Legal Briefs

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Wrongful termination

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The "wrongful termination" doctrine is making increasing inroads into "employment-at-will." However, the courts are having difficulty reaching a uniform approach to determining whether a wrongful termination occurred because of "public policy." In the 19th-century words of an English Lord, public policy "is that principal of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good." (Lord Truro, nearly 150 years ago.) This is an understandable idea, but it is difficult to apply in individual cases.

Where do courts find appropriate public policy to support? The question becomes important to healthcare professionals because healthcare is one of society's greatest tools for public good.

In *Winkleman v Beloit Memorial Hospital,* 483 N.W.2d 211, (Wisconsin 1992), the court affirmed a jury verdict for a nurse who had been fired for refusing to perform work that she claimed that she was not qualified for. The court held that in refusing, she was acting for the public good and could not be fired by her employer.

One of the first judicial decisions to make an inroad into the doctrine of employment-at-will was *Peterman v International Brotherhood of Teamsters. Local 396,* 174 Cal. App. 2d 184, 344 P.2d 25 (1959). An employee was discharged for refusing to give false answers to a legislative committee. When he sued his employer for wrongful termination, the trial court dismissed the case because he was an employee-at-will who could be fired for any reason or for no reason. The California Appellate Court recognized that the public had in interest in protecting employees who testified honestly and fully before legislative committees. If the employee could be fired, it might affect the ability of people to testify before these committees. The court, therefore, made an exception to the employment-at-will doctrine and prohibited employers from firing employees because of the employee's honest testimony before legislative committees. The court recognized in both the *Peterman* and *Winkleman* cases that the "public good" would be injured if employers could fire these employees in retaliation.

What is public policy

What is public policy and where do courts find it? The courts have struggled trying to find public policy and, as a result, there are a number of inconsistent state court decisions marking this area. In *Hinrichs v Tranquilaire Hospital,* (352 So.2d 1130 Alabama, 1977), the Supreme Court of Alabama flatly announced that it would not recognize any exception which would eliminate the traditional ability of an employer to terminate an at-will employee for any reason or no reason. In *Hinrichs,* an employee had refused to falsify medical records. Falsifying medical records is illegal. Surely it in-

jures the public good, yet the court would not grant relief.

A similar issue was raised in the case of *Marie Sides v Duke Hospital,* 74 N.C. App. 331, 328 S.E.2d 818 (1985). A CRNA was ordered by an anesthesiologist to administer certain anesthetics to a patient after surgery. She refused, believing that the anesthetics would be harmful. The anesthesiologist administered the agents himself, the patient stopped breathing, went into cardiac arrest and suffered brain damage. Sides claimed that she was advised not to testify at the ensuing malpractice trial by various physicians who worked with her. She was incensed and testified for the patient. When she was fired, she claimed that she had been fired for refusing not to testify and the court agreed that she had an issue which justified a trial. Various statutes, adopted for the proper administration of the court system permit parties to obtain evidence from witnesses and punish those who refuse or testify falsely. The court found that firing someone who testifies at a trial injures the public good by interfering with the administration of the courts.

In *Wright v Shriners Hospital* (412 Mass. 469, 589 N.E.2d 1241, 1992), the plaintiff was a nurse who told a survey team that there were communication problems between the medical and nursing staffs. When a follow-up survey was scheduled, the hospital administrator became upset and forced the nurse, whom he blamed for the additional surveys, to be fired. The Massachusetts Appellate Court agreed with the hospital. The trial court had found that codes of ethics adopted by professional associations representing doctors and nurses represented public policy. The Appellate Court ruled that these codes were not the basis of public policy. Instead, public policy was limited to that contained in constitutional or statutory provisions. The nurse pointed out that there were any number of statutes which required healthcare workers to testify openly about problems and that these evidenced a "public policy" for healthcare workers to speak out in the best interest of their patients. The Massachusetts court refused to find a general policy from the specific statutory provisions. It even implied that conduct required by regulatory provisions did not rise to public policy.

On the other hand, in *Wagonseller v Scottsdale Memorial Hospital,* 147 AZ 370, 710 P.2d 1025, the court protected a nurse for actions far less noble than the nurses who were not protected in *Hinrichs* and *Wright.* This nurse claimed that she was fired because she had refused to join in "mooning" during a camping trip. While that certainly appears to be a very silly reason for firing somebody, was her conduct so important to the public good that the courts need to protect it. In Arizona, a statute makes "indecent exposure" a crime. The statute does not strictly apply to this situation since the defendant must be reckless about whether other persons would be offended. Moreover, the criminal statute provided a light penalty for violation (unless it involved a minor).

It would seem that the "public good" could be most affected by the employees in the two cases where the courts did not grant protection. In *Hinrichs,* employees need to be protected from employers who want them to falsify medical records and in *Wright,* the "public good" is best protected when healthcare employees are free to openly discuss problems with people who can solve them. The entire healthcare system is based on voluntary surveys and certifications which depend on full and frank disclosure. On the other hand, while it seems foolish to have fired the nurse in the *Wagonseller* case, it is hard to see how the "public good" is affected.

Where is public policy found?

Courts find public policy in numerous places, including statutory and constitutional provisions. In *Jones v Memorial Hospital System,* 677 S.W.2d 221 (Texas 1984), the court held that a nurse should not be fired for exercising her constitutional rights of free speech. The nurse wrote an article about the conflict that hospital personnel feel when on the one hand they are obligated to prolong life and on the other hand, they want to recognize the right of patients to die with dignity. On the other hand, in *Johnson v Independence School District,* 891, F.2d 1485 (10th Cir. 1989), a school nurse objected to giving nonprescription medications without physician direction. She could not have been fired for her statements which were protected but she could be fired for interfering with the administration of the school system, dominating every meeting.

In *Kirk v Mercy Hospital,* 851 S.W.2d 617 (Missouri Court of Appeals, 1993), the Court of Appeals protected a nurse by reversing the grant of summary judgment for the hospital. A nurse recognized toxic shock syndrome and when the treating physician failed to give an order for antibiotics, she complained vehemently. By the time she involved the chief of the medical staff, it was too late. She was fired by the hospital for making statements to the decedent's family, but the court held that her dismissal violated public policy as expressed in the nursing act. Additionally, regulations issued by the Board of Nursing showed that she was following a public policy in faithfully serving the best interests of her patient (note the conflict between

states: the Massachusetts court did not believe regulations reflected public policy). Although not accepted by every court, other sources of public policy include a professional association's code of professional responsibility, such as a nurse's ethics.

Courts have recognized that public policy includes a variety of activities related to the legal system. In *Ludwick v This Minute of Carolina, Inc.* (287 S.C. 219, 337 S.E.2d 213, 1985), the Supreme Court of South Carolina ruled that public policy prohibited dismissal of employees for responding to subpoenas from state administrative agencies. The Missouri courts have recognized a fine distinction: public policy protects employees who attend civil depositions, but employees who file their own lawsuits are not protected.

Part of the court's concern and caution in this area reflects the fact that if the law protects an employee who protects a patient's rights, what protection do you give employees who *think* they are protecting patient rights (but are not)? In *Hayes v Beverly Enterprises, Inc.,* 766 F.Supp. 350 (WD Pennsylvania 1991), the court refused to recognize as public policy a nurse's claim that she could not be fired for complaining that a nursing home was not providing proper care to a patient. The patient's doctor had determined that the patient's problems were completely psychological and was prescribing placebos. The nurse was fired for telling the family that the nursing home was failing to provide care. The court carefully reviewed statutes, cited by the nurse, requiring the nursing home to provide care when a physician directed it. Here the physician had directed that there be no care. The real problem in the *Hayes* case was that the nurse was wrong about her diagnosis.

A number of cases have involved nurses who protested the removal of feeding tubes. Many of these have been held not to be protected because the employers, whose actions they have protected, have acted within the law. In *Seery v Yale-New Haven Hospital,* 17 Conn. App. 532, 554 A.2d 757 (1989), the court affirmed a directed verdict for the hospital. The nurse anesthetist had refused to work with an anesthesiologist who had recently returned to work after a leave of absence, probably for being impaired. The court held that there was no evidence that the physician was actually impaired on the date the CRNA refused to perform the services and, therefore, the hospital was within its rights in firing her.

Courts continue to struggle

The public policy exception to the termination-at-will doctrine is new, and the courts continue to struggle with it. Thus, one court may determine that a situation calls for protection, while a court in a neighboring state determines that it does not. Over time the courts will have an opportunity to work out their conclusions and, hopefully, greater uniformity will come to this area.

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BRIEF SUMMARY

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The following is a brief summary only; see full prescribing information for complete product information.

INDICATIONS AND USAGE: (For complete INDICATIONS AND USAGE information, see full prescribing information.) Prevention of postoperative nausea and/or vomiting. As with other antiemetics, routine prophylaxis is not recommended for patients in whom there is little expectation that nausea and/or vomiting will occur postoperatively. In patients where nausea and/or vomiting must be avoided postoperatively, ZOFRAN Injection is recommended even where the incidence of postoperative nausea and/or vomiting is low. For patients who have nausea and/or vomiting postoperatively, ZOFRAN Injection may be given to prevent further episodes (see CLINICAL TRIALS section of full prescribing information).

CONTRAINDICATIONS: ZOFRAN Injection is contraindicated for patients known to have hypersensitivity to the drug.

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Drug Interactions: Ondansetron does not itself appear to induce or inhibit the cytochrome P-450 drug-metabolizing enzyme system of the liver. Because ondansetron is metabolized by hepatic cytochrome P-450 drug-metabolizing enzymes, inducers or inhibitors of these enzymes may change the clearance and, hence, the half-life of ondansetron. On the basis of limited available data, no dosage adjustment is recommended for patients on these drugs. Tumor response to chemotherapy in the P 388 mouse leukemia model is not affected by ondansetron. In humans, carmustine, etoposide, and cisplatin do not affect the pharmacokinetics of ondansetron.

Carcinogenesis, Mutagenesis, Impairment of Fertility: Carcinogenic effects were not seen in 2-year studies in rats and mice with oral ondansetron doses up to 10 and 30 mg/kg per day, respectively. Ondansetron was not mutagenic in standard tests for mutagenicity. Oral administration of ondansetron up to 15 mg/kg per day did not affect fertility or general reproductive performance of male and female rats.

Pregnancy: ***Teratogenic Effects: Pregnancy Category B:*** Reproduction studies have been performed in pregnant rats and rabbits at intravenous (IV) doses up to 4 mg/kg per day and have revealed no evidence of impaired fertility or harm to the fetus due to ondansetron. There are, however, no adequate and well-controlled studies in pregnant women. Because animal reproduction studies are not always predictive of human response, this drug should be used during pregnancy only if clearly needed.

Nursing Mothers: Ondansetron is excreted in the breast milk of rats. It is not known whether ondansetron is excreted in human milk. Because many drugs are excreted in human milk, caution should be exercised when ondansetron is administered to a nursing woman.

Pediatric Use: Little information is available about dosage in children under 2 years of age (see DOSAGE AND ADMINISTRATION section for use in children 4 to 18 years of age receiving cancer chemotherapy or for use in pediatric patients 2 to 12 years of age receiving general anesthesia).

Use in Elderly Patients: Dosage adjustment is not needed in patients over the age of 65 (see CLINICAL PHARMACOLOGY section of full prescribing information). Prevention of nausea and vomiting in elderly patients was no different than in younger age-groups.

ADVERSE REACTIONS: (For complete ADVERSE REACTIONS information, see full prescribing information.)

Postoperative Nausea and Vomiting: The following adverse events have been reported in ≥2% of adults receiving ondansetron at a dosage of 4 mg IV over 2 to 5 minutes in clinical trials. Rates of these events were not significantly different in the ondansetron and placebo groups. These patients were receiving multiple concomitant perioperative and postoperative medications.

	ZOFRAN Injection 4 mg IV n = 547 patients	Placebo n = 547 patients
Headache	92 (17%)	77 (14%)
Dizziness	67 (12%)	88 (16%)
Musculoskeletal pain	57 (10%)	59 (11%)
Drowsiness/sedation	44 (8%)	37 (7%)
Shivers	38 (7%)	39 (7%)
Malaise/fatigue	25 (5%)	30 (5%)
Injection site reaction	21 (4%)	18 (3%)
Urinary retention	17 (3%)	15 (3%)
Postoperative CO_2-related pain*	12 (2%)	16 (3%)
Chest pain (unspecified)	12 (2%)	15 (3%)
Anxiety/agitation	11 (2%)	16 (3%)
Dysuria	11 (2%)	9 (2%)
Hypotension	10 (2%)	12 (2%)
Fever	10 (2%)	6 (1%)
Cold sensation	9 (2%)	8 (1%)
Pruritus	9 (2%)	3 (<1%)
Paresthesia	9 (2%)	2 (<1%)

*Sites of pain included abdomen, stomach, joints, rib cage, shoulder.

Pediatric Use: The following were the most commonly reported adverse events in pediatric patients receiving ondansetron (0.1 mg/kg for children weighing 40 kg or less, a single 4-mg dose for children weighing more than 40 kg) administered intravenously over at least 30 seconds. Rates of these events were not significantly different in the ondansetron and placebo groups. These patients were receiving multiple concomitant perioperative and postoperative medications.

Frequency of Adverse Events From Controlled Studies

Adverse Event	Ondansetron n = 755 Patients	Placebo n = 731 Patients
Wound problem	80 (11%)	86 (12%)
Anxiety/agitation	49 (6%)	47 (6%)
Headache	44 (6%)	43 (6%)
Drowsiness/sedation	41 (5%)	56 (8%)
Pyrexia	32 (4%)	41 (6%)

Drug Abuse And Dependence: Animal studies have shown that ondansetron is not discriminated as a benzodiazepine nor does it substitute for benzodiazepines in direct addiction studies.

OVERDOSAGE: There is no specific antidote for ondansetron overdose. Patients should be managed with appropriate supportive therapy. Individual doses as large as 145 mg and total daily dosages (three doses) as large as 252 mg have been administered intravenously without significant adverse events. These doses are more than 10 times the recommended daily dose.

"Sudden blindness" (amaurosis) of 2 to 3 minutes' duration plus severe constipation occurred in one patient that was administered 72 mg of ondansetron intravenously as a single dose. Hypotension (and faintness) occurred in another patient that took 48 mg of oral ondansetron. Following infusion of 32 mg over only a 4-minute period, a vasovagal episode with transient second degree heart block was observed. In all instances, the events resolved completely.

DOSAGE AND ADMINISTRATION: (For complete DOSAGE AND ADMINISTRATION information, see full prescribing information.)

Prevention of Postoperative Nausea and Vomiting: The recommended IV dosage of ZOFRAN for adults is 4 mg administered intravenously in not less than 30 seconds, preferably over 2 to 5 minutes, immediately before induction of anesthesia, or postoperatively if the patient experiences nausea and/or vomiting occurring shortly after surgery.

Vial: ZOFRAN Injection **REQUIRES NO DILUTION.**

Repeat dosing for patients who continue to experience nausea and/or vomiting postoperatively has not been studied. While recommended as a fixed dose for patients weighing more than 40 kg, few patients above 80 kg have been studied.

Pediatric Use: The recommended IV dosage of ZOFRAN for pediatric patients 2 to 12 years of age is 0.1 mg/kg for children weighing 40 kg or less, or a single 4-mg dose for children weighing more than 40 kg. The rate of administration should not be less than 30 seconds, preferably over 2 to 5 minutes.

Use in the Elderly: **NO DILUTION NECESSARY.** The dosage recommendation is the same as for the general population.

Dosage Adjustment for Patients With Impaired Renal Function: No specific studies have been conducted in patients with renal insufficiency.

Dosage Adjustment for Patients With Impaired Hepatic Function: In patients with severe hepatic impairment according to Child-Pugh criteria, a single maximal daily dose of 8 mg to be infused over 15 minutes beginning 30 minutes before the start of the emetogenic chemotherapy is recommended. There is no experience beyond first-day administration of ondansetron.

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