator, often a private-practice attorney or retired judge.

Arbitration of a healthcare negligence claim is appropriate only when both sides have fairly and knowingly agreed to arbitration. As arbitration is growing in popularity with healthcare facilities, there is a corresponding growth in court cases questioning whether a frail, elderly, possibly confused or demented person has fairly and knowingly agreed. If they did not, arbitration is out and the patient, or very often the surviving family, can still take the case in front of a civil jury.

The Court of Appeals of Ohio recently looked at these factors:

Was the language about arbitration set apart in a separate document, or buried in the fine print?

Was arbitration explained to the resident or the family, especially the fact the right to go to court is being given up?

Did the resident and the family have a real choice whether or not to sign? Were they forced to sign, either by staff pressure or the pressure of circumstances?

Did the resident have the capacity to understand? Validly agreeing to arbitration requires a higher level of abstract reasoning capacity than merely agreeing to enter a nursing home and consent to care.

Did the resident or family have the chance to opt out of arbitration, after admission, and still remain admitted? **Manley v. Personacare, 2007 WL 210583 (Ohio App., January 26, 2007).**

Nursing Home Admissions: Safety Of Others Must Be Considered.

An elderly male nursing home resident physically assaulted an elderly female resident without provocation while he was apparently having an episode of dementia-related confusion and agitation.

The woman fell, broke her hip, succumbed to pneumonia while incapacitated and died. The family sued the nursing home for wrongful death.

The pre-admission assessment of a nursing home resident involves a comprehensive look at the patient's medical diagnoses, functional capacities and care needs vis a vis the resources available at the facility.

Of necessity, however, although not spelled out explicitly in the complex Federal and state regulations, there must also be an assessment of the patient's suitability for placement in the home, with the safety needs of other residents taken into consideration.

COURT OF APPEALS OF TENNESSEE
January 4, 2007

The Court of Appeals of Tennessee agreed with the family that a basic requirement should be read into the complex state and Federal regulations for nursing home admissions also to take others' safety needs into consideration. **Estate of Stinson v. Life Care Centers of America, Inc., 2007 WL 34828 (Tenn. App., January 4, 2007).**

Nursing Home Admissions: Assets Too High For State Aid.

In preparation for entering a nursing home the elderly mother's home was to be placed on the market. Before placing the home on the market the children fixed up the house and substantially improved its value in the ensuing sale.

When they found they would just have to turn around and use the substantial home-sale proceeds to pay the nursing home, it was decided the children would be paid $100,000 for the work they had done on the house.

Money that leaves an elder's assets to pay for goods or services reduces the assets for purposes of eligibility for state aid for nursing home care.

Money given gratuitously to a family member, however, does not count as a deduction and net worth is calculated as if the money was still there.

APPEALS COURT OF MASSACHUSETTS
February 14, 2007

The Appeals Court of Massachusetts ruled the $100,000 that went to the children was not a legitimate deduction for purposes of state aid eligibility, but was more like a non-qualifying gift.

Unlike a pre-sale fix-up payment to a legitimate home-repair contractor, there was no actual expectation of repayment or contract for repayment to the children when they performed the services in question. **Andrews v. Division of Medical Assistance, __ N.E. 2d __, 2007 WL 447187 (Mass. App., February 14, 2007).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Employment Discrimination: Court Upholds Nurse's Right To Sue.

Following her termination from a staff nurse position a nurse filed a complex lawsuit against her former employer in the US District Court for the Southern District of Indiana for disability and religious discrimination.

No Disability Discrimination

The nurse, after fourteen years service at the hospital, came down with irritable bowel syndrome. During intermittent bouts of diarrhea she was unable to work.

The court did not have to consider the threshold question whether irritable bowel syndrome is a disability for purposes of the Americans With Disabilities Act (ADA).

The court pointed out the nurse called in sick for one quarter of the shifts she was scheduled to work during a one-year period.

A hospital staff nurse with chronic absenteeism that violates the employer's established attendance policies is not considered a qualified individual with a disability even if the absences are caused by a disability that is recognized by the ADA.

Regardless of the underlying cause, it is not reasonable accommodation for a healthcare facility to have to tolerate a staff nurse's excessive absenteeism, the court said.

Religious Discrimination Occurred

A supervisor had mockingly upbraided her for taking time off for the Jewish Passover and then more time off to mourn, or sit shivah, after Passover for a close relative who had died during Passover but by Jewish law could not be mourned until after Passover was over.

Circumstantial evidence of management's discriminatory attitude surfaced when she was able to return from an extended medical leave. She was turned down for entry-level staff nursing slots for lack of relevant clinical experience, slots that did not call for relevant experience and were given to others without experience.

If a person who qualifies as a minority is treated differently than others, the employer must be prepared to explain why, or discrimination is presumed. **Praigrod v. St. Mary's Medical Center, 2007 WL 178627 (S.D. Ind., January 19, 2007).**

Narcotics Diversion: Employer Went Beyond Collective Bargaining Agreement, Nurse Can Sue.

A registered nurse was accused of stealing narcotics from the hospital where she worked.

The nurse claimed her co-workers confronted her and forcibly prevented her from leaving the premises for a period of time during which she was strip-searched and forced to give a urine sample and a Breathalyzer test.

She sued the hospital for false imprisonment, assault and battery, invasion of privacy, defamation and intentional infliction of emotional distress.

The US District Court for the Eastern District of Washington has not passed judgment on these allegations except to say that if they are true the nurse would have the right to sue.

As yet only a technical legal point has been resolved, that this case is not a dispute over the interpretation of the nurses' collective bargaining agreement and therefore belongs in state court, not Federal District Court.

When a nurse is accused of narcotics diversion, and there is a collective bargaining agreement with the nurses' union, the employer's recourse is strictly defined by the collective bargaining agreement.

An employer can be liable for civil assault and battery, false imprisonment, etc., if the employer tries to exceed the employer's authority under the contract.

UNITED STATES DISTRICT COURT
WASHINGTON
February 5, 2007

A dispute over the interpretation of a collective bargaining agreement must be resolved the way the agreement provides, that is, as a rule a Federal court would simply order binding arbitration.

However, when an employer takes action not authorized by the collective bargaining agreement in the first place, the employee's right to a civil suit is not circumscribed by the collective bargaining agreement. If the employer crosses the line and commits wrongful acts for which the employer has no legal authority, the employee can sue for damages. **McKenzie v. Kadlec Medical Center, 2007 WL 433088 (E.D., Wash., February 5, 2007).**