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## Legal Briefs

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### **The evolving right of at will employees to contest wrongful discharge**

Approximately 60% of the work force in the United States is comprised of employees who are not protected by state or federal civil service codes or collective bargaining agreements. Both collective bargaining agreements and civil service statutes usually provide for termination of the employee only for "cause." If the union member or government worker believes that he/she has been discharged for reasons that are unjustified, he would typically have the right to file a grievance before an arbitration or civil service review board which would have the final ruling.

Yet because the majority of American workers and a majority of nurse anesthetists are not covered by union contracts or civil service laws, it is appropriate to examine what rights these employees have to contest their termination. The protection that does exist for these employees (who are legally referred to as "at will" employees) emanates from two sources: statutes enacted by state legislatures and the U.S. Congress, and case law decided by the courts of the country.

We are all generally familiar with many of the statutory protections that exist for at will employees. Federal civil right laws prohibit discrimination based on race or sex, and relatively recent legislation also prohibits discrimination on the basis of age. Many federal and state regulatory statutes, such as the Occupational Safety and Health

Act (OSHA) (governing safety in the workplace) and the Fair Labor Standards Act (covering minimum wage and overtime) contain provisions to protect an employee from being fired because he reported violations of these statutes to government enforcing authorities. Similarly, the federal labor laws protect those fired for union-related activities, and in many states, legislatures have adopted statutes protecting those who lose their jobs because they chose to take part in jury duty or refused to take polygraph examinations.

While the existing statutes provide significant protection from the most glaring instances of employer misconduct, they by no means cover all of the instances where the firing might offend important principles of public policy. Examples abound: You are requested by a surgeon to participate in a conspiracy to falsify medical records to avoid a potential malpractice claim. You refuse and are fired. Or, you are requested to participate in a medical procedure which you believe to be a violation of medical ethics. Your refusal again leads to termination. Do you have any rights?

The traditional rule, recognized in this country and the United Kingdom, was that an employee without a contract (or without the protection of civil service laws) could be fired for good reasons, bad reasons or no reason at all. Over the past ten years, however, the courts of many

states have struggled to create case law which protects employees from those terminations which, while not sufficiently egregious to trigger a violation of existing statutes, nonetheless demand some form of relief in order to prevent an unconscionable result.

This brings us back to our original example. Is there any relief accorded for those refusing to participate in criminal conspiracies or unethical actions, or who are fired for reasons which can be perceived as offending important tenets of public policy? As one might expect, the answer is far from clear. The courts of certain states have refused outright to recognize any departure from the traditional rule.

In *Hinricks v. Tranquilaire Hospital*, the Supreme Court of Alabama flatly announced that it would not recognize any right which would effectively eliminate the traditional ability of the employer to terminate an at will employee for any reason or no reason. Thus, if you refuse to falsify medical records in Alabama (the facts of the *Hinricks* case) you may well be left without a remedy.

Yet the courts of many other states have shown a far more enlightened approach to the question. New Jersey, for example, recognized in *Pierce v. Ortho Pharmaceutical Corporation* that in certain circumstances an employee may have a duty not to participate in acts which violate a professional code of ethics. (The court declined, however, to recognize such a right in *Ortho* because of the circumstances of that case.) Indeed, if there is a general rule in the state courts today, it is that the at will employee whose termination offends "public policy" has a right to redress.

Yet the courts have been reluctant to afford to at will employees the same protection that employees which union members and government employees generally enjoy. Specifically, no court has elected to recognize an at will employee's general right to be terminated only "for cause."

Thus, if you are fired for inadequate job performance, your disagreement with that decision will not generally give you any right to contest the termination. Rather, the termination must still offend "public policy."

Just what constitutes a termination offending "public policy" is virtually impossible to predict, insofar as one court's perception of public policy will undoubtedly differ from other courts' interpretations. The result of this confusion will be a painstaking process of judicial refinement and review, as the courts attempt to create a body of case law which will put both employers and employees on notice of their rights and obligations. The process will take a substantial amount of time, be confusing and vary significantly from state to state.

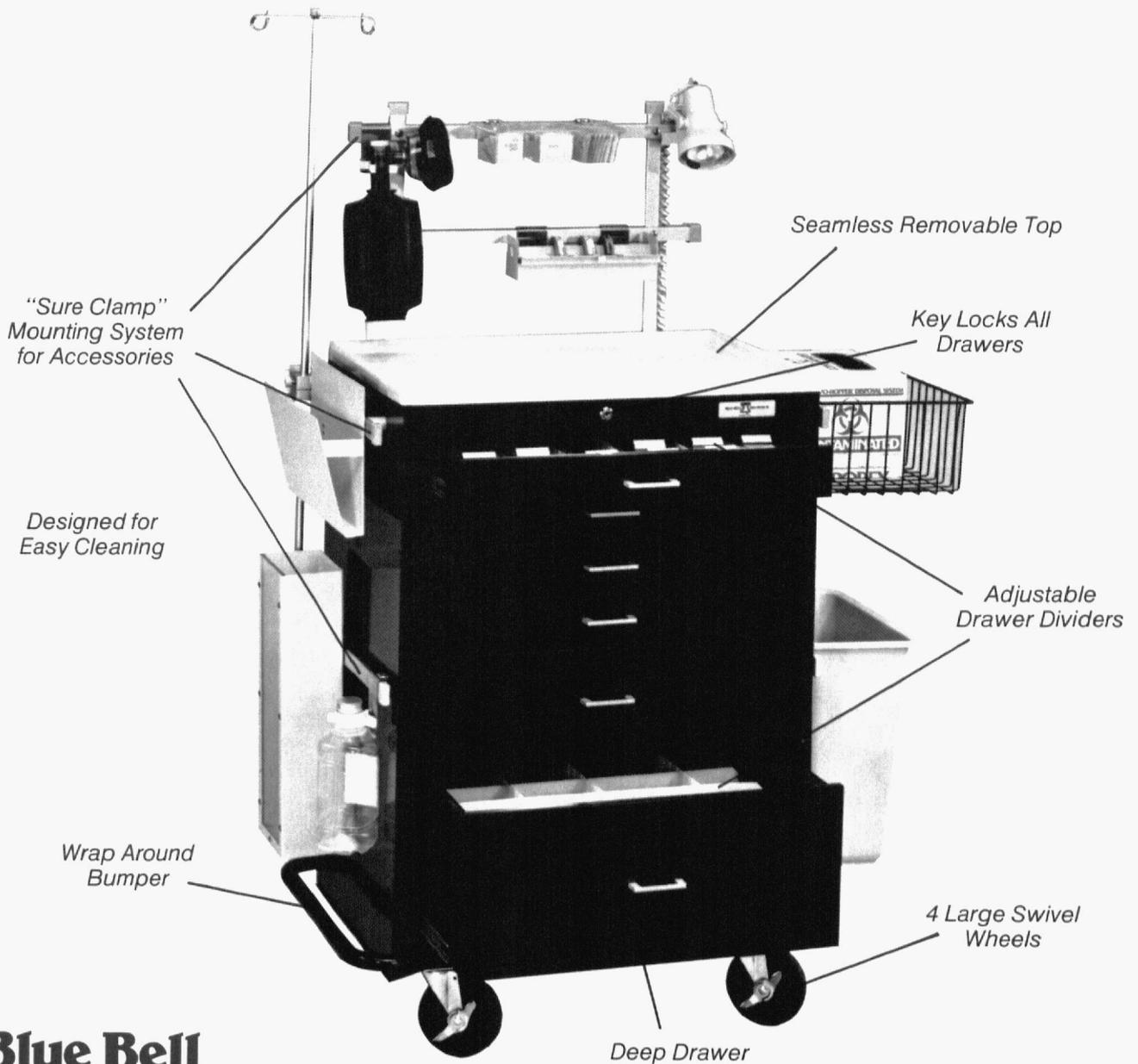
A more appropriate method of resolving the problem would be for state legislatures to adopt statutes specifically identifying those circumstances under which it is illegal to fire an at will employee, and at the same time create an administrative board (similar to the boards created to resolve unemployment cases) to resolve contested cases. This action would provide an aggrieved employee with an inexpensive and expeditious remedy in the event of an unjust firing. Ideally, the statutes adopted by the various states would be relatively uniform in nature, so that national employers would not have to comply with a myriad of different or even inconsistent laws.

A uniform statute protecting at will employees is still a long way off, although rumblings in some state legislatures are starting. In the meantime, it is important to remember that even if you are not protected by a collective bargaining agreement or a civil service statute, you may still have some basis to contest your termination in the event you believe the firing offends public policy.

#### ACKNOWLEDGEMENT

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