

# Importance of Nursing Assistant / Nursing Aide (CNA) Patient Advocacy

## Avoiding Liability Bulletin - January 15, 2016

The CNA's role in protecting a patient's safety and overall well-being cannot be overemphasized. Your role includes physical safety and the emotional well-being of the patients for whom you care. It may also include speaking up about patient care issues when patients' physical and emotional well-being are compromised, as the following care illustrates.<sup>1</sup>

Karen, a CNA who had worked at a nursing home in Maine for eight years became concerned when staffing levels for CNAs on her shift dropped from 3 to 4 rather than 4 to 5. As a result, the CNA staff was unable to answer residents' call bells promptly. Residents were at risk when getting up themselves to use the bathroom or when trying to transfer themselves from their beds to a chair or a wheelchair.<sup>2</sup>

Karen voiced her concerns to the Director of Nursing about the staffing levels and resulting risks to the residents. She also spoke "quite a few times" to a charge nurse about this issue. On one evening late in December when the facility lost power, Karen spoke with the nurse educator that there were not enough CNAs to get dinner to the residents while also dealing with the power outage.

Shortly after this conversation, the Director of Nursing spoke with Karen about an incident reported to her by a charge nurse. According to one of the charge nurses, she heard another CNA talking about Karen's hitting a resident on the hand while caring for the resident.

Karen signed a statement that a resident became combative and she tried to hold the resident's hand so he would not hit her. Karen was suspended pending an investigation into the incident. Shortly after signing the statement, Karen realized she was not working on that wing and called the Director of Nursing to tell her that the statement was not correct.

An investigation was done and it was decided by the nursing home administrator and HR director that Karen should be terminated, despite Karen's emphatic denial of working on that wing during the day in question. Karen filed a case alleging that her termination was in retaliation for her complaints which were protected under the state's whistleblower act.

The trial court granted the nursing home's summary judgment motion and Karen appealed. The nursing home cross-appealed.

The appeals court, analyzing the state whistleblower act and comparing Karen's conduct to it, stated that Karen's termination was adverse (unfavorable), thus fulfilling one of the elements that

trigger's the act's protection. The court then analyzed the two remaining elements required under the act.

Karen's many complaints satisfied the act's requirement that complaints by an employee be made in "good faith", and that the complainant has "reasonable cause to believe an act or omission.. constitutes a deviation from the applicable standard of care for a patient by an employer charged with the care of that patient."<sup>3</sup>

The third element of the act requires that the protected activity of the employee must be the basis or part of the basis of the termination. The court carefully evaluated the facts surrounding Karen's termination and concluded that the record in the court below was sufficient to allow a jury to reasonably find that Karen's complaints were protected under the state whistleblower protection act and her termination was at least in part by those complaints.

The court vacated the summary judgment decision in favor of the nursing home and remanded the case back to the trial court for further proceedings consistent with its opinion.

This case is a valuable lesson for you as a CNA. Although litigation was necessary after Karen was terminated, she was able to seek, and obtain, the protection of the state's whistleblower act.

Karen has the chance to obtain a monetary award from the employer for being terminated in violation of the state law, either through a jury trial or through a settlement with the employer. It is pretty clear that she would not want her job back, although that could be a resolution as well.

In addition, and also very important, she has a chance to clear her name, so that the termination is recognized as not due to an alleged abuse of a resident, but rather due to her employer's retaliation for her advocacy for the residents at the nursing home.

If you are ever in such a situation, sharing concerns with those in and up the "chain of command", hopefully in writing, but certainly orally, and continuing to voice them until they are heard, is vital. If terminated due to your vocalizations, seek the advice and counsel of an attorney as soon as possible.

Advocating for patients or residents is never easy. Moreover, it may be legally problematic. Although a resolution in your favor may take time, conforming to the mandates of your state whistleblower act provides you with the safeguards you need to protect the well-being and safety of those for whom you provide care.

1. Cormier v. Genesis Healthcare, et al., Maine Supreme Judicial Court, 2015 ME 161, 1-16.
2. Id ., at 2.
3. Id ., at 8.

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