

## Using a Personal Cell Phone Photo and Good Intentions When Documenting Patient Care Provide No Legal Protection

### Avoiding Liability Bulletin - July 15, 2016

Earnest was a ED Tech whose job it was to act as a paramedic and monitor patients that had been restrained and monitor other psychiatric patients that came into the ED. One day, he was assigned to a patient who was in restraints due to intoxication and violent behavior.<sup>1</sup>

The patient had a catheter and he asked the ED Tech to remove it. The Tech attempted to remove the catheter but noted that a large amount of tape had been used to attach the tubing to the patient's upper thigh.

Because the Tech found the amount of tape used to be "disturbing" and the fact that he had never used tape to secure catheter tubing, he believed the patient had been mistreated.

Earnest went to the charge nurse and asked her for permission to take a picture of the patient's leg and the tape because he wanted to bring this treatment to the attention of hospital administration.

The charge nurse told the Tech to "just go ahead and deal with it", which he believed was permission to take the picture. Earnest also asked the patient for permission to take the picture, which the patient granted.

The tech took out his personal cell phone and took a picture of the patient's upper thigh.

Several days later, a meeting took place with the charge nurse and a member of the human resources department. His concerns were not acknowledged. In fact, he was told that he "brought the possibility of liability against the hospital on the patient's part".<sup>2</sup> Earnest was subsequently terminated for the "unauthorized use of his cell phone" and violating the patient's privacy rights.

Earnest believed the reasons for his termination was a "pretext" for the hospital's displeasure of him bringing the mistreatment to the patient's attention and documenting it with his cell phone camera, so he filed a case against the facility, alleging wrongful termination under the state's whistleblower protection statute.

The trial court granted the hospital's summary judgement motion based on the failure of the Tech to assert what public policy was violated when he was terminated and dismissed his case. Earnest appealed that decision.

The Court of Appeals of Ohio carefully reviewed the record in the trial court as well as the

applicable state law. It upheld the decision of the trial court.

According to the testimony introduced in the lower court, the facility's policy prohibited the use of personal cell phones while at work. If a photograph was needed in the ED, it was to be taken with a Polaroid camera available there. Moreover, a patient's consent must be written using a facility form for that purpose.

The Court also opined that the ED Tech did not meet his burden of proof that he was wrongfully terminated and clearly held that the hospital had the right to terminate him. No public policy existed that would prevent an employer from terminating an employee when an "employee alerts a patient to potential mistakes a hospital may have made when providing treatment".<sup>3</sup>

Whistleblower protection is important when a nurse or other employee observes mistreatment of patients in any form. However, the requirements of the statute have to be met by the nurse who decides to take his or her concerns to the appropriate individuals or to an outside agency.

As a nurse, your legal and ethical mandates require you to notify others when patient mistreatment occurs. You need to know what your state law says about how and where to report your concerns. You also need to know your facility policy about the use of personal cell phones while at work and adhere to that policy without fail.

It is always a wise move to consult with a nurse attorney or attorney before initiating any reporting so you are protecting both you and the patient from maltreatment. As this case underscores, the best of intentions will not be of much help.

## FOOTNOTES

1. Earnest Strodbeck v. Lake Hospital System, 2011-Ohio-2327, at 2.
2. Id.
3. Id., at 10.

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