

## Controlled Substances: Nurse Guilty Of Medication Errors, Discrimination Suit Dismissed.

A male nurse of Russian ancestry was terminated from his position in the ICU after a series of errors in the administration and documentation of narcotics.

One of the incidents involved IV bags hung during the night containing fentanyl which emptied much more rapidly than the ordered drip rate, without evidence of leakage or patient overdose, leading to suspicion the nurse injected himself. The rest were basically failures to adhere strictly to rules for correct documentation.

### Russian Ancestry

#### National-Origin Discrimination

The US District Court for the District of Maryland stated at the outset that a Caucasian male nurse of Russian ancestry would be considered a minority for purposes of anti-discrimination law, but that is only one element of a discrimination case.

#### Documentation Errors

#### Legitimate Non-Discriminatory Reason for Termination

The Court said that the nurse demonstrated what it called a pervasive pattern of documentation errors involving controlled substances. Narcotics diversion could not be proven, but the nurse's errors and omissions nevertheless jeopardized the integrity of the facility's procedures, threatened its accreditation and put the health and safety of its patients at risk.

#### Other Nurses

#### Were Not Valid Basis for Comparison

Even if an employee has been proven guilty of misconduct that justifies termination or other severe disciplinary measures, the employee can still sue for discrimination if other non-minority employees were not disciplined as severely for basically the same offense or offenses.

Another nurse was verbally warned, not fired, for a series of medication errors, but she had not yet completed her competency training like the nurse in this case had. Still another nurse was also counseled rather than fired, but he violated several different facility policies only once each before accepting correction, not the same rules over and over again like the nurse in this case. **Volochayev v. Sebelius, 2011 WL 4747898 (D.Md., October 5, 2011).**

***The nurse cannot raise the issue of discrimination as a defense to his termination.***

***The facility is correct that the nurse in question failed to prove that he was performing his duties at a level that met the facility's legitimate expectations at the time of his termination.***

***The facility had legitimate, non-discriminatory reasons for firing him, despite the fact he was a minority.***

***The nurse had pervasive problems with documentation of his narcotic meds.***

***The nurse was aware of the procedures in question and the institutional risks raised by his conduct with regard to the facility's accreditation.***

***The nurse is not correct to argue there is any relevance to the fact that his conduct was never proven to have injured a patient.***

***Other nurses were counseled for their documentation issues rather than terminated.***

***However, their situations were not the same. One, unlike him, was basically still in training. Another nurse violated any given rule only once before accepting correction.***

UNITED STATES DISTRICT COURT  
MARYLAND  
October 5, 2011

## Arbitration: Agreement Is Valid, Family's Case Will Not Go Before A Jury.

After the patient passed away the family sued the nursing facility where she resided for ten months before they had her transferred elsewhere three months before she died. The cause of death was listed as end-stage Alzheimer's disease.

She was eighty-nine years-old, immobile and bedridden, requiring frequent repositioning by facility staff. She suffered from skin tears and bedsores, allegedly due to care planning which was inadequate and understaffing which was a factor in the facility being able to meet her needs.

### Facility Countered Family's Lawsuit By Asking for Arbitration

The facility's first response to the lawsuit the family filed in the local county Superior Court was to ask the Superior Court to dismiss the civil lawsuit in favor of arbitration based on the arbitration agreement signed by the resident the day she entered the facility.

The Court of Appeal of California agreed with the nursing facility and with the Superior Court that the family's lawsuit alleging malpractice and wrongful death belonged in arbitration.

### No Unfairness Found

The arbitration agreement informed the resident that if she signed it she would give up the right to have disputes with the nursing facility heard by a judge or jury, even if her family sued *post mortem*.

No one tried to take advantage of the resident by forcing her to sign something she or the family did not understand or want to sign. The arbitration agreement was not required as a pre-condition for admission and even if the resident did sign it she still had thirty days to revoke her signature and remain in the facility.

No evidence was given to the Court that the resident lacked mental capacity when she entered the nursing facility. Whether that was true was not the point. When a contract is signed mental capacity is presumed. Lack of mental capacity has to be proven. **Negrete v. Grancare, 2011 WL 4906602 (Cal. App., October 11, 2011).**