

# LEGAL EAGLE EYE NEWSLETTER

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## Whistle Blowing: US Courts Restrict Nurses' Rights, Give Their Employers Wider Latitude.

The US District Court for the District of Colorado has ruled that a 2006 US Supreme Court decision does apply to nurses.

In 2006 the Supreme Court sharply restricted the right of a public employee to claim free-speech protection under the First Amendment for speaking out on a subject of public concern that falls within the scope of the public employee's duties as a public employee.

### **Nurse's Primary Responsibility Was Patient Safety and Welfare**

The nurse in this case claimed she was terminated in retaliation for her complaints to her superiors and for allegations she raised in occurrence reports relating to inadequate staffing and various mix-ups in the hospital heart-transplant unit where she worked.

Even if her claim is true that she was a victim of retaliation, the court said, the First Amendment does not give the nurse the right to sue her former employer for violation of her Constitutional rights, as those rights are now defined by the US Supreme Court.

The essence of the court's ruling is that the nurse was not speaking out as a private citizen voicing concerns about a subject of public concern, but as a public employee whose official duty was to deal with the subject matter.



***The hospital's argument is correct that a recent US Supreme Court decision does apply to nurses and does restrict nurses' right to claim whistle blower protection for speaking out in some circumstances.***

***Was the nurse speaking out within the scope of the nurses' job responsibilities. If so, the nurse is not a whistle blower.***

UNITED STATES DISTRICT COURT  
COLORADO  
October 16, 2007

The nurse in question, according to the court, drafted and circulated numerous occurrence reports documenting nursing errors and so-called "near misses" as part of a wider campaign she had undertaken to demonstrate to hospital management that patient care was being endangered by insufficient nurse staffing on the unit.

The court ruled it was irrelevant whether these were legitimate issues of public concern. The relevant point was that this was part of her official duties as a nurse. That was true whether or not her job description formally allowed her to draft occurrence reports or delegated responsibilities to her for quality assurance.

The nurse also reported to an organ-procurement organization that the hospital tried to cover up an alleged incident of a heart meant for one patient actually being given to a different, mismatched patient.

Even if that really happened, the court said, and even if monitoring procurement and allocation of transplant organs was not one of the nurse's official job functions, it still related in general terms to the nurse's job as a nurse on the transplant unit.

Speaking out not as a private citizen but as an employee of the transplant unit, her self-expression did not come under the First Amendment. **Rohrbough v. Univ. of Colorado Hosp., 2007 WL 3024449 (D. Colo., October 16, 2007).**

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