

## **AT-WILL EMPLOYMENT: JUST LET IT GO**

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### **ABSTRACT**

In the United States, at-will employment is the bulwark of employment relationship. One estimate is that 60 percent of American workers are employed on an at-will basis [1], which according to common law, means that either the employer or the employee may terminate the employment relationship at any time, with or without cause. While this employment relationship has been recognized for over a century, it has deteriorated markedly in the past decades. The argument of this article is that, in actuality, employers have far less leeway in at-will situations than they believe. In addition, explicit at-will statements, which are meant to strengthen the employers' situation, actually increase the likelihood that employees will feel unfairly treated. Based on these two arguments, this article suggests that employers should abandon the at-will doctrine and substitute a good faith dealing with employees.

At-will employment has been the default employment relationship within the United States since the late 1800s. Under this doctrine, without a written employment contract or with an indefinite term of employment, either the employer or the employee may terminate the relationship for "good cause, bad cause, or no cause at all" [2]. While at first glance this appears to be an equal relationship, in actuality many people recognize that it is not a level playing field [3]. Being dismissed from employment has a far greater impact on an individual than a single individual's resignation has on a company. Hence, several exceptions to the at-will employment doctrine have become widely recognized. These exceptions can be classified

as: 1) nonstatutory, which include implied contracts and the doctrine of good faith and fair dealing; and 2) statutory, which include an array of policy and statutory limitations.

## NONSTATUTORY EXCEPTIONS TO AT-WILL EMPLOYMENT

### Contractual Exceptions

While both parties may have the *power* to terminate an agency or employment relationship, they may not have the *right* to terminate it as, for example, if such an action would breach a contract governing the association. Any express contract of employment supersedes the more general concept of at-will employment. A collective bargaining agreement is one such contract between management and such contracts usually modify at-will employment with express provisions for just termination. Also, some courts have held that a company handbook, which specifies procedures for dismissal, may form an implied contract of employment, unless it conspicuously disclaims such an effect [4]. If an employer has such a handbook without a legally binding disclaimer, some courts might view the manual as modifying the at-will relationship [5]. For example, an employee handbook might contain provisions related to progressive discipline procedures, performance improvement plans, and proper termination procedures, in addition to specifying justifiable grounds for termination, such as employee theft, misappropriation, and self-dealing. Such a handbook or, alternatively, a company policy, can be viewed as creating an implied contract between the company and its employees that obligates the employer to follow the specified procedures and precludes any summary dismissal action [6].

### Good Faith and Fair Dealing

If an express or an implied contract of employment exists, some states recognize a covenant of good faith and fair dealing as an implied-in-law adjunct to the parties' agreement. Some states even recognize such an obligation in at-will employment [7]. Such a covenant obliges the parties to deal honestly and equitably with each other. The breach of such a covenant may give rise to a cause of action for compensatory damages [8]. Other states recognize the obligation of the parties to negotiate the terms of the relationship and are reluctant to force standards not included in the express contract [9].

### The Public Policy Exception

In the absence of contractual protection, employment remains at-will unless there are public policy or statutory reasons that preclude dismissal without legal recourse [10]. The public policy exception to at-will employment, which could

make a discharge wrongful, is widely recognized [11]. Courts have held that a dismissal was wrongful when employees were terminated for refusing to commit an illegal act [12] or for blowing the whistle on illegal company activities that violate state or federal law [13]. Federal and state statutory law, as well as state common law, may specifically protect the actions of whistleblowers when the public interest is concerned [14]. Generally, there must be a sufficiently clear mandate of public policy to support a tort claim for wrongful discharge [15].

A case for wrongful discharge might also be appropriate if an employee is dismissed for exercising rights guaranteed to him or her under the law [16]. For example, workers' compensation laws provide statutory relief to workers who suffer job-related injuries. If an employee were to be terminated for filing a worker's compensation claim, a right guaranteed by state law, and if causation could be established between exercising that right and the firing, then a dismissal could be viewed as being wrongful and against public policy [17]. Recent trends in the wrongful discharge area, particularly with respect to privacy issues, seem to suggest that the doctrine of at-will employment may be eroding to the point of extinction [18].

### **STATUTORY EXCEPTIONS TO AT-WILL EMPLOYMENT**

Statutes can also modify at-will employment. All other things being equal, at-will employees could be terminated for wearing tacky clothes but not solely because of their age, race, gender, national origin, or disability. Title VII of the Civil Rights Acts of 1964 provides that "[I]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." [19, §703(a)]. The act covers employers whose business affects interstate commerce and who employ 15 or more persons for 20 or more weeks a year. The act also created the Equal Employment Opportunity Commission (EEOC) to enforce its provisions [19].

If an employee falls into a class of persons that such legislation is designed to protect, the employee is said to be a member of a protected class. A successful plaintiff is entitled under the act to reinstatement, back pay, retroactive promotions, and damages. In addition to the statute, corresponding state agencies, such as California's Fair Employment and Housing Commission, often handle these types of claims as well.

### **Sexual Harassment and Homosexuality**

Sexual harassment is a recognized form of sex discrimination. The Equal Employment Opportunity Commission has determined that the act is violated

when a supervisor makes sexual advances or demands sexual favors of an employee as a condition of employment or favorable status. The EEOC has defined sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when 1) submission to such conduct is made either explicitly or a term or condition of an individual's employment, 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or 3) such conduct has the purpose or effect of reasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Title VII does not prohibit discrimination based on homosexuality, but a homosexual who is discharged because of his or her *gender* can sue under Title VII. While no federal law as yet prohibits private employers from discriminating based on sexual orientation, some state laws do prohibit such discrimination, although the prohibition may be limited to governmental employers, depending upon the state. Furthermore, public policy considerations in some jurisdictions may also counsel against arbitrary action taken by employers based upon sexual orientation. Specifically, California's statute declares that it is the public policy of the state to "protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation" [20].

### **Age and Disability**

Other acts of Congress complement Title VII and further prohibit discrimination based on age or disability. Congress enacted the Age Discrimination in Employment Act (ADEA) in 1967 as part of a scheme to eliminate invidious bias in employment decisions, including those related to hiring, promotion, compensation, and terms and conditions of employment. Congress passed the statute in an effort to eradicate arbitrary and stigmatizing stereotypes about the lower performance level of older workers in favor of assessments based on ability [21]. As amended by the Older Workers Benefit Protection Act, it also expressly prohibits discrimination with regard to benefits.

The act is something of a hybrid, with its substantive features incorporating the antidiscrimination prohibitions of Title VII of the Equal Employment Opportunity Act of 1964, and its remedial provisions incorporating by reference the provisions of the Fair Labor Standards Act of 1938 [22]. As amended in 1978, it now covers employees over 40 years old. The ADEA makes it unlawful for a covered employer:

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter [23, § 623(2)(1-3)].

The Americans with Disabilities Act (ADA) was passed in 1990 and applies to employers with 15 or more employees. State laws may also include provisions similar to the ADA, such as California's Fair Employment and Housing Act. Such laws frequently have threshold jurisdictional requirements of less than 15 employees in order to fill in the gap left by federal law. The ADA defines the term "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation can perform the essential functions of the employment position that such individual hold or desires" with consideration being given to the employees judgment as to what job functions are essential [24]. In other words, a qualified individual must be able to satisfy the prerequisites for the position, such as proper training, skills, and experience, in addition to possessing the ability to perform the essential functions of the job either with or without reasonable accommodation [24].

### Processing the Case

In a discrimination case involving disparate treatment, in which an employee alleges that s/he has been treated differently because of membership in one of these protected classes, proof of discriminatory motive is usually critical to establishing the *prima facie* case, unless it can be inferred, given the circumstances [25]. For example, under the ADEA, direct evidence of discriminatory motive can consist of comments made by managerial decision makers concerning age or older workers (e.g., "we need to purge the company of these old people and get some new blood"), although stray remarks in the workplace may not be sufficient evidence [26]. In the absence of direct evidence of discrimination, the plaintiff may establish his or her case by circumstantial evidence according to a three stage, burden-shifting paradigm. After the plaintiff-employee meets his or her *prima facie* burden of proof, the burden shifts to the defendant-employer to show that there was a nondiscriminatory reason for the adverse employment decision and that legitimate factors motivated the employer's decision [27]. If the employer fails to articulate a nondiscriminatory reason for the adverse employment action after the plaintiff-employee has established a *prima facie* case according to the trier of fact, then the court must enter judgment for the plaintiff [28].

For a *prima facie* discrimination case based on disparate treatment, generally the employee must allege and prove by circumstantial evidence that 1) s/he was a member of a protected class, 2) s/he suffered an unfavorable or adverse employment decision, 3) s/he was qualified to assume or retain the position, and 4) the employer did not treat race, gender, national origin, age, or disability neutrally in

making the decision. These allegations, if true, create a rebuttable presumption that the employer violated the civil rights of the employee. Thus, in cases where there is no direct proof that the employer did not treat age neutrally, once the plaintiff proves a *prima facie* case of racial discrimination, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the adverse employment action [27]. An unjustified refusal to work is an example of a legitimate, nondiscriminatory reason for termination [29].

By way of example, a plaintiff in an ADEA case must establish by a preponderance of evidence that s/he is over 40 years old, was qualified for the position in question, and nevertheless suffered an adverse employment action in favor of a younger worker, or in reduction-in-force cases, that the employer did not treat age neutrally in its layoff decisions. The Supreme Court has held that a covered employee who was replaced by another member of the protected class, that is, a worker over 40 years old, nevertheless can still establish that the termination decision was based on age discrimination [30]. To successfully establish a defense, the employer must show that the adverse employment decision was based on “reasonable factors other than age” [31]. If a reason other than age motivated the employer’s decision, there is no threat that older workers are suffering because of inaccurate stereotyping about the competence and productivity of older workers and there is no violation of the ADEA [25]. For example, an employer might offer proof that an older employee was passed over for promotion in favor of a younger employee based on such valid objective criteria as experience, education, and competence rather than age, or that an older employee was discharged based on a well-documented unsatisfactory performance, absenteeism, or poor attitude, not age [32].

Another legitimate defense available to employers is the Bona Fide Occupational Qualification (BFOQ) defense, which permits valid criteria for initial employment or continued employment that may adversely affect members of a protected class, so long as the employer shows that the qualification is “reasonably necessary to the normal operation of the particular business,” such as for legitimate concerns for safety or efficiency [31]. If the defendant succeeds in establishing a legitimate defense, then the burden shifts back to the plaintiff to try to prove that the defendant’s apparent justification was merely a “pretext” for discriminatory treatment.

As the aforementioned statutes and court cases demonstrate, employers who are covered by federal and state nondiscrimination statutes have less discretion in termination decisions than a pure at-will employment doctrine would imply. The statutory defenses highlight the importance of an employer being able to negate any inference of discriminatory motive with objective proof. Employers who do not document and justify terminations to employees may find themselves documenting and justifying those terminations to governmental agencies.

While employers argue that at-will employment is crucial to reducing litigation costs and to maintaining flexibility, others argue that at-will employment actually

hurts employee relations and makes organizations less attractive to applicants. Rather than worrying solely about defending themselves from employees who file claims in response to termination decisions, employers should heed another perspective on at-will employment policies. That perspective considers employees' reactions not to termination decisions but to the actual at-will employment policy itself.

### EMPLOYEE REACTIONS TO AT-WILL STATEMENTS

Employers should consider the stream of research that addresses employees' psychological reactions to employment policies. For example, Dunford and Devine built a model to identify the psychological antecedents of the decision to bring a claim against a company for discharge-related reasons [33]. They argued that even if the employer wins the suit or the suit never gets to court, the organization has incurred costs, such as preparation time, legal fees, and negative goodwill [33]. Hence, organizations should try to minimize the probability of such claims by knowing the factors that lead to them and creating and implementing appropriate human resource policies.

Dunford and Devine's model posits that the organization's discharge policy affects the context in which discharges take place, and this context, in turn, affects the core concept of the model—organizational justice. Organizational justice deals with the judgments that employees make about what and why events occur. Organizational justice tells us that employees make two types of judgments. The first has to do with distributive justice, i.e., "What happened to me?" or "What was my outcome?" The second has to do with procedural justice, i.e., "Why did that outcome occur?" or "On what rules was the decision based?" [33].

The model contributes to our understanding of reactions to at-will employment policies by tracing reactions through judgments about justice. The authors suggested that employees may react to termination for one of two reasons based on injustice—what happened or why it happened. They also argued that while at-will employment statements may protect an employer from implied-contract liability, they may simultaneously produce lower levels of perceived justice, leading to more claims [33].

Additionally, organizations in which at-will employment is the stated discharge policy may face two problems from their managers. The managers may think there are few (or no) constraints on their authority to discharge, leading to situations where public policy exceptions are violated. Even when this is not the case, managers who have the authority to discharge "at-will" may do so abruptly, with little time to articulate correct explanations. More may be said than should be, and adequate justification may not be considered. Thus, at-will employment may reduce the employer's liability for lawsuits based on implied contracts, but it may simultaneously increase the factors that lead employees to believe that they have not been treated justly, leading to more lawsuits.

The relationship between statements of employment policies and employees' psychological reactions to employers has been tested empirically, as well as conceptually. Schwore and Rosen tested subjects' reactions to explicit statements of at-will employment policy versus explicit statements of due-process policies [34]. They determined that applicants found employers with expressed at-will employment policies in their recruitment materials significantly less attractive [34].

Wayland, Clay, and Payne found that subjects, when presented with an at-will statement in an employment application, drew several inferences from the statement [35]. Applicants reported that they would resent signing the statement, that they believe long-term employment with that company would be unlikely, and that the company was uncaring about its employees [35].

Roehling and Winters asked a similar question [36]. Their empirical research tested the difference in applicant attitudes in three settings, one in which recruitment materials contained an explicit at-will statement, one in which the materials contained a good-cause statement, and one in which there was no statement concerning employment policy. They found that, in terms of organizational attractiveness, explicit at-will statements can have a negative impact and explicit good-cause statements can have a positive impact. Subjects reported that while they might accept a job with an employer with a stated at-will policy, they would not anticipate long-term employment with the employer. The researchers concluded that "[t]he use of explicit at-will statements may make it more likely that an employer ends up in court in the first instance" [36, p. 36] supported the model of Dunford and Devine [33].

What, then, do employment policies look like that protect the rights of both employers and employees? A task force created by the EEOC identified the "best" equal opportunity policies, programs, and practices of private sector employers [37]. The criteria used to qualify a firm's practices as "best" were:

- Best practices comply with the law.
- Best practices promote EEO and address barriers.
- Best practices manifest management commitment and accountability.
- Best practices ensure management and employee communication.
- Best practices do not cause or result in unfairness.
- Best practices produce noteworthy results [37].

The task force collected information about all aspects of employment, from recruiting and hiring through promotion, termination, and downsizing, and alternative dispute resolution. The category that most closely addresses the issue of at-will employment is "termination and downsizing." The EEOC's recommendations for best practices in termination and downsizing area include:

Conduct and performance which will subject an employee to termination should be clearly communicated. The termination process should be understood by managers and supervisors and consistently applied. The reasons for



termination should be accurate and should be supported by documents and records. Management should carefully review its termination decision and records of similarly situated employees to assure no disparate treatment.

Circumstances that may make termination problematic include the termination of a long-term employee with a recent or [past] history of outstanding performance appraisals. In addition, problems may arise where there is little or no documentation of employee problems, inconsistent treatment, or the failure to follow employer procedures. Finally, a termination may be problematic where the employee recently returned from pregnancy leave, work-related injury, or had recently filed a charge against the employer [37].

This statement from the EEOC indicates that at-will claims may not be sufficient to justify the termination of many employees.

### **THE ARGUMENT FOR ABROGATING AT-WILL EMPLOYMENT**

While most employees in the private sector can be terminated for reasons other than just cause, they cannot be terminated in violation of federal or state protective legislation. Therefore, human resource managers must keep accurate and complete records of performance problems. Job descriptions, which detail the responsibilities and tasks associated with a position, and job specifications, which identify the knowledge, skills, abilities, and other employee characteristics needed to perform the job, are invaluable tools for HR managers to help ensure compliance with EEOC guidelines and assure that decisions are based on job-related information. Additionally, job descriptions are essential to establish the essential function of the job under the ADA. Pay-grading systems also serve an important function. Job classifications and pay grades provide proof that a company's reward system is not discriminatory, in addition to insuring the fairness of the compensation of employees relative to each other and to the tasks performed.

Since employers must be prepared to justify adverse employment decisions concerning persons in protected classes, why not justify them for all employees? Rather than deify employment-at-will and waste resources litigating its application, why not abolish it and recognize that the employee handbook and its policies are contractual in nature, and that employees' respective rights and responsibilities will be enforced accordingly? Research has shown that employees not only value procedural justice, but that job applicants and employees also interpret at-will employment statements as indications that the employer is likely to act in bad faith. If employers have just cause for terminating an employee, then the established rules will permit such a discharge. If there is no just cause, then why fire the employee? What value is there to arbitrary, whimsical treatment in the workplace? Ethically, employers should not terminate employees for unjust reasons [38]. There should be some sort of protection for at-will employees, and a means of resolving employment disputes concerning them should be

provided [39]. Many employers are now turning to arbitration and other alternative dispute resolution techniques.

### *Arbitration*

Many employers have recognized the advantages of arbitration in nonunion settings [40, 41]. Applicants and employees are regularly now confronted not with an at-will statement, but with mandatory arbitration statements. Such mandatory arbitration agreements have been upheld in the courts [42, 43]. The issue to be addressed, then, is how best to design arbitration agreements that are perceived as meting out distributive and procedural justice in the eyes of the employees [44, 45]. Arbitration agreements that are not perceived as providing due process will be no more valuable than at-will statements in terms of building trust [46].

The National Academy of Arbitrators (NAA) issued a due process protocol to guide the arbitration of statutory employment disputes. They identify the following issues as safeguards for fair arbitration: choice of representation (as spokesperson for the claimant), fees for representation (employer should reimburse part of costs), access to information (adequate but limited pretrial discovery), and qualifications of the mediator or arbitrator (professional memberships, training, and panel selection) [47].

Going further to address these ideas is a proposal presented by the Uniform Law Commissioners (ULC), a group whose goal is to encourage uniformity in state laws. Recognizing that some 45 jurisdictions modified employment-at-will in the last 50 years in an effort to support a cause of action for wrongful termination in at least some cases, the ULC drafted and approved the Model Employment Termination Act (META) in 1991. Attempting to get beyond the subjective criterion of "good faith," META suggests that employees not be terminated with "good cause," which includes individual performance (such as theft, assault, destruction of property, insubordination, excessive absenteeism, or inadequate performance) and business reasons (such as economic conditions) [48].

META also prescribes that employees must be given a reason for their termination within 10 days of the event and provides for the use of professional arbitrators appointed by the appropriate state administrative agency, either to sustain the termination, reinstate the employee, or require full or partial back pay. The ULC suggests that this is a compromise designed to protect most employees from discharge without good cause, not just those able to sustain the costs and risks of litigating employment at will exceptions. As a result, employees would have the assurance that they will be terminated only for good cause, and employers would know that their remedies will be limited [49-51]. While META is designed to help states adopt laws to address the problem of wrongful discharge and inject some aspect of fairness into termination decisions, some critics, nonetheless, argue that only a federal statute will provide employees with the protection they need and deserve [52].

## CONCLUSION

Whether or not state legislatures or Congress ever passes legislation designed to provide procedural and substantive justice in employment termination decisions, employers should nevertheless re-think their staunch adherence to the at-will employment doctrine, and by their own initiative provide due process in termination decisions. Offering mediation with respect to employment disputes, followed by binding arbitration conducted by independent arbitrators, could prove a viable option to all interested parties in the employment relationship. Even without further regulation, employers are required to justify their actions in a great many termination decisions. At-will doctrine provides employers with an illusionary freedom of action that may very well be far more expensive to retain than to just let go.

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