LEGAL EAGLE EYE NEWSLETTER

October 2003 *For the Nursing Profession* Volume 11 Number 10

PTSD: Court Upholds Work Comp Award For Psych Nurse Disabled By Migraines.

As a general rule, workplace stress is not covered by worker's comp even if the stress becomes so severe that the worker needs treatment for physical or psychological symptoms, has to take time off or becomes disabled from doing the job any further.

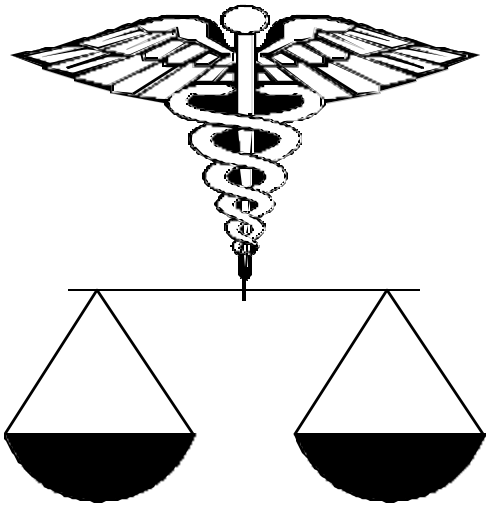
Stress / Mental Illness as Occupational Disease

On the other hand, some occupations place special stresses on workers, stresses not ordinarily faced by people in general in their day-to-day travails in the workplace, special stresses for which some workers are entitled to worker's compensation for stress as an occupational disease.

A recent case from the Court of Appeals of North Carolina involved a psychiatric nurse who faced both kinds of stresses on the job.

Everyday Workplace Stress Not Compensable Under Worker's Comp

The nurse had serious problems with her supervisor not backing her up in disputes with mental health assistants whom the nurse supervised. They were not doing their assigned patient-care tasks and would become angry and disruptive when the nurse confronted them. Although it made her life very trying on the job, stress from difficult interaction with difficult subordinates, co-workers and supervisors is not the sort of thing the law usually recognizes as an occupational disease, no matter how genuinely debilitating that stress may actually become.



A nurse caring for a special selection of patients has a job involving special stresses to which the working population in general is not exposed.

Treatment errors at any time can result in death, and at least once a treatment error in the nurse's workplace did result in a child-patient's death.

PTSD is an occupational disease for this nurse.

COURT OF APPEALS NORTH CAROLINA
September 2, 2003

Special Stresses Faced By Caregivers In Special Care Settings

On the other hand, this nurse was also profoundly affected by the death of a pediatric psych patient at the facility. Although she was not responsible, she began to focus apprehensively on the personal guilt and professional repercussions if such an event were to recur on her watch.

Her psychiatrist pointed to post-traumatic stress disorder over events like the child's death as the primary cause of her disabling migraine headaches. Tragic events like that can place special burdens on workers in certain care settings above and beyond and of a different character than the everyday stresses many workers routinely face.

The court concluded her migraines from PTSD were an occupational disease, due to factors peculiar to and characteristic of her specific occupation and not due to the types of stress ordinarily borne by the workforce at large. **Smith-Price v. Charter Pines Behavioral Center, __ S.E. 2d __, 2003 WL 22037746 (N.C. App., September 2, 2003).**

Inside this month's issue ...

Home Health: Aide Falls From Tree. Injured In Course And Scope Of Employment, Court Awards Compensation.

A home health aide had completed a certification course for certification as a certified nursing assistant. The only client of her agency employer with whom she worked was an elderly woman with limited physical mobility.

The aide worked a regular 6:00 a.m. to 3:30 p.m. shift in the client's home. She assisted her with bathing, dressing, personal care, housekeeping and meal preparation, drove her to various places in the town and did her grocery shopping for her, including getting her fresh fruit from the local farmers market.

One day after breakfast the client asked the aide to take the dog out to the yard as the aide routinely did once or twice a shift. The aide saw a fresh pear in the client's pear tree and decided to climb for it as she had done before without incident.

This time she fell, sustained a serious vertebral compression fracture, needed a complicated surgery for rod implantation and was rendered temporarily disabled from working.

Home Health
Liberal Interpretation of
Worker's Compensation Law

The Court of Appeals of North Carolina approved worker's compensation for medical benefits and time loss.

The court ruled that a home health worker is entitled to a very liberal interpretation of the course and scope of the worker's employment duties caring for a home health client, with the purpose being to find the worker covered by worker's compensation if at all possible while performing the varied and multi-faceted tasks characteristic of the field of home health.

An action being ill-advised, even foolish, does not defeat the purposes of the worker's compensation law if there is some connection between the action and the employment. **McGrady v. Olsten Corp., 583 S. E. 2d 371 (N.C. App., August 5, 2003).**

The worker's compensation law is supposed to be interpreted liberally in favor of allowing compensation to injured workers.

A worker's entitlement to compensation is not defeated by the worker's own negligence, even when the worker has engaged in foolish or even forbidden activity. The worker's compensation law was not enacted just for the protection of careful, prudent employees. Employees who do not stick strictly to their business are not beyond the law's protection.

For compensation to be available under the worker's compensation law it is enough that there be some reasonable relationship between the employment and the injury.

For an injury to arise out of and in the scope of employment it is generally sufficient that it occurred during the hours of employment and at the place of employment while the worker was in the performance of a job function.

COURT OF APPEALS
OF NORTH CAROLINA
August 5, 2003

Chlamydia Pneumonia: Court Finds No Connection To Nurse's Job.

Shortly after taking a job in the hospital's neonatal intensive care unit a registered nurse became ill and tested positive for chlamydia pneumonia.

Due to the debilitating effects of the illness she has been unable to work since the time of her diagnosis.

A physician retained by the nurse's attorneys as a medical expert testified there is a greater likelihood of someone contracting pneumonia in a hospital setting as opposed to somewhere else.

The physician retained by the attorneys for the hospital stated in his opinion the nurse more likely than not contracted the disease out in the community and not in the hospital.

The worker's compensation law gives the worker's compensation board's administrative law judge the exclusive province to pass on the credibility of the witnesses and the evidence.

Unless there is overwhelming evidence the administrative judge was wrong, a court cannot overturn the judge's ruling.

COURT OF APPEALS OF KENTUCKY
UNPUBLSIHED OPINION
July 25, 2003

In an unpublished opinion, the Court of Appeals of Kentucky ruled there was no basis to overrule how the evidence was interpreted in favor of the employer's legal position by the worker's comp administrative law judge. **Roberson v. Norton Hospital, 2003 WL 21715187 (Ky. App., July 25, 2003).**

Chart Records: Power Of Attorney Allows Family Access.

By law a patient's medical records prepared and kept by a health care provider are the property and business records of the health care provider.

However, patients are entitled upon request to obtain copies of any and all medical records a health care provider has that pertain to the patient.

The patient must furnish the health care provider a signed authorization.

The patient must pay photocopying charges up front, before receiving his or her medical records. Patients are also entitled to copies of x-rays, scans, films, etc., upon payment of reproduction costs.

Holder of Power Of Attorney
Same Rights as Patient

According to the Court of Appeal of Louisiana, a family member or other person holding a power of attorney on the patient's behalf has the same right to copies of medical records, in this case to give them to the attorney investigating a possible lawsuit over a fall by the patient at a nursing home. **In re Gould, __ So. 2d __, 2003 WL 21976113 (La. App., August 20, 2003).**

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E. Kenneth Snyder, BSN, RN, JD
Editor/Publisher
12026 15th Avenue N.E., Suite 206
Seattle, WA 98125-5049
Phone (206) 440-5860
Fax (206) 440-5862
info@nursinglaw.com

Temporary Restrictions: Nurse Not Regarded As Disabled.

A hospital staff nurse had been injured on the job several times. As a temporary accommodation her employer assigned her to an office computer position.

While working in the office the hospital unit where the nurse had worked was closed. All of the nurses actually working on the unit at the time were reassigned within the hospital. Then the nurse's office computer position was eliminated and she was not offered other employment.

At the time when her computer position was eliminated the nurse's temporary medical restrictions had been lifted by her physician.

Temporary Accommodation
Nurse Not Regarded As Disabled

An employee who is not actually disabled, but who the employer falsely believes is disabled, who suffers discrimination based on the employer's false belief, is entitled to sue for disability discrimination just like a truly disabled individual, the US Circuit Court of Appeals for the Eighth Circuit observed.

However, according to the court, an employer does not necessarily hold a belief that an employee is disabled just because the employer makes an accommodation to an employee's temporary work restrictions and the employer does not risk a discrimination lawsuit just for taking such action. **Simonson v. Trinity Regional Health System, 336 F. 3d 706 (8th Cir., July 16, 2003).**

PCA: Patient Dies, Nursing Negligence Not Proven.

A patient needed wrist fusion surgery. His physician knew that the patient was obese and had a history of heart problems but believed he could safely have the surgery as an outpatient.

After the procedure, however, the patient had to be admitted to a medical-surgical unit of the hospital for management of his intense pain. He was placed on a morphine patient-controlled analgesia (PCA) device.

At 4:00 a.m. the staff nurse checked on him and found him grayish in color and unresponsive. She summoned the physician on duty. They were not able to revive him with repeated doses of Narcan and he died. The on-duty physician believed he died from a heart attack and congestive heart failure.

Proof of Causation
Nursing Expert Not Accepted

An advanced practice registered nurse testified he should have been checked while sleeping more frequently than q 4 hours, given he was obese, had a cardiac history and was getting morphine, a narcotic known to depress respiratory and cardiac function.

However, the Appellate Court of Connecticut ruled the nurse practitioner did not have the education to give an opinion that less frequent monitoring, even if it was negligence, caused or contributed to his death, and dismissed the case. **Sherman v. Bristol Hospital, 79 Conn. App. 78, 826 A. 2d 1260 (Conn. App., August 26, 2003).**

EMTALA: New Regulations For Hospital Emergency Department Policies And Procedures.

The US Centers for Medicare & Medicaid Services announced new regulations under the Emergency Medical Treatment and Active Labor Act (EMTALA) which take effect on November 10, 2003.

Every hospital which participates in Medicare and has an emergency department must comply with the new regulations with respect to the emergency treatment of all individuals, Medicare-eligible or not, as a condition of receiving Medicare reimbursement for any patient.

Nurses and other non-physician personnel who serve in front-line positions in hospital emergency departments bear a great deal of practical responsibility for whether their facilities do or do not comply with the EMTALA.

We have covered more than two dozen cases in this newsletter in the past few years involving nurses selected from more than two hundred EMTALA cases handed down by US courts.

Physicians and hospitals can be sued in civil court for violations of the EMTALA. Nurses and other non-physician personnel cannot be personally sued under EMTALA but their hospital employers can be sued for what they do or fail to do.

We will try to summarize here only the material in the new regulations that is both new and pertinent to nurses.

Admission Satisfies EMTALA

A hospital has the option to satisfy its responsibilities under the EMTALA by screening an individual and then admitting the individual as an inpatient, provided the admission is done in good faith in order to stabilize the emergency medical condition that was found to exist.

Expanded Definition of Emergency Patient

A person who has not come to the emergency room *per se*, who has begun to receive non-emergency inpatient or outpatient care, who then develops what a reasonably prudent layperson would interpret as an emergency medical condition, is entitled to be examined and treated as an emergency patient under the EMTALA.

New US Centers for Medicare & Medicaid Services regulations take effect November 10, 2003 clarifying the responsibilities of Medicare-participating hospitals in treating individuals with emergency medical conditions.

We have placed the full forty-four page text of the announcement from the September 9, 2003 Federal Register on our website at http://www.nursinglaw.com/emtalaregs.pdf

FEDERAL REGISTER
Pages 53221 – 53264
September 9, 2003

Refusal of Consent to Treatment Documentation

A hospital meets the requirements of the new regulations if the hospital offers an emergency patient an appropriate screening examination and stabilizing treatment and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of the examination and treatment, but the individual (or a person acting on the individual's behalf) does not consent to the examination or treatment.

The medical record must contain a description of the examination, treatment, or both if applicable, that was refused by or on behalf of the individual.

The hospital must take all reasonable steps to secure the individual's written informed refusal of treatment (or that of the person acting on his or her behalf). The written document should indicate that the person has been informed of the risks and benefits of the examination or treatment, or both.

Delay in Examination or Treatment Insurance Status

A hospital may not delay an appropriate medical screening examination or further medical examination and treatment in order to inquire about the individual's method of payment or insurance status.

A hospital may not seek, or direct an individual to seek, authorization from the individual's insurance company for screening or stabilization services to be furnished by a hospital, physician, or non-physician practitioner until after the hospital has provided the individual with the required appropriate medical screening examination and initiated any further medical examination and treatment that may be required to stabilize the individual's emergency medical condition.

Delay in Examination or Treatment Prior Medical History

An emergency physician or non-physician practitioner is not precluded from contacting the individual's physician at any time to seek advice regarding the individual's medical history and needs that may be relevant to the medical treatment and screening of the patient, as long as this consultation does not inappropriately delay required services.

Delay in Examination or Treatment Registration Process

Hospitals may follow reasonable registration processes for individuals for whom examination or treatment is required by this section, including asking whether an individual is insured and, if so, what that insurance is, as long as it does not delay screening or treatment.

Reasonable registration processes may not unduly discourage individuals from remaining for further evaluation.

(*Editor's Note: A November 10, 1999 Special Advisory Bulletin from the HCFA Office of Inspector General dealt extensively with the topics above, but, strictly speaking, only now are there mandatory Federal regulations here.)*

FEDERAL REGISTER
Pages 53221 – 53264
September 9, 2003

Bowel Habits: Court Finds Nursing Care Plan, Assessment, Charting Adequate, No Link To Delayed Diagnosis Of Patient's Colon Cancer.

The resident was admitted to the nursing home at age seventy-nine with medical diagnoses of Alzheimer's disease, depression, cerebral atherosclerosis, senile dementia with delirium and chronic mental syndrome.

Four years later she went to the hospital for abdominal pain. A colonoscopy in the hospital revealed a Stage II colon cancer in the cecal region. She had colon resection surgery and then went back and forth between the hospital and the nursing home. She died fourteen months after the cancer was diagnosed.

The family sued the nursing home for wrongful death, alleging nursing negligence in the lawsuit. The jury believed the nursing home had provided sub-standard nursing care in violation of the state's Nursing Home Residents' Bill of Rights and awarded a verdict of $65,000 compensatory damages and $25,000 attorney fees.

The Court of Appeal of Louisiana threw out the jury's verdict.

First, the nursing care the resident received was completely adequate under the circumstances.

Second, assuming the nurses actually did not adequately communicate to the physician that the resident was suffering from constipation, there would be no basis to suspect colon cancer based only on the fact she was constipated without other telltale signs like rectal bleeding, changes in eating habits, changes in behavior, weight loss, abdominal pain, malaise, etc.

Constipation A Common Problem For Elderly Nursing Home Patients

Due to various age-related factors, constipation is an almost universal problem among elderly nursing home residents. As the court pointed out, in itself constipation is not an illness and it is not realistic for nurses or physicians to take it as a sign of illness unless it is accompanied by other factors.

Nurses routinely take measures to combat constipation without a physician's order, like encouraging mobility and fluid and fiber intake. Nurses routinely administer stool softeners and laxatives as needed with an order from a physician.

The legal standard of care for nurses in a nursing home must take into consideration the fact that nursing home residents need to live within the least restrictive environment possible in order to retain their individuality and some personal freedom and preserve their dignity and personal integrity.

For a resident who is semi-independent, even one with Alzheimer's, the goal of care planning is for the resident to take care of as many activities of daily living as possible, including using the restroom by herself as best she can.

For Alzheimer's residents and those with problems with regularity, aides are instructed to remind them and offer assistance every two hours to use the restroom. Aides are permitted only to document bowel movements they personally observe. It is not unusual for bowel movements not to be charted.

Without other telltale signs that staff tend to notice, constipation is not a red flag that a resident may have colon cancer.

COURT OF APPEAL OF LOUISIANA
August 20, 2003

Nursing care plans routinely call for the resident's bowel habits to be monitored and charted. At the same time good nursing practice and legal regulations require residents to be given the utmost practicable privacy and respect for personal independence. That is, they are to go to the bathroom alone whenever possible.

Medical Testing Not Indicated

Although routine CBC testing would reveal anemia and anemia is generally associated with colon and other cancers, it is not customary for nurses to seek routine orders for blood draws just to monitor their patients, or for physicians to order blood draws unless there are more specific signs that blood tests are indicated.

According to the court, it is also not within the scope of nursing practice for nurses routinely to test patients' stools for occult blood without a physician's order, even though that might indicate the beginning stages of colon cancer.

Nursing Documentation

The court said the primary method nurses communicate with physicians is by careful flow charting and nursing progress notes. The court found the charting of this resident's bowel habits was sporadic at best. However, without a physician's order it is simply not within the scope of nursing practice routinely to follow patients into the bathroom to chart bowel movements or to chart bowel movements that have not been directly observed by the staff charting them.

Even if the nursing staff were carefully documenting her constipation, constipation does not require nursing follow-up for possible colon cancer without other signs. In this case those signs were not first seen by the physicians until after the colonoscopy. **Hinson v. The Glen Oak Retirement System, __ So. 2d __, 2003 WL 21976413 (La. App., August 20, 2003).**

O.R.: Prep Solution Under Tourniquet, Patient's Thigh Burned.

The patient had to have surgery to repair an anterior cruciate ligament tear in her left knee.

The perioperative nurses who were hospital employees prepped the knee by scrubbing her leg from mid-thigh to mid-calf with a Betadine solution. A tourniquet was applied above the knee to restrict blood flow to the lower extremity during the procedure.

After the procedure it was discovered the patient had a chemical burn on the back of her thigh, an area not within the field of the surgery.

Apparently some of the Betadine prep solution leaked under the tourniquet. When the tourniquet was inflated the pressure of the tourniquet on the Betadine solution against the patient's skin most likely caused the chemical burn, according to the Court of Appeals of Iowa.

The surgeon, the nurse anesthetist and the anesthesiologist collectively had exclusive control. They will have to sort out who is responsible

COURT OF APPEALS OF IOWA
UNPUBLISHED OPINION
September 10, 2003

The hospital paid an undisclosed settlement to the patient, leaving the surgeon, nurse anesthetist and his supervisor the anesthesiologist as defendants in the suit.

The court ruled the patient had the benefit of the legal doctrine of *res ipsa loquitur*, meaning the remaining defendants each had to disprove their own responsibility for her injuries. **Pillers v. The Finley Hospital, 2003 WL 22087488 (Iowa App., September 10, 2003).**

Forgery: False Nursing License Given To Employer, Nurse Convicted.

An individual just hired as a nursing supervisor in a long-term care facility was asked for her nursing license.

She said she had just graduated and taken her boards and was awaiting the results. Being unable to verify that, the employer again insisted on seeing her nursing license. She handed over a photocopy of a nursing license in her name with the word "Void" stamped on it.

Any person who shall utter and publish as true any false, forged, altered or counterfeit record, deed, instrument or other writing knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud, shall be guilty of the crime of uttering and publishing.

COURT OF APPEALS OF MICHIGAN
September 9, 2003

As a general rule, as pointed out by the Court of Appeals of Michigan, the crime of forgery occurs not when a person prepares or possesses a false document, but when a false document is presented as real in an attempt to obtain something under false pretenses. This criminal act is referred to as uttering and publishing.

The court ruled that a nurse presenting an invalid nursing license to an employer as real in an attempt to obtain employment under false pretenses commits the crime of uttering and publishing. **People v. Cassadime., __ N.W. 2d __, 2003 WL 22086011 (Mich. App., September 9, 2003).**

Nursing Home Bill: Power Of Attorney *versus* Responsible Party.

In a recent unpublished opinion, the Superior Court of Connecticut ruled that a family member with power of attorney for a nursing home resident's affairs is not automatically considered the responsible party required to pay the bill.

The court pointed out the admission papers had two places for someone other than the resident to sign if someone else had to sign for the resident.

One signature line was for a legal guardian or person holding power of attorney to sign to consent to care.

Another signature line was for the responsible party to co-sign for the resident to assume responsibility for payment.

If the person holding power of attorney does not also sign as the responsible party, the person holding power of attorney is not financially liable. **Gladeview Health Care Center v. Grande, 2003 WL 22040626 (Conn. Super., August 7, 2003).**

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Abuse: Nurse Slapped, Shoved Alzheimer's Patient, Criminal Charges Upheld.

An eighty-three year-old nursing home resident was physically in good shape but had been diagnosed with Alzheimer's and was prone to bouts of dementia where she would wander toward a particular door looking for her parents and then try to get out of the building.

The nursing home fitted her with a bracelet that automatically locked the door whenever the wearer of the bracelet came within fifteen feet of the door, then unlocked the door for fire-safety reasons fifteen seconds later. Staff basically had fifteen seconds to notice the elopement attempt and redirect the resident.

The crime of abuse of a resident of a care facility is knowingly causing physical harm to a person by physical contact or by the inappropriate use of a physical or chemical restraint, medication or isolation.

COURT OF APPEALS OF OHIO
August 11, 2003

During such an episode, while the resident was pushing on the locked door, a nurse came up from behind her, slapped her on the buttocks, grabbed her by the shoulders, turned her around and shoved her back up the hallway.

An aide reported the incident to the director of nursing who interviewed another nurse on duty and also verified a red mark was present on the resident's buttocks consistent with being struck there.

The Court of Appeals of Ohio upheld the nurse's conviction of one count of felony patient abuse. **State v. Barcharowski, 2003 Ohio 4281, 2003 WL 21920952 (Ohio App., August 11, 2003).**

Sexual Assault: Alzheimer's Patient Assaults Another Resident, Court Says Nursing Home Is Responsible.

The victim was a resident at the nursing home and was unable to care for or protect herself.

The perpetrator was also a resident at the nursing home.

He was known to wander into other residents' rooms. He was known to be abusive, both with physical violence and crude sexual displays and comments.

This was all established as true with uncontradicted testimony from current and former employees of the nursing home.

The nursing home had a legal obligation to provide a safe place for the victim.

Instead, although the nursing home's staff were aware of the danger the perpetrator posed, the nursing home did not take action to prevent the assault.

The nursing home's nursing administrator admitted in her court testimony that if they had taken some action, being on notice of a potential problem, the assault would not have occurred.

COURT OF APPEALS OF MISSISSIPPI
September 9, 2003

The Court of Appeals of Mississippi had a difficult decision to make, weighing whether a nursing care facility should be held responsible and legally liable in a civil lawsuit for damages when one resident sexually assaults another.

On balance the Court of Appeals believed the nursing home was negligent and should be held liable.

Sexual Verbalizations versus Sexual Acting Out

The court acknowledged nursing experts' testimony offered on the nursing home's behalf that male Alzheimer's patients very commonly verbalize sexually inappropriate content. It is not uncommon for some to act out sexually.

The court believed there is a line between talking and doing. That is, it does not necessarily pose a danger when an Alzheimer's patient makes crude remarks or says he is going to do something. It is very different when an Alzheimer's patient acts out in a frightening manner, going into other residents' rooms without any pants on as he did on more than one occasion, walking the halls unclothed or masturbating in front of the nurses.

Nurses Wanted To Transfer Him

The nursing home's nurses did appreciate the danger and did try to take steps to have the perpetrator transferred. There were numerous documented conversations initiated by the nurses with the perpetrator's treating physician and with a psychiatrist, resulting in nothing being done.

While conceding the nurses did not have legal authority to restrain the perpetrator without a physician's order and did not have legal authority to initiate an involuntary transfer to another facility without a physician's order, the court still held the nursing home liable for payment of compensation for not protecting a vulnerable individual. **Dupree v. Plantation Pointe, __ So. 2d __, 2003 WL 22077863 (Miss. App., September 9, 2003).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Needlestick: Visitor Cannot Sue For Fear Of HIV.

The Court of Appeals of Kentucky, in a recent unpublished opinion, did not elaborate on how a hospital visitor's leg came to be stuck by a used hypodermic needle except to say the needle was improperly discarded on a nurse's medication cart. The needle itself was never located and was never tested for contamination.

The jury awarded the visitor $1,150 for physical and emotional distress from the injury and follow-up testing. However, because follow-up testing of the visitor was consistently negative for HIV and other infectious diseases the judge would not let the jury even consider awarding compensation for fear of HIV.

The Court of Appeals agreed that without proof the needle was contaminated and infection could have resulted, there is no basis for a lawsuit over fear of HIV infection, as other US courts have ruled that have had to consider the same question in similar lawsuits. **Booker v. Galen of Kentucky, Inc., 2003 WL 21828795 (Ky. App., August 8, 2003).**

Emergency Room: Patient Left Voluntarily, No EMTALA Violation.

The hospital's director of emergency services who was an R.N. met the patient in the hallway, sat her in a wheelchair, asked about her complaints, quickly assessed her status and wheeled her into the emergency department.

The E.R. triage nurse saw her twenty-two minutes later, classified her as non-urgent and checked her twenty-five and forty minutes later.

When her family wheeled her out to the parking lot the triage nurse and a security guard went after them. The family adamantly insisted they were taking her elsewhere, so the triage nurse and the guard helped her into the car. She died later that night from meningitis at another facility. The Court of Appeals of Texas, in an unpublished opinion, found no violation of the Emergency Medical Treatment and Active Labor Act. **Johnson v. Nacogdoches County Hospital, 2003 WL 21999408 (Tex. App., August 20, 2003).**

Sleeping On The Job: Court Upholds Arbitrator's Finding Of Just Cause For Nurse's Termination.

A hospital staff nurse was on the hospital's registry of staff nurses who wished to make themselves available for private-duty assignments on top of their assigned staff-nursing shifts.

At the time in question she was working the midnight shift private-duty for the family of a hospital patient recovering from neck surgery who had a tracheostomy and was unable to talk, only being able to communicate with gestures and written notes.

A family member complained to the hospital that the nurse had fallen asleep on the job and failed to respond to the patient's needs. There was no actual harm to the patient.

After an investigation, in which a staff nurse on the floor verified she had fallen asleep, the hospital terminated her. The union filed a grievance which was turned down by an arbitrator.

The nurse was sleeping on the job according to a family member and another nurse working on the floor.

Her misconduct did not harm the patient but it did compromise patient care.

The hospital had just cause to terminate the nurse. It did not change anything that she technically was working private-duty for the family rather than for the hospital.

UNITED STATES DISTRICT COURT
NEW YORK
August 28, 2003

The US District Court for the Southern District of New York agreed with the arbitrator that a nurse falling asleep on the job is misconduct justifying termination, with or without harm to the patient.

In addition, under US Federal labor law, when the union pursues a grievance on a worker's behalf and the union does not appeal the arbitrator's decision turning down the grievance, the employee cannot herself file an appeal in court unless the union was guilty of failure to provide fair representation thus undermining the arbitration process. **Velasco v. Beth Israel Medical Center, __ F. Supp. 2d __, 2003 WL 22038289 (S.D.N.Y., August 28, 2003).**