# LEGAL EAGLE EYE NEWSLETTER

March 2008 — *For the Nursing Profession* — Volume 16 Number 3


# Disability Discrimination: Court Challenges Hospital's Full-Release-For-Duty Policy.

A registered nurse's job title was RN Case Manager. Her job description required her:

*To assist patients of varying physical ability and size in the movements required for clinical care;*

*Perform clinical duties consistent with standard nurse practice;*

*Communicate with co-workers, patients, physicians, etc.*

*Work varying shifts;*

*Provide service in a friendly, calm, professional manner.*

**Patient's Physician Cleared Her To Return To Work**

After a complicated course of treatment and medical leaves for a femur fracture from a trip and fall on the job, the nurse's physician cleared her to return to work as a clinical case manager, with no lifting over 50 pounds and use of a cane to walk.

**Hospital Policy No Accommodation For Acute Injuries**

Human resources interpreted the hospital's obligations under the Americans With Disabilities Act to require no accommodation whatsoever for an acute injury. The hospital would not allow an employee to return to work unless the employee was 100% cleared for duty and no appliances such as canes, walkers or wheelchairs would be considered.

***The hospital's policy was that an employee still treating for an injury or still using an appliance could not return to duty.***

***The hospital made no effort on an individual case-by-case basis to see if the employee was nevertheless capable of doing his or her job or would be capable if an accommodation could be made.***

UNITED STATES DISTRICT COURT
ILLINOIS
January 17, 2008

The US District Court for the Northern District of Illinois ruled the hospital's understanding of its legal duties was mistaken. Whether her condition was acute or chronic, the nurse case manager was substantially limited in the major life activity of walking. That fit the legal definition of a disability.

She was more likely than not a qualified individual with a disability, as her physician had cleared her to return to work if certain conditions could be met which did not appear to conflict with the core requirements of her job.

The hospital did not communicate with the nurse case manager, that is, as the law phrases it, engage in an interactive process to determine what she could do, what, if anything, she could not do and what help she might need to do her job.

There was no way to tell if a reasonable accommodation was needed to permit her to return to work until she was back to 100%. The employer, not the employee, bears the legal burden when such failure to communicate occurs.

The court said that an employer's rule is discriminatory if the rule flat-out does not allow an injured employee who is not yet 100% to return to work with a cane or other appliance that might be necessary. **Street v. Ingalls Memorial Hosp., 2008 WL 162761 (N.D. Ill, January 17, 2008).**

## Inside this month's issue ...

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# Insulin Overdose: Arbitration Award For Family Of Deceased.

The seventy-two year-old patient was scheduled to be discharged from the hospital to a skilled rehab facility for physical therapy.

On the night before his discharge a hospital nurse gave him 80 rather than the prescribed 8 units of NPH insulin for his Type II diabetes.

Although NPH insulin is considered by the facility to be a high-alert medication requiring a second nurse's check-off, the nurse did not consult with anyone before injecting it.

After injecting the insulin the nurse reportedly remarked, "Whew. That was a lot of insulin." It was only at that point that another nurse checked the medication administration record and discovered the massive overdose. It was too late.

The damage was already done. The patient coded, but was revived and lingered several days before he died.

The arbitrator awarded the family $318,944. **Lakos v. Kaiser Permanente, 2008 WL 382331 (Med. Mal. Arbitration, Los Angeles, California, February 5, 2008).**

# Prescription Error: Nurse Caught The Mistake, Lawsuit Dismissed.

The patient went into respiratory arrest on her second day in the hospital but was revived without complications.

After she was discharged from the hospital she and her family came to believe that her arrest was caused by an overdose of narcotics. In fact, her physician had written an order for her for 30 mg of Dilaudid, a substantial overdose.

The patient's nurse, however, realized it was way too much. Following standard nursing practice, she phoned the physician before going ahead.

The physician immediately agreed that it was a mistake and told her the correct dose was 3 mg, not 30 mg, The nurse went ahead and gave the medication only after the dosage was clarified to her satisfaction.

The Court of Appeals of Tennessee said there was some confusion created by the new order for 3 mg never being entered in the physicians' orders in the chart. The nurse wrote a progress note about calling the physician and giving the correct dose, but never corrected the original erroneous 30 mg order. **Wall v. Hillside Hosp., 2008 WL 275968 (Tenn. App., January 31, 2008).**

# TPN Overdose: Nurse Gave 10x Ordered Dose, Large Verdict.

The infant was on total parenteral nutrition while recovering from surgery to correct an omphalocele that the infant had been born with.

A nurse administered a dose of TPN ten times the dose that was ordered. No particular explanation was offered for how or why the incident happened.

The hyperosmolar overdose caused neurological injuries to the child's brain.

The jury in the Superior Court, Los Angeles County, California awarded $1.65 million, the bulk of which was to be paid by the nursing agency who was the nurse's actual employer. **Moc v. Children's Hosp., 2007 WL 4624414 (March 23, 2007).**

# Post-Partum Care: Patient's Brain Death Tied To Nursing Negligence.

The $7.6 million settlement of a civil lawsuit filed in the Superior Court, Los Angeles County, California was reported on condition that the names of the patient, hospital, physicians, nurses, etc., remain confidential.

The lawsuit raised complex medical issues involved in the vaginal delivery of triplets and the mother's post-partum care at a tertiary care facility specially chosen as appropriate for this complicated procedure.

**Nurses Held Up Physician's Order For Blood Lab Work**

On the night following delivery the mother, on the post-partum floor and not in the ICU, had a blood pressure of 70/53 and clammy skin.

Two junior resident physicians came to her room, started a saline IV to raise her blood pressure and ordered a "stat" CBC. The residents apparently expected the blood work to be done right away and to be advised of the results right away. Then they were going to confer with a senior obstetrical resident about what to do, but none of that ever happened.

The patient's husband asked the nurses if it was OK to delay the blood tests until morning. His wife was completely exhausted from her ordeal earlier that day delivering three babies. The nurses agreed.

The nurses never followed through to see that the lab sent someone to draw the blood.

At 6:00 a.m. on morning rounds the residents discovered the patient in cardiopulmonary arrest. The patient had been bleeding into her abdominal cavity. Her hemoglobin was 4 and her hematocrit was 12%, midrange normals being 14 and 42%.

She now has severe brain damage and is semi-comatose and institutionalized. **Confidential v. Confidential, 2007 WL 4896737 (Sup. Ct. Los Angeles Co., California, November 21, 2007).**

# Alcohol Withdrawal: Nursing Care Faulted.

The patient entered the hospital for alcoholism treatment. That required medical detox. The physicians' plan was to wait for symptoms such as delirium tremens to appear and then treat the symptoms with Ativan. The physicians were faulted for not starting him on benzodiazepines earlier.

Along the way a Dobhoff nasogastric tube was inserted so that he could receive nutrition despite his nausea. He was placed on aspiration precautions.

The nurses were faulted for allowing a patient with a feeding tube, who should have been handled as a high regurgitation aspiration risk, to lie flat on his back for extended periods of time. There was also some question whether the tube was ever verified as correctly lodged in the stomach.

Nutrient fluid entered his lungs. He experienced an anoxic brain injury which led to his death at age fifty-two.

The US District Court for the District of Connecticut awarded his widow $300,000. **Edwards v. US, 2008 WL 220744 (D. Conn., January 25, 2008).**

# Abuse: No Intent, No Patient Abuse, Court Says.

The ruling has been overturned in a case we reported in May, 2007.

See *Patient Abuse: Nurse Used Pillow To Muffle Patient's Cries.* Legal Eagle Eye Newsletter for the Nursing Profession, (15) 5, May '07, p.8.

A nurse used a pillow over the mouth to muffle the cries from one patient, suffering from dementia and the effects of a brain tumor, who was acting out in distress. She did it to avoid unnecessary alarm to another neuro rehab patient, recovering from a subarachnoid hemorrhage, who was resting quietly in a nearby darkened room.

A co-worker reported the nurse to their supervisor, who reported her to the state department of human services, who put her name in the registry of caregivers found guilty of abuse of a dependent adult.

The Court of Appeals of Iowa agreed with the department and went so far as to say the nurse criminally assaulted her patient. The Supreme Court of Iowa, however, reversed the Court of Appeals and the department and ordered the nurse's name removed from the registry.

According to the Supreme Court of Iowa, to commit abuse a person must possess the mental state of intent to harm a patient or other dependent person.

This nurse had no intent to harm anyone and was actually motivated by concern for the safety and welfare of another very fragile individual in her care. **Wyatt v. Dept. of Human Services, __ N.W. 2d __, 2008 WL 162243 (Iowa, January 18, 2008).**

# Alzheimer's: Elopement, Death Lead To Settlement.

The family of a ninety year-old resident who eloped from an assisted-living facility in February and was found dead from hypothermia twenty hours later obtained a $350,000 settlement of their lawsuit filed in the Supreme Court, Dutchess County, New York.

The company with the contract to provide nursing services for residents of the facility contributed approximately 17% of the total settlement.

The main question in the lawsuit was whether it was wrong for an assisted-living facility to take and keep a deteriorating Alzheimer's patient even though it did lock its doors and did have door alarms. The lawyers argued whether reforms to New York's licensing laws which now answer that question explicitly were in effect at the time.

**Nursing Services Should Have Seen Patient Transferred**

If the lawsuit had not settled, the family's lawyers would have faulted the nursing-services contractor for failing to intervene and make arrangements to transfer the resident to a facility able to handle an Alzheimer's patient, once the resident's diagnosis had been confirmed in a letter written to the nursing-services contractor by the resident's neurologist and the nurses realized her condition had deteriorated to the point that assisted living was no longer the right placement for her. **Pelletier v. Manor at Woodside, 2007 WL 4863935 (Sup. Ct. Dutchess Co., New York, December 11, 2007).**

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# Maternal Fever, Cesarean Delay: Settlement Paid By Hospital.

The mother came to the hospital in labor at thirty-six weeks, two weeks before she was already scheduled to come in for a cesarean. She had a fever of 101.3. She was given Tylenol but over the next six hours it did not reduce her temperature.

When the fetal monitor was started the first reading was 170. Over the next four hours the progress notes penned by a second-year medical resident and the staff nurses showed the heartbeat was in the 170-180 range and reactive in the opinion of the resident and the nurses.

***The mother was already scheduled for a cesarean, her third, two weeks before she came into the hospital in labor.***

***When she came in her temp was 101.3.***

SUPREME COURT, KINGS COUNTY
NEW YORK
April 19, 2007

The baby was finally delivered at 7:10 a.m. by cesarean, six and one-half hours after the mother first presented at the hospital. The child was subsequently diagnosed with moderate right-side hemiparesis and cognitive impairment from cerebral infarctions and is developmentally delayed.

**Why Was The Cesarean Not Done Right Away?**

The parents' lawsuit on the child's behalf in the Supreme Court, Kings County, New York settled for $3,000,000.

The plaintiff's attorney was prepared to argue there was no justifiable reason to leave the mother, who inevitably was going to deliver by cesarean anyway, in labor in the care of a resident and the nurses for six hours. **Ballard v. Henry, 2007 WL 2491531 (Sup. Ct. Kings Co., New York, April 19, 2007).**

# Emergency: Hospital Drops "Rescue Team" Defense, Pays Settlement.

According to the patient's lawyer, the obstetrician and the labor and delivery nurses failed to realize the electronic fetal monitor was picking up the mother's (slower) heartbeat rather than the fetus's heartbeat and consequently believed that an expedited vacuum extraction was necessary, with the fetus still too high in the birth canal to do that safely.

***When the electronic fetal monitor began tracing the mother's rather than the fetus's heartbeat, the physicians decided that an emergency vacuum extraction was necessary.***

SUPERIOR COURT, RIVERSIDE COUNTY
CALIFORNIA
December 7, 2007

The defendants' lawyers asked the judge in the Superior Court, Riverside County, California, to dismiss the lawsuit, citing a California state statute which substituted a good-faith standard in place of a common-law negligence standard for hospital emergency code teams.

Before the judge ruled one way or the other on the requested dismissal, a settlement of $3,250,000 was agreed upon.

**Apparent Emergency Was of Defendants' Own Making**

A civil-court defendant cannot claim special consideration based on emergency circumstances, that is, a false belief that emergency extraction is necessary, based on the defendants' own negligence in misreading the pertinent medical data. **John Doe v. Confidential Hospital, 2007 WL 4788549 (Sup. Ct. Riverside Co., California, December 7, 2007).**

# Gestational Diabetes: All Caregivers Cleared Of Negligence.

The jury in the Court of Common Pleas, Lehigh County, Pennsylvania returned a defense verdict in a lawsuit filed over the stillbirth of a twelve-pound fetus carried by a young mother with gestational diabetes.

**Prenatal Care**

Three months after beginning her prenatal treatment she weighed 305 pounds and her blood glucose was 218. She gained 110 pounds during her pregnancy.

Her obstetrician referred her to a maternal fetal medicine specialist who made the definitive diagnosis of gestational diabetes and referred her to a diabetes clinic.

A physician at the diabetes clinic carefully explained the risks of gestational diabetes, particularly the risk of an abnormally large baby. The medical plan was to lower her blood sugar by starting her on glyburide rather than insulin. She was to take her medication twice daily.

Three weeks later she had an ultrasound which indicated her fetus was, in fact, larger than normal, in the 95th percentile. She was again counseled about the risks she was facing, including the possibility that her baby would be stillborn.

She saw a nurse at the prenatal clinic two weeks later who again counseled her about the need for compliance.

A week later her blood glucose was 231. The electronic memory in her blood glucose meter revealed she was not testing. Her eating habits were poor for diabetes management, that is, she was skipping meals during the day and then eating a large evening meal.

She finally came to the hospital when she felt her baby had stopped moving. A stillborn infant was delivered by cesarean. The jury found no fault with any of her caregivers. **Caraballo v. Lehigh Valley Hosp., 2007 WL 4863898 (Ct. Com. Pl. Lehigh Co., Pennsylvania, December 19, 2007).**

# Discrimination: Hospital Not Required To Accommodate LPN's Disability.

A licensed practical nurse who had been working in surgery injured his back and knee. The hospital let him continue in surgery, with an accommodation that he could sit when he wanted and did not have to lift patients or be able to turn them in an emergency or push gurneys.

The accommodation continued until a physician wrote an evaluation indicating that his restrictions were permanent. At that point the LPN was required to transfer out of surgery and landed in pediatrics.

***The courts generally defer to a healthcare employer's judgment in defining what functions are essential to a particular position.***

***An employer is not required to accommodate an employee's disability which makes the employee unable to perform the essential functions of the job.***

UNITED STATES DISTRICT COURT
NORTH CAROLINA
February 8, 2008

The US District Court for the Eastern District of North Carolina threw out the LPN's disability discrimination lawsuit.

An employer is never obliged to dispense with essential job functions when accommodating an employee's disability. A special temporary arrangement the employer had no obligation to offer in the first place does not create any long-term obligation. The hospital legitimately defined prolonged standing and the ability to lift and turn patients as essential for nurses in surgery. **Storkamp v. Geren, 2008 WL 360991 (E.D.N.C., February 8, 2008).**

# Post-Mortem Care: Nurse Fired Over Handling Of Miscarriage Wins Discrimination Lawsuit.

***At the time the hospital had no policy on what to do with a miscarried fetus under twenty-four weeks.***

***When any employer terminates an employee for alleged misconduct in a subject area where the employer has no express policy, the employer can be left facing a gaping legal void if the former employee turns around and sues for discrimination.***

***Not having a defined policy to follow can be especially problematic if it was a senior, highly paid person with a good work record who was approaching retirement age who was terminated for alleged misconduct and replaced by someone only minimally qualified and half her age.***

***To prove age discrimination the victim must be at least 40 years of age, be qualified for the position, suffer adverse employment action and be replaced by a younger person.***

***The employer can come forward and offer a legitimate, non-discriminatory explanation, but the employee can still play upon suspicions it is only a cover-up for discriminatory intent.***

UNITED STATES DISTRICT COURT
PENNSYLVANIA
January 23, 2008

A registered nurse had worked as a nurse at the hospital for twenty-five years. Adding those years to the twelve years she worked there before getting her nursing degree gave her thirty-seven years seniority.

Another labor and delivery nurse called her into a patient's room while the patient was on the commode. The nurse in question noticed blood clots in the bowl as she assisted the patient to stand up.

The nurse called the doctor. The doctor told her not to flush as it was necessary to preserve the contents. The doctor came and took a look and told her to remove the contents with a forceps and place them in a formalin container. She did so and then informed him that all of the products of conception, a whole fetus and placenta, were accounted for.

The doctor's rationale was that he wanted to test the remains for chromosomal abnormalities.

The nurse stayed with the patient in her room until she was relieved by another nurse at the end of her shift.

**Nurse Fired for Misconduct**

A few days later the nurse was given formal written notice she had been terminated over this incident. The best explanation she could obtain was she should have started an IV and Pitocin for the patient, even though there was no doctor's order for either and a doctor's order is normally required.

The nurse sued for age discrimination. A jury in the US District Court for the Eastern District of Pennsylvania awarded her $216,800 from the hospital.

Two physicians testified there was nothing inappropriate about the manner in which she handled the remains. It was legally problematic for the hospital, not for her, that there was no particular policy on the books for what she was supposed to do in this situation. Thus she could not have and did not violate hospital policy. **Scanlon v. Jeanes Hosp., 2008 WL 191169 (E.D. Pa., January 23, 2008).**

# Deep Vein Thrombosis: Court Rules Patient's Nurses Met The Legal Standard Of Care.

The patient collapsed and died from blood clots in his lungs from deep vein thrombosis shortly after returning home from a three-day hospital stay.

Despite the tragic outcome the Court of Appeal of Louisiana upheld a jury verdict in favor of the hospital, finding that the patient's nurses met the legal standard of care in all respects.

The patient's ENT physician admitted him for sinus surgery. Because of complications he had to be kept in the hospital two extra days for observation for fever and infection, antibiotics and bed rest.

The patient's physician did not believe his patient was at risk for deep vein thrombosis. He never examined his legs, checked his Homan's sign or ordered the nurses to check Homan's sign, exercise his legs, put on compression hose, start sequential compression or administer anti-coagulants.

**Episodes of Lower Extremity Pain Not Reported To Nurses**

The patient's wife testified in court that the deceased did have problems with pain and what he described as muscle cramps in his lower legs. He asked his wife to assist him to stand and move around and had her soak some towels in warm water and place them on his legs.

The wife admitted, however, she and the deceased never reported any of this to the nurses.

**Nursing Experts Testimony**

The family's nursing experts testified the nursing literature now establishes a basic nursing function to assess any immobile patient for lower extremity tenderness with touch and dorsiflexion of the foot and to look for calf swelling.

Nurses should instruct immobile patients in calf-pumping exercises, particularly patients who are at-risk due to age and obesity.

The jury apparently discounted the family's nursing experts' testimony. **Little v. Pou, __ So. 2d __, 2008 WL 239687 (La. App., January 30, 2008).**

***Injury to the patient, in and of itself, does not raise a legal presumption of negligence by a caregiver.***

***The law does not look at the outcome to determine whether the actions of the nurses were reasonable and met the standard of care.***

***Instead, the professional judgment and conduct of the nurses is evaluated under the circumstances when care was rendered, not in terms of the result or in light of subsequent events.***

***The key to the nursing staff's observations of their patient was the lack of any reports of leg pain.***

***It was reasonable for the jury to conclude that if the incidents to which the family later testified had been reported to the nurses, the cardiovascular checklist would not have reported "no calf tenderness."***

***The jury's finding in a medical malpractice case is reviewed only for manifest error. The jury's verdict can be overturned only if there was no factual basis for it, not just because the judge disagrees with the jury's decision.***

COURT OF APPEALS OF LOUISIANA
January 30, 2008

# Confidentiality: Former Employee Barred From Seeing Charts.

A hospice worker who had been working with a nursing home patient continued to visit the patient in the nursing home after she was fired from her job at the hospice.

When the nursing home's nursing director learned that the individual was no longer a hospice employee she circulated a memo to her staff to the effect the individual could visit the patient as a friend, but was no longer considered a professional caregiver and had no right to access the patient's medical chart.

The individual sued her former employer and the nursing home for defamation over the hospice director informing the nursing home she had been fired and over the nursing home's director circulating a memo to her staff. The Court of Appeals of Washington threw out the case. **Vande Hey v. Walla Walla Community Hospice, 2008 WL 152595 (Wash. App., January 17, 2008).**

# Sexual Assault: Hospitals Liable.

A male nurse caring for a female patient touched her inappropriately while caring for her post-operatively.

The nurse had two prior incidents at another hospital touching female patients inappropriately, but those incidents were never reported.

A jury in the Superior Court, Orange County, California awarded the patient $500,000. Of that sum 5% was to be paid by the hospital where the patient was a patient, 10% by the nurse's former employer and 85% by the nurse himself. **Jane Doe v. Le Poblete, 2007 WL 4911192 (Sup. Ct. Orange Co., California, May 18, 2007).**

# Arbitration: Agreement Out, Family Member Had No Authority To Sign.

A deceased nursing home resident's daughter, as personal representative of her mother's estate, filed a civil negligence lawsuit against the nursing home.

The issue for the Court of Appeals of Arkansas, before getting to the allegations of negligence, was the more basic issue whether the case would be decided by arbitration or in court by a jury.

***The nursing home resident never agreed to arbitration and her daughter had no authority to sign an arbitration agreement for her.***

COURT OF APPEALS OF ARKANSAS
February 6, 2008

The resident's daughter had her own daughter put a pen in her elderly grandmother's hand and trace her signature on the bottom line of legal-form power of attorney which her brother then took to be notarized by a notary who was not there when the document was "signed." The power of attorney was not valid.

The arbitration agreement was mailed to the resident's daughter five years after the resident was admitted. At that time, according to the court, the resident and her family were in a vulnerable bargaining position and had no meaningful choice in the matter of whether or not to sign.

The elderly resident herself was partially paralyzed, unable to speak and had a number of disabling medical conditions. The court believed had she been asked to sign away her right to a jury trial in court she herself would have declined. **Waverly-Arkansas, Inc. v. Keener, 2008 WL 316149 (Ark. App., February 6, 2008).**

# Whistleblower: Nursing Director's Suit Dismissed.

The nursing director of an extended care facility resigned her position at the culmination of a series of disputes with management over patient-care issues.

The disputes started when her decision was overruled not to admit a 900 pound patient whom she believed could not be cared for at the facility.

***The whistleblower laws do not grant protection to an employee whose job requires the employee to ensure legal or regulatory compliance.***

***The nursing director's job duties required her to expose unlawful behavior internally.***

***She did not become a whistleblower merely by performing her duty to report compliance problems to management at her facility.***

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT
February 8, 2008

The US Court of Appeals for the Eighth Circuit ruled the nursing director could not raise the issue that her resignation was forced upon her as retaliation for voicing concerns about legal and regulatory compliance issues at the facility.

The whistleblower laws are meant to protect employees from employer retaliation who blow the whistle on illegal activities. A major exception has been carved out by the courts, however, for employees whose very job descriptions require them to deal with compliance issues. They cannot be whistleblowers. **Skare v. Extendicare Health Services, __ F. 3d __, 2008 WL 341464 (8th Cir., February 8, 2008).**

# Defensive Charting: Court Says Errors Do Not Prove Negligence.

The patient, a physician, sued the hospital claiming that failure of the post-op nursing staff to take her vital signs on a consistent basis led to brain damage.

The California Court of Appeals upheld the jury's verdict of no negligence by the nurses aide or the nurse.

***The hospital admitted that a nurses aide made mistakes in her charting.***

***There is no basis in the law to equate mistakes in charting to negligent care.***

CALIFORNIA COURT OF APPEALS
January 24, 2008

The problem was that the nurses aide on duty during the first post-op night overwrote some of her blood pressure entries, when she should have crossed out and initialed the incorrect entries and written the correct entries next to them or in a different space on the flow sheet.

The hospital's own nursing expert witness admitted that overwriting any chart entry is never correct procedure.

**Defensive Charting Alleged**

The patient's lawyers tried to argue it was a case of defensive charting, that is, charting blatantly changed after the fact to cover up substandard care, for example, abnormal BP's that necessitated but did not lead to medical follow-up.

Defensive charting raises serious suspicions but it does not prove negligence. The court looked at the situation as a whole, particularly the nurse's progress notes, and concluded the nurse and the aide were, in fact, monitoring their patient very carefully and attentively despite the aide's clerical errors. **Terajima v. Torrance Memorial Med. Center, 2008 WL 192650 (Cal. App., January 24, 2008).**

LEGAL EAGLE EYE NEWSLETTER
*For the Nursing Profession*

## Discrimination: Nurses Can Be Held Liable In A Physician's Lawsuit, Court Says.

An African-American physician who openly identified himself as bisexual and who was thought by many co-workers to be HIV-positive sued the hospital, his former employer, for discrimination.

His lawsuit focused primarily on the decision of the medical staff residency selection committee to turn down his tenure application allegedly because of his race and sexual orientation.

**Nurses Can Create a Hostile Environment For a Physician**

The US Circuit Court of Appeals for the Ninth Circuit had occasion to point out that it is possible for nurses, by their conduct, to create a hostile or discriminatory environment for a minority physician, although the conduct of the nurses in this particular case did not, in the court's opinion, give this physician grounds to sue. **Johnson v. Riverside Healthcare System, __ F. 3d __, 2008 WL 375214 (9th Cir., February 13, 2008).**

## Discrimination: Chemical Dependency Does Not Require Accommodation.

A registered nurse sued claiming to have a disability which required reasonable accommodation from her employer, an acute-care hospital. The US District Court for the Western District of Pennsylvania dismissed her lawsuit.

The nurse claimed that depression and post-traumatic stress disorder stemming from her victimization in a violent crime led to a drinking problem which required her to take a medical leave. The hospital only allowed the nurse to return to work if she signed a last-chance agreement stipulating she could be fired for any on-duty or off-duty alcohol abuse.

The court validated the hospital's position that the nurse was unfit for duty caring for critically ill patients, due to off-duty abuse of alcohol, and there was no way for the hospital reasonably to accommodate that. **Nicholson v. West Penn Allegheny Health System, 2007 WL 4863910 (W.D. Penna., October 23, 2007).**

# Choking: Disabled Patient Known To Have Problems, Was Not Supervised While Eating.

A lawsuit filed in the District Court, Dane County, Wisconsin by the family of a deceased fifty-six year old mildly retarded woman against the state mental health facility where she was committed resulted in a monetary settlement paid to the family, amount agreed to be kept confidential.

The woman had been diagnosed with mild retardation, schizoaffective disorder and mood swings. She was court-ordered to the facility because of threatening behavior toward others.

**Staff Knew of Eating Problems Nothing Was Done**

Staff observed the patient to have a propensity to stuff her mouth full of food and try to swallow but nothing was done by way of a care plan to monitor and assist her while she was eating.

***For thirteen days after she was admitted four staff members observed the patient stuffing her mouth full of food and trying to swallow without chewing.***

***No orders were written for the nursing staff nor was any systematic effort made to assist and monitor the patient while she ate.***

***She choked on a peanut butter sandwich and died.***

CIRCUIT COURT, DANE COUNTY
WISCONSIN
July 1, 2007

Nor was the dietary department notified to provide food in small or soft portions that would tend not to choke a person who had difficulty swallowing.

On the evening in question she stuffed a whole peanut butter sandwich in her mouth and started choking.

The emergency suctioning apparatus had never been used before and, it came out during the lawsuit, had not even been tested since the early 1990's. Unfortunately it did not work any more when it was actually needed.

It also came out in the lawsuit that another resident at the same facility died exactly the same way after this incident after two choking episodes with no care-plan or dietary modifications. **Groves v. State, 2007 WL 4898281 (Cir. Ct. Dane Co., Wisconsin, July 1, 2007).**