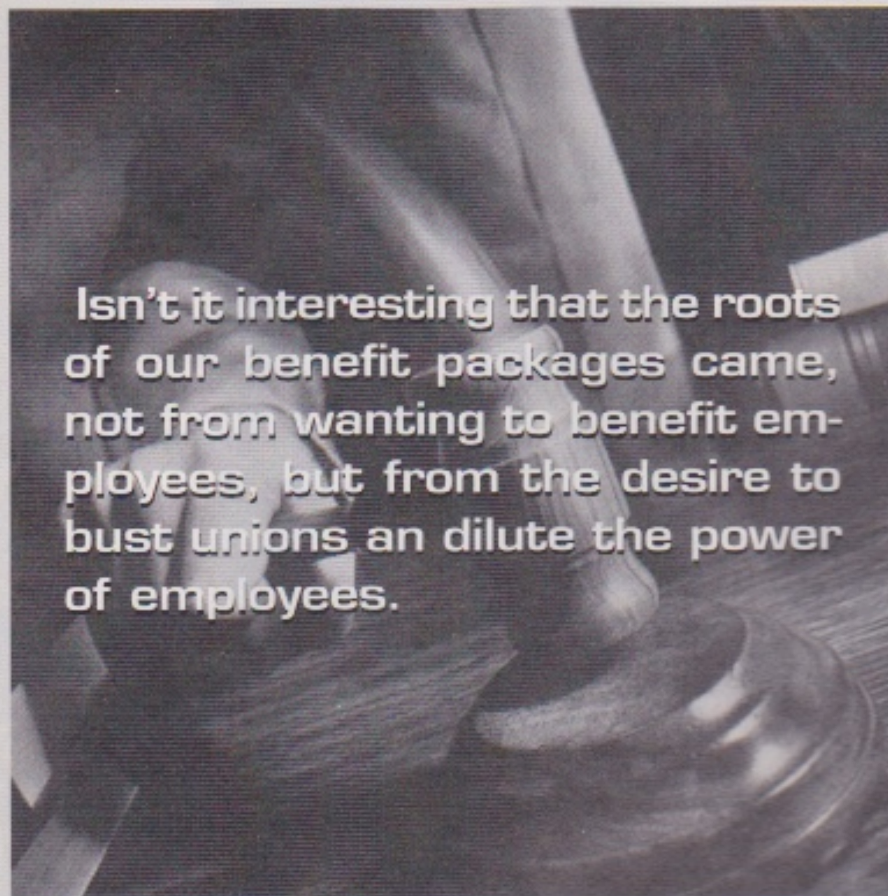
NURSING & THE LAW -

By Harold Stearley

Did you know that your employment status is probably classified as "at will"? Unless your State Law holds exception to this doctrine, or you are a union member, or you have your own employment contract, then you are subject to dismissal, any time, without cause, "at will" of your employer. This archaic concept was passed on to us from English Common Law, and to this day remains a point of contention between labor and management. Management claims that this doctrine is fair as it allows employees to terminate their employment "at will", as well as giving management the ability to fire us "at will".



Over time, and many lawsuits, our society has amended this basic premise to protect the greater interest of the public. Obviously, if management could fire anyone without justification the potential for exploitation of employees for profit would have no limits. At this point in time four exceptions to the "at will doctrine" are recognized - Public Policy, Good Faith, Contract, and Wrongful Termination.

The issue of public policy is invoked when issues of discrimination arise. Employees cannot be discriminated against based upon race, sex, religion, age, or national origin. Further, if public policy requires that people perform jury duty, or give testimony at trials or hearings, your employer does not have the right to terminate you for performing the duties required of you as a citizen.

The Good Faith exception comes into play when employers try to terminate an individual motivated by bad faith or malice. A good illustration of this is a Massachusetts case in which an employer attempted to terminate a salesman to avoid paying his agreed upon commission.

Employment contracts, whether explicit, or implied, guarantee that both parties live up to the terms of employment. In the early days of unionization, employers attempted to stop their growth by offering employee benefits. Personnel policies were compiled, in exchange for union contracts, accompanied by promises that procedures would be followed. Much to the employer's surprise, some courts held these policies and procedures to be employment contracts which provided another avenue of defense against termination at will. Isn't it interesting that the roots of our benefit packages came, not from wanting to benefit employees, but from the desire to bust unions and dilute the power of employees. Labor law history is very revealing.

The final category of exception to the employment at will doctrine is wrongful termination. Courts recognized that sometimes employees would be required to perform a public duty in conflict with an employer. An example of this would be someone reporting dangerous practices at a nuclear power plant. The courts created a category called

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"whistle blowers" to define these employees who were performing beneficial service to the public. Nurses who report unsafe, or negligent, patient practice would fall into this category.

So, have the courts protected nurses from retaliatory termination? In some cases yes, and in others no. In the case Havens versus Tomball Community Hospital -793 S. W. 2d 690 (1990), the head nurse of the Labor and Delivery unit protested a physician's decision to administer an epidural anesthesia on a mother in labor, and subsequently leave the hospital. The physician was not authorized by the hospital to perform the procedure, and coupled with the physician's subsequent absence, the nurse felt that the life of the mother and infant were in jeopardy. The nurse's reward for her concern was harassment from the physician and Director of Nursing followed by her termination. The 215th District Court granted summary judgment in favor of the hospital regarding the nurse's claims to retaliatory discharge. The Court of Appeals, First District, however, reversed the judgment of the lower court in favor of the nurse. The court acknowledged the "intentional infliction of emotional distress" stemming from the behavior of the above mentioned parties, and in the state of Texas, this is noted as a separate cause of action. This nurse was able to win her suit by application of another statue, infliction of emotional distress, instead of the true cause of action which was retaliatory termination. It's a good thing Texas recognized this as a separate legal issue.

In the case of Kirk versus Mercy Hospital Tori-County, 851 S.W. 2d 617 - Mo. (1993), a Missouri nurse found herself terminated for pursuing treatment for a patient with toxic shock syndrome. The patient died due to lack of treatment, and the nurse was terminated for "not staying out of it" by insisting that treatment be provided. The Circuit Court of Wright County granted summary judgment for the hospital stating that the public policy exception to the employment at will doctrine did not apply to this case. However, the Missouri Court of Appeals ruled that the public policy issue did exist related to Missouri's Nursing Practice Act which requires nurses to pursue the best possible care for their patients. The Court also noted that the nurse could have faced disciplinary action from the State Board of Nursing had she ignored the improper treatment which her patient had received. The administration's instructions for her to "stay out of it" were not only inappropriate, but placed the nurse in the position of breaking the law had she followed those instructions.

In another example the outcome for the nurse in question was not so favorable. In the case Wright versus Shriners Hospital - 589 N. E. 2d 1241 - MA (1992), an Assistant Director of Nursing (ADN) was terminated for revealing inconsistent practices and procedures which were jeopardizing patient care. The hospital administrators were upset with the fact that an internal audit was scheduled to be repeated to reexamine these patient care issues, and they responded by firing the ADN. A jury trial ruled in favor of the nurse, but upon appeal, the Supreme Judicial Court of Massachusetts reversed the lower court's judgment stating that not enough evidence was presented to show that public policy was violated.

Clearly, this presents a quandary for nurses when faced with flagrant abuses and malpractice in the patient care arena. Employers want us to be quiet. Employers benefit from "at will doctrines", because they can fire you for not liking the color of your hair, or for no reason at all. It is easy to see why nurses remain quiet in the face of negligent medical practice, yet it is our duty to protect our patients.

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My opinion, document every detail of any negligent event in your journal, and seek out a good attorney's advice before confronting such issues. Perhaps we should be lobbying Congress for a special provision, or amendment, to the "at will doctrine" which would protect nurses from malicious persecution surrounding patient care issues?

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Synopsis - Read how employers benefit from “at will doctrines,”— you can be fired for no reason at all.