

## Whistleblower: Court Refuses To Dismiss Nurse's Lawsuit.

A nurse discovered a smelly substance which she feared was black mold in a cabinet under the sink in the dialysis unit of the health facility of the correctional institution where she worked.

She talked to a number of individuals at the facility about what she discovered.

One of them, who had completed an eight-hour janitorial orientation but had never been trained to collect and analyze samples and identify mold, believed it was just a combination of dirt, rust and calcium from a leaking p-trap under the sink.

Further up the facility hierarchy, the assistant health services administrator, who had degrees in both chemistry and biology, also had the general impression, without any testing or analysis, that it was not mold. The nurse collected samples on sterile q-tips, but no one was interested.

She was then informed that the under-sink space had been thoroughly cleaned and bleached, but the suspicious odor returned shortly anyway.

A few days later the nurse observed a substance she believed was the same she had seen in the cabinet under the sink had spread to the baseboards in an adjacent treatment room.

Finally, after the deputy warden refused to listen to her complaints, the nurse contacted the local office of the Occupational Safety and Health Administration and informed her superiors that she had done so.

### Nurse Terminated for Her Complaints

The nurse sued her former employer alleging she was terminated because her superiors considered her a "loud-mouth" and a "troublemaker" who was acting unprofessionally by creating tension over health and safety issues that could boil over into inmate complaints. She was also accused of going outside the chain of command with her complaints, which was also considered unprofessional conduct.

The US District Court for the Middle District of Tennessee ruled that the nurse fit the legal definition of a whistleblower who was entitled to protection from employer reprisals under state law and she had the right to sue over her termination. **Gore v. Chardonay**, 2012 WL 3552882 (M.D. Tenn., August 16, 2012).

***The question is whether the nurse complained about an illegal activity.***

***An employee is protected by the state's whistleblower law from employer reprisals if the reprisals were the result of the employee refusing to participate in or to remain silent about illegal activity or activities by the employer in the workplace.***

***The courts have ruled that Joint Commission National Patient Safety goals are merely expressions of "aspirations" about patient safety. A complaint by a nurse that the Joint Commission's goals not being met is not a valid basis for a whistleblower case even if the nurse suffers consequences afterward.***

***However, in this case the nurse was able to cite a specific state Department of Health regulation which is intended to protect the public health and safety and which does apply directly to her work environment, a dialysis clinic, and which expressly says that the physical environment of the facility must be maintained in a safe, clean and sanitary manner.***

***The nurse has the right to sue her former employer over her termination.***

UNITED STATES DISTRICT COURT  
TENNESSEE  
August 16, 2012

## Home Health: Court Says Nurses Must Have Caused Patient's Injury.

The husband wanted to sue his late wife's home health agency alleging that her home health nurses negligently fractured her arm while caring for her.

The husband's lawyers, however, waited until after the statute of limitations had expired before they filed the lawsuit, so the lawsuit against the home health agency was dismissed. The husband then sued his lawyers for legal malpractice.

***The patient's E.R. records showed a fracture consistent with a twisting type injury to the right upper extremity with a concurrent axial loading likely caused by falling or being dropped on to her arm.***

***The quadriplegic total-care patient could not have caused the injury to herself.***

COURT OF APPEALS OF OHIO  
August 14, 2012

The Court of Appeals of Ohio ruled that there was sufficient circumstantial evidence for a case of nursing negligence against the home health agency.

Therefore, although it was no longer possible to sue the home health agency, the husband did have a valid case of legal malpractice against the lawyers for allowing the statute of limitations to run out before filing what would have been a valid court case against the home health agency.

The Court ruled it was not relevant that one nurse from the agency cared for the patient from 7:00 a.m. to 4:00 p.m. and another nurse from the same agency, who first reported the fracture to the husband who called the ambulance, was on duty from 4:00 p.m. until 11:00 p.m. One or the other nurse was the only person who could possibly have caused the problem for this bedridden totally dependent quadriplegic patient. **Carter v. Vivyan**, 2012 WL 3291824 (Ohio App., August 14, 2012).

## HIPAA: Disclosure Of Protected Health Information By Employee Whistleblowers.

### Uses and disclosures of protected health information: general rules.

(a) *Standard.* A covered entity may not use or disclose protected health information, except as permitted or required by this subpart ...

(1) *Permitted uses and disclosures.* A covered entity is permitted to use or disclose protected health information as follows:

- (i) To the individual;
- (ii) For treatment, payment, or health care operations ...

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(iv) Pursuant to and in compliance with a valid authorization ...

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(j) (1) *Disclosures by whistleblowers.*

A covered entity is not considered to have violated the requirements ... if a member of its workforce or a business associate discloses protected health information, provided that:

(i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services or conditions provided by the covered entity potentially endangers one or more patients, workers or the public; and

(ii) The disclosure is to:

(A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity or to an appropriate health care accreditation organization for the purpose of reporting the allegation of failure to meet professional standards or misconduct by the covered entity; or

(B) An attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options of the workforce member or business associate with regard to the conduct described in paragraph (j)(1)(i).

CODE OF FEDERAL REGULATIONS  
Title 45 Section 164.502

## Patient Confidentiality: Nurse Cannot Use Patient Information In Her Whistleblower Lawsuit.

***The nurse will be barred from using her log or any of the confidential information in her log as evidence in her lawsuit against the hospital alleging she was terminated for legitimate whistleblowing activities.***

***The US Health Insurance Portability and Accountability Act contains limited exceptions to the ironclad rule of strict confidentiality which allow certain disclosures of confidential information by whistleblowers.***

***An employee can disclose information he or she has taken from a medical chart to a governmental agency or authority with the power to investigate the conduct or conditions at issue or to an appropriate healthcare accreditation organization.***

***Information taken by the employee from a chart can also be disclosed to the employee's attorney for the purpose of obtaining advice as to the employee's legal options as a whistleblower.***

***However, the HIPAA does not allow a healthcare employee to use confidential patient information in the employee's own lawsuit which the employee has taken from a patient's chart.***

UNITED STATES DISTRICT COURT  
OHIO

July 27, 2012

An RN employed in a psychiatric hospital began having suspicions that the facility's medical director was involved in fraudulent and illegal activities. She began keeping a log of his allegedly suspicious activities which included specific patients' names, ages and room numbers.

She took her log home with her, photocopied it and sent the photocopy to a state Department of Health investigator. The investigator decided the Department would not pursue a case against the medical director. The nurse also gave a copy of her log to her own attorney.

### **Nurse Terminated for Violation of Patient Confidentiality**

The nurse was terminated for contacting and meeting a patient's family at an off-site location, considered improper fraternization with a family member, and for improperly removing confidential information from patients' charts.

### **Nurse Barred From Using Confidential Information in Her Own Lawsuit**

The US District Court for the Southern District of Ohio pointed out that a healthcare employee is allowed to remove confidential patient information from a patient's chart to disclose it to a health oversight agency authorized by law to investigate the relevant conduct or conditions at the facility or to an appropriate healthcare accreditation organization.

A healthcare employee can also provide confidential patient information to his or her own attorney to obtain advice as to the employee's legal options.

A healthcare employee, however, is not allowed to use confidential information the employee has taken from a chart such as photocopies of medical records or even the patient's name or other confidential data copied by hand from a chart as evidence in a whistleblower lawsuit or other legal proceeding.

To be able use such information in court the employee or a lawyer must obtain it through the court's civil discovery processes which have "de-identification" procedures built in to protect patients' privacy. ***Cabotage v. Ohio Hosp. for Psych.***, 2012 WL 3064116 (S.D. Ohio, July 27, 2012).