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# Legal Briefs

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## Wrongful termination: Massachusetts takes a step backward

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As this column has discussed before, the courts have increasingly recognized exceptions to the doctrine that an employer may terminate "at will" employment at any time and with or without a reason. Recently, the Massachusetts Supreme Judicial Court took a step backward and held that a hospital could terminate a nurse's "at will" employment in reprisal for her critical remarks to a survey team. The nurse's action was not protected by the public policy exception to the "at will" doctrine (*Wright v Shriners Hospital*, 412 Mass. 469; 589 N.E. 2d 1241, April 1992).

In general, an employment situation which does not have a specific term is "at will," that is, it may be terminated with or without cause at the will of the employer. The courts have, however, recognized various limitations on the ability of an employer to terminate "at will" employment. Among the areas in which the courts have recognized exceptions are:

1. Asserting legal rights (for example, filing a worker's compensation claim).
2. Doing what the law requires (service on a jury or cooperation with a grand jury or governmental investigation).
3. Refusing to do what the law forbids (refusing to give false testimony at a trial).

There is a fourth area, more difficult to de-

fine, in which courts have protected employees where the employee is terminated for performing an important public deed even though the law does not absolutely require the performance of the deed. Examples of this are the so-called "whistle blower" cases where an employee reveals to the press or others that his employer is doing something illegal or to the detriment of the public.

The ability of an employer to fire an employee "at will" when the employment contract does not contain a specific term is a concept deeply embedded in the law. Many states have been reluctant to recognize any exception to this rule. Massachusetts had been a leader in recognizing exceptions to the harsh consequences that an "at will" employee could be terminated at any time and for any or even no reason. In the *Wright* case, the Massachusetts courts severely limited the availability of the public policy restriction on an employer's ability to discharge an employer's ability to discharge an employee in retaliation for acts that benefitted the public.

The plaintiff was a nurse employed at the Shriners Hospital in Boston. The Shriners Hospital is a separate corporation but is one of many Shriners facilities that are affiliated with a national headquarters. A former assistant head nurse wrote a letter to the director of Clinical Affairs for the Shriners national headquarters detailing her concerns about the medical staff and administration at the Boston Shriners Hospital. As a result of the letter, the national headquarters notified the hos-

pital administrator that a survey team would visit the Boston Shriners Hospital.

### **Survey team conducts interviews**

The survey team visited the hospital and interviewed the plaintiff and other employees. The plaintiff told the survey team that there were communication problems between the medical and nursing staffs. These comments were included in a report of the survey team and a follow-up site survey was scheduled. The hospital administrator became upset at the surveys and told the director of nursing that it was the nursing department's fault that the team was making another visit. After the follow-up site visit the administrator ordered the plaintiff's employment be terminated for "patient care issues that had arisen as a result of the surveys." The jury awarded the plaintiff \$100,000, but the hospital asked the court to rule that the evidence was insufficient to support the verdict.

The Appellate Court agreed with the hospital. The plaintiff contended that the jury would have been warranted in finding that the Shriners Hospital fired her in retaliation for having criticized the hospital, specifically, the quality of care rendered to patients. The plaintiff also contended that the retaliatory firing violated public policy and, therefore, was actionable. The defendants, of course, disputed the plaintiff's assertion that she was fired for having criticized the hospital. In its decision, the Massachusetts Appellate Court held that a termination of the plaintiff's "at will" employment in reprisal for critical remarks to a survey team would not violate public policy. Because of the court's finding, it was unnecessary to consider whether the evidence proved either the plaintiff or the defendant to have been correct. While the matters were disputed, for purposes of this article, we will assume that the plaintiff's contention was correct.

The trial judge determined that the public policy exception kept Shriners Hospital from firing the plaintiff in reprisal for criticizing the hospital in interviews with the survey team. In his instructions to the jury, the judge based his view, in part, on "the duty of doctors and nurses found in their own code of ethics to report on substantial patient care issues." The Appellate Court ruled that the trial judge should not have based his holding on the ethical codes of a professional organization because no code of ethics was introduced into evidence at trial. The Appellate Court questioned but did not answer whether the ethical code of a private professional organization could ever be a source of recognized public policy.

The Appellate Court also noted that the trial

judge's view was based, in part, on various state laws of the Commonwealth of Massachusetts that require reports of patient abuse. Massachusetts has a statute that requires nurses and others to report to a state agency when they have reason to believe that a child under 18 years of age is suffering from physical or sexual abuse or neglect. In addition, nurses and others who have a reasonable cause to believe that an elderly person is suffering from abuse are required to file reports. Nurses and others are also required to report when any patient or resident of a licensed facility is being abused, mistreated, or neglected.

The Appellate Court pointed out that none of these statutes applied to the plaintiff's situation. In similar situations, courts in other states have adopted the view that the legislature was trying to encourage persons with knowledge of poor patient care to report these situations. Instead, the Massachusetts court takes the very narrow and limited view that since patient care at the Shriners Hospital did not involve sexual or physical abuse of minors, abuse of the elderly, or mistreatment of patients of licensed facilities, none of the statutes was applicable and there was no public policy ground to support the nurse's action in making critical remarks to the survey team.

### **Board of Nursing regulation**

Lastly, the plaintiff claimed that the Massachusetts Board of Registration in Nursing had a regulation that described the responsibilities and functions of a registered nurse to include collaboration, communication and cooperation as appropriate with other healthcare providers to insure quality and continuity of care. The Appellate Court said that even if the regulation did require the plaintiff to report perceived problems or inadequacies to the survey team, a regulation governing a particular profession was not a source of well-defined public policy. The Appellate Court concluded that the plaintiff's report was an internal matter and internal matters are not sufficient to be the basis of a public policy exception to the rule that the employer in an "at will" employment relation may terminate the employee's employment at any time for any or no reason. The court seems to be saying that even if the Board of Nursing required you to make critical statements to a survey team, your employer can still fire you.

While the decision theoretically acknowledges that there is a public policy exception to the rule that employment "at will" may be terminated at any time, the Massachusetts court has adopted an extremely narrow view as to the source of that public policy. By ruling out codes of ethics adopted by

professional associations, regulations promulgated by Boards of Nursing, and statutes which while not applicable show the intent of the legislature to encourage reporting to improve patient care, the Appellate Court limits the public policy exception to situations where a statute directly requires the plaintiff to take the action for which the plaintiff is fired. The decision seems extremely narrow and regressive.

Even in states that had been slow to adopt the public policy exception to the ability of an employer to terminate "at will" employment in retaliation, the courts had granted some leeway in how precise the legislation had to cover the activity. In the case of *Sides v Duke University* (discussed in this column in the February 1992 *AANA Journal*), the North Carolina courts had refused to recognize the "retaliatory discharge" doctrine for so long that the court announced that it would not adopt such a doctrine unless the legislature told it to change. Finally, the North Carolina General Assembly granted certain rights to employees fired in retaliation for exercising rights under the North Carolina Worker's Compensation Act.

When the *Sides* case reached the North Carolina Appellate Court, the court ruled that the legislation meant that there was a doctrine of "retaliatory discharge" in North Carolina. The court determined that the new doctrine protected a CRNA from being discharged for testifying on behalf of a patient (*Sides v Duke University*, 74 NC App. 331, 328 SE 2d 818). The North Carolina court used the legislature's actions in the area of worker's compensation as permission to fashion its own, broader "retaliatory discharge" doctrine. The North Carolina court did not feel restricted to recognize only exceptions specifically recognized in the legislation. The Massachusetts Supreme Judicial Court, on the other hand, has retreated behind the stance of the Massachusetts legislature. The Massachusetts Supreme Judicial Court has refused to go further, even if the activities of the nurse were just as worthy of protection as activities the legislature had determined to protect.

### **Termination offends public interest**

The *Wright* case is likely to be very controversial and, in fact, the controversy began even before the decision had been issued. The case was heard by a panel of five judges, including Massachusetts' Chief Justice, a very well-respected jurist. The decision was not unanimous but was a 4-1 decision with the Chief Justice dissenting. In his view, the plaintiff's actions fell within the exception for "legal redress in certain circumstances for employees terminated for performing important public deeds even though the law does not absolutely require the performance of such deed." The Chief Justice analyzed the situation by pointing out that there is a public interest in the provision of good medical care by hospitals. Consequently, the Commonwealth of Massachusetts should have as its public policy the protection, if not encouragement, of hospital employees to report conditions which harm patient care. Only when problems are identified can they be adequately addressed. The plaintiff was troubled and reported the lack of cooperation between the nursing and medical staffs which in turn affected the quality of patient care. She was fired for reporting the problems to an appropriate accrediting authority. In the view of the dissenting judge, the termination of the plaintiff offended the public interest and should have been protected by the courts.

The Massachusetts case is very troubling in that a jurisdiction that had previously been recognized as progressive on employment matters now seems to be retrenching. Instead of taking a broad view on public policy, the decision says that employees will only be protected if they are carrying out activities that are clearly identified in a statute. If hospitals are free to fire nurses who expose improper practices, the nursing staff will be greatly hindered in acting as advocates for patient care. Finally, if hospital employees cannot feel free to discuss matters with accrediting agencies, the effectiveness of the accrediting agencies will ultimately suffer.

The Massachusetts decision seems rather short-sighted and very inappropriate. We can only hope that other jurisdictions do not follow suit.