

## Freedom Of Speech: Court Says Nurse's Rights Were Not Violated.

A ventilator patient died in a county nursing home. The alarm was found turned off. The nurse who wrote the report to the county had a lot more to say in her report beyond the simple fact the alarm was turned off, but she was pressured by the nursing home's director of nursing to keep it to just that one issue.

The nurse sued, claiming her right to freedom of speech was violated.

***The Constitutional right to freedom of speech only applies to governmental action.***

***A private individual cannot violate another private individual's right to freedom of speech.***

***The nursing director of a public nursing facility is a public employee, but, unlike a police officer or a judge, does not perform official governmental functions, and cannot violate a private individual's right to freedom of speech.***

UNITED STATES DISTRICT COURT,  
NEW YORK, 2000.

The US District Court for the Southern District of New York threw out the nurse's lawsuit.

First, there was no proof of actual retaliation against the nurse. Second, only a government official can violate a private citizen's right to freedom of speech, not another private citizen. Although the nursing director was a public-agency employee, she is not a governmental official for Constitutional purposes. ***Carlucci v. Kalsched***, 78 F. Supp. 2d 246 (S.D.N.Y., 2000).

## Whistleblower: Court Validates Employee's Retaliation Claim.

***To have a valid employment retaliation lawsuit a whistleblower must meet all of the following conditions:***

***1. The whistleblower must disclose or threaten to disclose an allegation in writing and under oath to the state department of professional regulation.***

***2. The allegation must have been about an activity, policy or practice of the employer that is or was a violation of a state or Federal law, rule or regulation.***

***3. The employee must have given the employer written notification and a reasonable time to correct the problem.***

***4. The employee must have suffered retaliation in the form of some actual harm.***

***A hospital physician sexually abusing a patient is a clear violation of the law.***

***Going one step further, the law requires hospitals to have and to use peer-review procedures against unprofessional conduct by physicians practicing at the hospital.***

***A hospital not moving ahead with peer review and peer discipline against an offending physician is in itself a violation of the law.***

DISTRICT COURT OF APPEAL  
OF FLORIDA, 2000.

A female hospital employee who worked in the emergency room sued the hospital for retaliation after she was suspended and a probationary period was imposed upon her and she was transferred out of the emergency department with her hours reduced in her new department so that she could not make the money she needed and was not eligible for benefits.

This happened after she complained to hospital higher-ups, then to state authorities, that a male physician was fondling female patients in the examination room in the emergency department and was going in alone without a third person as required by hospital protocols.

The District Court of Appeal of Florida ruled she had valid grounds for an employment retaliation lawsuit against the hospital under the state's Whistle Blower's Act.

### **Complaint Within Internal Channels**

Before going to the state department of professional regulation, the employee first complained verbally and in writing to the hospital's administration, including her own supervisor in the E.R.

### **Complaint to State Department of Professional Regulation**

It was not clear from the court record whether the employee suffered retaliatory action before or after she complained to the state department of professional regulation. That did not seem to matter to the court, as long as she ultimately followed through and did it.

Her report to the state was in writing for the record as required by state law.

### **Violation of the Law**

To benefit from the Whistle Blower's Act, the employee must have complained of conduct by the employer that is a violation of the law. That is essential.

Here there was a staff physician sexually abusing patients. That is clearly against the law. And it is a hospital's legal responsibility to supervise and discipline staff physicians. Failing to do so is a violation of the law by a hospital, the court pointed out. ***Taylor v. Memorial Health Systems, Inc.***, 770 So. 2d 752 (Fla. App., 2000).