

Louisiana Employment Law Letter

H. Mark Adams, Editor; Sidney F. Lewis V and Jennifer L. Anderson, Associate Editors

December 2001

Vol. 10, No. 9

EMPLOYEE MISCONDUCT

Court's decision is a bitter pill for nurse who got caught 'playing doctor'

A hospital fired one of its nurses because she admitted to performing a medical procedure on a patient without a doctor's order and falsifying the patient's record to reflect that a "verbal order" had been given. A pretty solid case of misconduct justifying discharge, don't you think? Certainly such an employee would not sue, and if she did, she'd lose, right? Not necessarily.

Under the category "we told you so," this case illustrates precisely how inconsistent discipline (i.e., failing to impose the same punishment for the same infraction under similar circumstances) can lead to serious legal consequences. And as if that's not enough to write about, this case also gives us cause to extol the virtues of having unexpressed thoughts (i.e., keeping your mouth shut) and keeping personnel matters private. These three lessons, which we've delivered through the pages of our newsletter time and time again, found their way into a single case that initially resulted in a jury verdict against the employer of more than \$500,000. But the case didn't end there because the employer challenged the verdict. The outcome (and how the case got there) is something you just can't afford to overlook.

Who needs doctors, anyway?

The intensive care unit nurse in this case could be accused of many things, but lack of initiative is not one of them. The nurse took it upon herself to perform a medical procedure without a doctor's order even though there was a doctor available to provide one. Particularly, she removed a "Salem Sump," a large bore tube used for suctioning fluids and feeding, from a patient's stomach. The eager nurse then inserted a smaller "nasogastric tube" into the patient's stomach. Complicating matters, she then located the patient's chart and wrote that she had performed the procedure in accordance with a doctor's "verbal order" when, in reality, no such order had been given.

When the patient's attending physician arrived, he was upset to learn that the nasogastric tube had been inserted and was concerned about the patient's well-being. After checking the chart and seeing that a "verbal order" for the procedure had been given, he followed up with the doctor who purportedly gave the order. That doctor denied giving any such instructions to the nurse.

Subsequent meetings between the nurse, two immediate supervisors, her ultimate supervisor, the medical director of the hospital, and a human resources representative revealed that the nurse had likely violated hospital policy by acting without a doctor's order and falsifying medical records, so the hospital instituted a full investigation into her conduct. During two separate meetings with the nurse, she admitted that she inserted the nasogastric tube without an order and subsequently wrote in the chart that she had received a verbal order without having actually received one. The nurse then stated "she wouldn't do it again."

The hospital ultimately decided to fire the nurse. Four days before Christmas and one month before her third maternity leave, the nurse was called into work by her supervisor and told she was being fired for two reasons: implementing a procedure without a physician's knowledge or consent and falsifying medical records.

Situation becomes very 'touch and go'

You're probably thinking that the hospital has a pretty persuasive case justifying the nurse's discharge. Unfortunately, things were not so clear-cut in the hospital's favor. At the time of her discharge, the nurse was in her third trimester of pregnancy and, as we mentioned, was one month away from taking her third maternity leave in less than three years. By no means are we suggesting that an employee should be treated specially or better than others simply because she is pregnant (assuming, of course, that she does not have a serious health condition, disability, or some other complication). No, what made this case different was that another nurse, who was not pregnant at the time, also performed a medical procedure on a patient without a physician's knowledge or consent. The nonpregnant nurse, however, received only a verbal reprimand.

Moreover, the pregnant nurse claimed her supervisors had made the following comments to or about her:

- One of the nurse's supervisors told a co-worker she had terminated the nurse because "she's been pregnant three times in three years."
- At a performance review meeting, one of the nurse's supervisors said, "I don't know how to classify you because you were gone three months and now you'll be gone three months again," apparently referring to the nurse's prior and forthcoming pregnancy leaves.
- When the nurse inquired about working a "compressed" shift schedule, her supervisor retorted, "you're still costing the hospital money."
- Another supervisor once asked the nurse, following her illogical interpretation of a doctor's instructions, "How stupid could you be?"
- The same supervisor also told the nurse that she "needed to choose between nursing and family."

The nurse sued the hospital after her discharge, alleging, not surprisingly, that she was discriminated against because of her pregnancies. After hearing the evidence, the jury sided with the nurse and awarded her more than \$500,000 in damages. But the hospital challenged the verdict, and both the trial judge and the U.S. Fifth Circuit Court of Appeals in New Orleans sided with the hospital.

On the road to recovery: Employer's case improves

The appeals court explained that the nurse had raised a question about the truth of the hospital's first reason for her discharge (*i.e.*, that she had performed a medical procedure without a doctor's order) because the hospital had merely reprimanded rather than discharged a nonpregnant nurse for virtually the same offense. But the nurse failed to discredit the hospital's second, independent reason for her discharge (*i.e.*, that she falsified a patient's medical records). In fact, the hospital offered evidence that it had previously discharged another nonpregnant nurse for having falsified medical records. Thus, the hospital had an undisputed, nondiscriminatory reason justifying the nurse's discharge.

The court also disregarded the alleged derogatory comments directed toward or made about the nurse. It reasoned that the comments were mere "stray remarks" that were either unrelated to her discharge, too remote in time to be connected to her discharge, and/or made by persons who lacked the authority to fire her. Finally, the fact that the hospital had conducted a thorough investigation verifying the nurse's misconduct ultimately tipped the scale in the hospital's favor. *Wallace v. Methodist Hospital*, No. 00-20255, 2001 WL 1267292 (5th Cir. Nov. 7, 2001).

So many lessons learned

Fortunately, things worked out for the employer in the end. It would truly seem unjust for an employee who admitted to such misconduct to profit from her wrongdoing. Nevertheless, this case presents a terrific learning opportunity for many employers. It exemplifies the importance of keeping personnel matters private. It is imperative that supervisors not discuss an employee's termination or other personnel matters with the employee's co-workers or others who do not have a need to know the information -- before, during, or after the fact. Had the supervisor in this case simply kept personnel matters private and not discussed the nurse's termination with one of her co-workers, this lawsuit might have been avoided.

This case also reminds us of another important lesson: Apply policies and discipline uniformly. By treating two nurses who violated the "doctor's order" rule differently, the employer laid the groundwork for a textbook discrimination claim. If you are considering an adverse employment action, ask yourself, "Has this offense occurred before, and if so, what were the consequences?" By being consistent when imposing discipline, you can reduce the risk of discrimination claims.

We would be remiss if we did not point out that the employer also did several things correctly. First of all, it was careful to write down each and every reason behind the nurse's discharge. As we all know, discharges rarely occur in a vacuum. There are often several factors motivating an employer's decision to discharge an employee. Yet employers often document only one of those factors as the official reason for the discharge. While separation notices and termination forms may call for a succinct and short reason explaining the discharge, you should briefly state all the reasons for your action in cases of multiple rules violations.

The employer also thoroughly investigated the suspected misconduct rather than jumping to a conclusion that might have been erroneous. Confidentiality, consistency, and thoroughness are three valuable rules you should always follow when considering and taking an adverse employment action against an employee.

Copyright 2001 M. Lee Smith Publishers LLC

LOUISIANA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Louisiana employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The State Bar of Louisiana does not designate attorneys as board certified in labor law.