

# WHY AT-WILL EMPLOYMENT IS BAD FOR EMPLOYERS AND JUST CAUSE IS GOOD FOR THEM

BY ELLEN DANNIN

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**O**n December 6, 2006, a Pennsylvania federal district court affirmed – in the strongest language possible – that not only does Pennsylvania law presume that “all employment is at-will, and, therefore, an employee may be discharged for any reason or no reason,” it also placed a heavy burden of proof on employees to overcome that presumption. In addition, the court ruled out various avenues for escaping at-will status, saying that the presumption may not be overcome by language in the employer’s handbook that appears to create an implied contract for just-cause. Indeed, it said that absent language demonstrating that the handbook was intended to be a legally binding contract, it would not hold that the employer intended to form a contract. This strong language was necessary to maintain that employment was at-will, for this employer had issued successive handbooks saying that an employee “may only be discharged for just cause” with examples of conduct that constituted just cause.<sup>1</sup>

Although commentators and courts often talk about employment at-will as based in an agreement between an employee and employer, more is involved than normal contract law. The courts use the language of basic contract doctrines such as intent, offer and acceptance, consideration, and mutuality, but in the workplace these concepts apply in ways that bear no relationship to contract law. The rights and obligations of employer and employee, they are imposed and interpreted in ways that sound more like status law, though no court seems to view it that way.

The Pennsylvania courts say they are determined to prevent any incursions into the domain of at-will employment because that has been the law since the late 19<sup>th</sup> century. A recent Wisconsin case suggests that longevity is only one reason courts vigorously defend at-will status.

The employment-at-will doctrine is a "stable fixture" of our common law, and has been since 1871. . . . It is central to the free market economy and "serves the interests of employees as well as employers" by maximizing the freedom of both. . . .

The prevailing general rule is that an at-will employee has no legal remedy for "an employer's unjustified decision to terminate the employment relationship." The employment-at-will doctrine thus inhibits judicial "second-guessing" of discharge decisions – even those that are unfair, unfortunate, or harsh.<sup>2</sup>

Naturally, if you believe that the viability of the United States economy rests on an employer's being able to fire workers for no reason and to have no second-guessing, you will accept actions that are unfair, unfortunate, and harsh. In addition, you will do all you can to preserve this right. Recently, I was asked to brief a delegation of Labor Ministry officials from China on U.S. law as background information for drafting a new Chinese employment contract law. They told me that they had met with officials from the U.S. Department of Labor the day before and that these officials had been adamant that if China gave workers any rights to just cause the Chinese economy would suffer.

As strongly held as these beliefs are, there has been theoretical but no empirical work to examine whether our economy's success depends on the regime of at-will employment nor whether employers are better off under an at-will regime than just cause. As for the

claim that employees are better off, it is difficult to say that at-will provides them with any rights they would not have under the 13<sup>th</sup> Amendment. Therefore, these two rationales are perhaps wrong but at the least they are unproven assumptions.

I argue here that the at-will regime does not exclude judges from examining (or "second-guessing") employer decisions. In addition, and far more important, I contend that it ill serves employers. If this is true, then it ill serves our economy and our national interests. My argument is that there is no empirical evidence that at-will employment has a positive effect on our economy. There is evidence that an at-will employment regime does not prevent litigation. In fact, there is no evidence that an at-will regime results in less litigation than a just-cause employment regime. There are reasons to believe that employers would be better off as managers with a just-cause employment regime. Finally, but more theoretical, there is a cost to society from maintaining at-will.

If correct, all of these propositions mean at-will employment imposes costs on employers. The reasons for these propositions fall into three categories: the cost to employers of retaining the at-will legal doctrine, the cost to the workplace associated with at-will, and the impact at-will has on society.

## **I. THE IMPACT AT-WILL HAS ON LEGAL DOCTRINE**

There is a price to be paid for retaining at-will employment as our default employment law, and employers are paying a large part of that price. Many employers believe that if they set up an at-will system and police it vigorously they will be safe from lawsuits. This is not necessarily so. Employment law litigation is on the rise:

Between 1970 and 1989, for instance, the overall caseload in federal courts grew by 125%. During the same period, the employment discrimination caseload before those courts grew by 2,166%. In 1989, there were 8,993

employment discrimination matters filed in federal courts; in 1997, plaintiffs filed 24,174 cases. Presently, approximately one in every eleven civil cases on federal court dockets involves a question of employment discrimination.<sup>3</sup>

Fulbright & Jaworski's annual survey of general counsels invariably finds employment litigation to be their top concern. The most recent survey states:

For general counsels in the US and UK, "labor/employment disputes dominate the types of litigation causing the greatest concern to a much greater extent than in 2005 (48% vs. 26%)." Fifty-four percent of US general counsels cited employment litigation as their greatest concern.<sup>4</sup>

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**For every case that makes it to the appellate level, many more are filed and linger for some time at the trial court level. All of these are expensive in money, emotion, and time. Every one of these cases should send a message that at-will employment does not protect an employer from being sued.**

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Its press release states:

Litigation Fear Factors — With so many risks facing the modern corporation — from product liability and high-stakes patent infringement claims to contentious shareholder revolts — it's notable that the greatest single dispute angst among U.S. companies stems from labor and employment problems: 54% of in-house counsel identified labor/employment as among their top three concerns. Middle-market companies in particular were distressed by the prospect of employee-related litigation. . . . *Labor and employment cases were the most prevalent class actions experienced by companies in the*

*past three years*, followed by securities litigation, environmental/toxic tort and antitrust cases.<sup>5</sup>

This increase in employment litigation, with its attendant costs, has continued despite the existence of at-will employment as our default law in all but two states.

This article cites several cases in which employees lost because the court found them to be at-will employees. That outcome

may appear to demonstrate the value of at-will employment. That conclusion ignores the enormous cost of getting those results. On the way to getting a case dismissed, the employer has spent money and time paying attorney fees and has had to open its files and disrupt its routine to respond to the lawsuit. For every case that makes it to the appellate level, many more

are filed and linger for some time at the trial court level. All of these are expensive in money, emotion, and time. Every one of these cases should send a message that at-will employment does not protect an employer from being sued.

To truly appreciate the costs of the at-will legal system we need to see its connection to the ferment we have seen in employment law over the past quarter century. This ferment results from the fact that at-will is simply inadequate to meet the needs of our society, and it is a poor fit with the goals and values of our country, many of which are espoused by modern workplaces. These forces have led to the development of countless new employment statutes and common law doctrines.

At the most basic level, when the law changes and is uncertain it imposes a financial

cost on employers to educate themselves on new developments and to take the necessary steps to comply with them. Even more expensive, however, is law that is so unstable and complex that it is impossible to predict outcomes. Instability and complexity make it impossible to plan.

#### **A. Brief consideration of at-will trends**

It would take several legal treatises to review all the ferment in employment law over the past quarter century, but it is helpful to review some of the trends in order to assess how the goal of retaining at-will employment is creating legal instability and complexity. This discussion examines only judicial decisions, but certainly state and federal statutes are part of the effort to make the at-will system functional.

##### ***Contractualizing at-will employment.***

Roughly a quarter of a century ago the courts of California<sup>6</sup> and Michigan<sup>7</sup> appeared to be leading the United States away from at-will employment as the law governing employment relationships. Courts spoke of at-will as based on contract. However, at-will was so unassailable that even written agreements for just cause and evidence of party intent to agree to just cause provided no escape. The cases that emerged before this time make uncomfortable reading as the courts distorted contract law in order to find that an employee was at-will. Gradually the courts began to take seriously the claim that at-will was based on contract and to apply normal contract law to the workplace. In other words, these and other cases<sup>8</sup> were a step toward aligning the law of employment relations with ordinary contract law in the sense that we enforce the deals people say they are making.

At the same time, empirical studies, such as those by Professor Pauline Kim have found that about 80-90% of employees believe that the law of the United States is just cause.<sup>9</sup> They believe that employers are legally obligated to be fair in their treatment of employees, and as a result, employees believe they have an obligation to reciprocate.

In a telephone survey of households in Omaha, Nebraska, Forbes & Jones (1986) found that the vast majority of those surveyed believed that employees could not legally be terminated without cause, despite the fact that at the time of the survey Nebraska was an at-will employment state. This finding coupled with those of the present study suggest that belief in employee "job property rights" might be widespread in the United States, despite the practice of at-will employment.<sup>10</sup>

Normal contract law takes the state of the contracting parties' minds, their intent, into consideration in interpreting contracts. These studies mean that when they accept a job, most employees think they are entering a relationship based on just cause. These studies have further undermined the justification of at-will as based on contract.

However, the law has not stopped evolving. First, in Michigan in 1991<sup>11</sup> and then in California<sup>12</sup> in 2000, these seminal cases were limited and overruled, but in other states and areas of the law, courts were applying contract doctrines and finding employment agreements to be binding within the context of at-will employment. Even though the result was to uphold rights that theretofore would have been struck down, the courts were doing nothing more radical than applying standard contract doctrines to the employment relationship. In Arizona<sup>13</sup> the court required employers to provide consideration if they wanted a change in an employment term, thus limiting the employer's ability to unilaterally set contract terms. Illinois,<sup>14</sup> as well as the courts in Michigan, California, and South Carolina,<sup>15</sup> limited the right of employers to unilaterally change employment terms to varying degrees.

**Legislation.** This trend toward finding employment agreements to be valid contracts that displaced at-will employment led to legislation. In 1991, the National Conference of Commissioners on Uniform State Laws produced the Model Employment Termination Act

(META). In addition, legislatures in two states enacted statutes that provided for just-cause employment, to a greater or lesser degree, in place of at-will – the Montana Wrongful Discharge from Employment Act<sup>16</sup> in 1987 and the Arizona Employment Protection Act in 1996.<sup>17</sup> Just as employees gained just cause, employers also gained because the statutes strictly limited remedies. Even more important, employers gained certainty and clarity. Courts in other states, such as New York,<sup>18</sup> deferred to the state legislature to act, but no further legislative action has been taken.

**Employment torts.** During the same period, additional changes limiting the reach of at-will have come from the courts through the creation of a variety of employment torts. These are designed to limit the power at-will gives an employer to fire workers for a bad reason. That power would allow an employer to coerce its employees into violating the law for fear of losing their jobs. In a sense, at-will gives employers the ability to exempt themselves from the law, but these torts attempt to limit that power. These torts protect employees who blow the whistle on employer violations of law or public policy; who refuse to commit an unlawful act or violate public policy; who fulfill a public obligation, such as jury service; or who exercise a statutory right. Some statutes have created other anti-retaliation prohibitions or whistleblower protections. The Sarbanes-Oxley Act of 2002 is a recent example of such laws.

**Pre-dispute arbitration agreements.** The spread of pre-dispute arbitration agreements since the 1991 *Gilmer* decision<sup>19</sup> is one more factor forcing courts to develop laws to determine the validity of such agreements and to interpret them. These interpretations inevitably

require examining the existence and terms of employment agreements, including whether the relationship has been transformed into one based on just cause. Employers who want to retain at-will employment need to take care to avoid creating any contractual obligations. This created a real challenge. In order to channel employment disputes into arbitration and not the courts, arbitration agreements had to bind the employees to arbitrate disputes while not creating just-cause employment. Employ-

ers wanted to be free to take unilateral action, and some wanted to bind employees to arbitrate while still allowing the employer free access to the courts. The resulting employment handbooks and pre-dispute arbitration agreements had the potential to do violence to contract law and logic.

In especially egregious situations, some courts refused to find that any contract existed. The agreements

themselves pushed courts to focus on contract interpretation and brought ordinary contract-law principles to govern their interpretation.<sup>20</sup> However, many courts remain fixed on at-will as the bedrock of employment law and do not scrutinize pre-dispute arbitration agreements using ordinary contractual principles.<sup>21</sup> Professor Richard Bales recently examined court application of contract principles to pre-dispute arbitration agreements and found little evidence that the courts are adhering to contract law.<sup>22</sup>

### **B. Cost of saving at-will**

Just as these legal changes signal problems with the at-will regime, the processes by which they have come into being have created their own problems. In a sense, these common law contract and tort developments are patches on an unstable system. They are viewed as excep-

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tions to at-will and thus must fit within that system yet not destroy it. They are also similar to patches in that they are more a product of incrementalist legal development than logic. Take, for example, the Pennsylvania Supreme Court's statement as to the ways a just-cause employment status can be established:

In order to rebut the presumption of at-will employment, a party must establish one of the following: (1) an agreement for a definite duration; (2) an agreement specifying that the employee will be discharged for just cause only; (3) sufficient additional consideration or (4) an applicable recognized public policy exception.<sup>23</sup>

This is an interesting grab bag of a list, rather than a coherent system of analysis. As such, the list raises many questions. For example, why has the court selected these four exceptions but not others? Are all fixed-term employment agreements to be based on just cause, or is it also necessary for the parties to agree to just cause? If the parties prefer at-will but also want a fixed-term agreement, must they then state that the contract termination is at-will? What sort of agreement is legally sufficient to show that a discharge is to be based only on just cause? Will any agreement that is sufficient at common law to create a contract or contractual obligation do, such as an oral agreement or promissory estoppel?

The requirement for "sufficient additional consideration" is puzzling. What purpose is it intended to serve, and must it only be the employee who provides the additional consideration? In addition to establishing what consideration is sufficient and what it is additional to, why does this requirement matter? Could an employer and employee stumble into a just-cause relationship because the employee happened to give "sufficient additional consideration"? The dissent in *McLaughlin* pointed out that the Pennsylvania and federal laws recognized safe workplaces as important policies, yet the majority had failed to apply its fourth exception and thus allowed the employer to

fire the employee.<sup>24</sup> Finally, while it seems reasonable not to allow an employer to fire an employee who complies with or furthers public policy, there is no clear way to know whether a policy is a recognized one.

In short, this seems to be a reflexive list with no internal logic and one that is ignored by the courts. Furthermore, if the Pennsylvania Supreme Court wants to preserve at-will employment, why is it creating these exceptions that can undermine it? Clinging to at-will and trying to shore it up piecemeal has led us to "doctrinal chaos."<sup>25</sup> It is impossible to follow the legal developments related to at-will, pre-dispute arbitration agreements, and common law exceptions to at-will without asking: What is the logic?

Illogical law is expensive law, a cost employers can not escape. The price of retaining at-will as the default law while trying to accommodate other needs and employer desires is the development of an incoherent legal system. Clinging to at-will has become an expensive project. Legal chaos and uncertainty make it difficult for employers to plan, for employees to know their rights, and for attorneys to give good advice.

## II. AT-WILL AND MANAGING THE WORKPLACE

Distortion of the law that leads to greater complexity and uncertainty is not the only cost created by at-will. In fact, its greatest cost may be its effect on employers in the management of their workplaces. In order to gauge its costs, we must start by asking what most employers gain from having an at-will system. The greatest benefit would be if most employers frequently wanted to fire their workers for a bad reason or for no reason. By now most bad reasons for firing workers are illegal, so an at-will regime is limited to firing workers for a good reason or no reason. It seems unlikely that most employers want to fire their employees for no reason,<sup>26</sup> because, by definition, this means firing good employees.

If these assumptions are correct, then employers are bearing the cost of exercising the vigilance necessary to keep and defend a

system that is not useful and may not even be much used. What is the benefit to employers of this strategy? And what are the costs?

Making it easy to fire good workers is not what is driving the retention of at-will. What drives employers is their desire to manage their businesses so they are profitable. Employers know that being sued cuts into profits; therefore, they try to bulletproof their workplaces to avoid the trouble and expense of being sued, including

by terminated workers. It has become accepted wisdom that the best way to do this is to ensure that workers are at-will employees.<sup>27</sup>

It is time to question the accepted wisdom. First, as discussed earlier, even in an at-will system employment lawsuits are the number one concern of corporate general counsels. This concern outstrips all others by a wide margin. If this litigation explosion exists under an at-will regime, then at-will has failed at its sole reason for being.

Second, the steps employers must take to preserve at-will may be having the perverse effect of causing the employment litigation explosion. Third, a direct effect of the campaign to keep at-will may be making it harder for employers to be good managers. For all these reasons, at-will may not be promoting a strong economy; it may be undermining it.

Here are some reasons why at-will is both contributing to the litigation explosion and undermining the management of workplaces.

*Managing the just-cause workplace.* Fear of litigation and the assumption that at-will employment will prevent being sued is driving employers to conduct business in a way that is not in their best interests. The need to retain at-will displaces the real goal – to manage a workplace well. Managing a workplace

well includes being a good employer, and being a good employer can achieve the goal of preventing lawsuits.

Most employers already understand how to go about being a good employer. To some extent it is a version of the Golden Rule, that is, the things that offend the employer will probably offend employees. This includes not feeling respected, having the ball hidden, being treated unequally, not being treated fairly, not being listened to,

being deprived of rights and possessions unfairly.

This list translates roughly into some of our country's most fundamental values – due process and equal protection. They include being given notice of what is expected, being given a chance to respond to charges of misconduct, being given a chance to reform, being given a fair decision, and being treated on a par with one's equals. This is also just-cause employment.

It is, however, not easy to practice.

First, it requires being honest with employees about their work. Telling employees the good as well as the bad as accurately and dispassionately as possible, especially over time, builds trust, shows respect, and gives employees a fair chance to succeed. This means telling employees concretely how they are and are not meeting their work requirements. If they are not meeting them, it means telling them objectively what they are expected to do and giving them a reasonable time in which to do it.<sup>28</sup>

If a system of regular and fair feedback is in place to give employees notice and if this is systematically followed, employers can avoid a lot of trouble. Bad employees can not improve when they are not told that their performance is unsatisfactory and are not told what they are expected to do. I have seen situations in which employees turn around once they understand

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what is expected of them. This is certainly the best outcome. Firing a worker is unpleasant and disruptive for all concerned, and hiring and training new employees is expensive and risky. After investing time and money, it may not result in finding a better employee.

Contrast this system with the impact of at-will on the workplace. An employer who wants to maintain an at-will relationship – and be able to prove this in court – must be vigilant that nothing is said or done that could in any way be interpreted as creating just cause. It must not have rules of conduct or standards for progressive discipline because these support the existence of just cause. At every point in the employment handbook or other literature, the employer must re-state its position that employment is at-will, and employees can be fired for a good reason, a bad reason, or no reason.

When I surveyed employees about how they reacted to such a handbook, they told me that they had been happy about starting their jobs until they read the handbook. After that, they felt less attachment and enthusiasm. When I have shown handbooks containing this principle to law students and lawyers who do not practice employment law, they have all reacted negatively. This language does not create or retain employee loyalty. This is one of the costs of at-will – alienating employees, in particular, good employees.

Some employers have told me that they like at-will because they do not have to put as much time into training supervisors. If this reflects the view of employers in general, this itself is a strong argument for jettisoning at-will.<sup>29</sup> There is little positive to say for a legal system that encourages employers to stint on training supervisors.

That said, I understand why an employer, and especially line supervisors, would prefer not to have to take on the burden of giving honest feedback and fair opportunities to respond. It is a natural feeling to resist giving people bad news. It is unpleasant to criticize other people. Having to do so or risk being sued is part of a just cause system.

But honest feedback is important for more reasons than avoiding a lawsuit. The conse-

quences of not giving honest feedback can be ruinous. The employee whose behavior has been condoned, who has received neutral or even positive feedback or has assumed that no news is good news is stunned when she is “let go.” She is likely to conclude that she has been treated unfairly, and it is reasonable for her to do so under the circumstances. This sense of unfairness is likely to fester, and the employee will look for a lawyer. Co-workers will lose work time and commitment speculating over whether they are next.

*Litigation under a just-cause system.* In addition to supporting and promoting good management practices, a just-cause system puts an employer in a better situation should it be sued.

First, consider the process of trying and defending a discharge case under an at-will regime. These are likely to be two-step cases and thus more expensive to try. The first step is proving whether or not the at-will relationship is actually or has been transformed into just-cause employment, whether there is a contract for fair treatment or whether there has been promissory estoppel. The evidence will also have to prove what the terms of that contract are. The proofs are likely to involve an array of conversations, documents, and testimony on courses of conduct during the course of employment. These are, of course, hard cases for plaintiffs to win, but that does not mean employers need not mount a defense.

The second step of this sort of claim – whether the employee was justly terminated – is where an employer in a just-cause regime begins. This step measures the employer’s decision against the standards of the workplace. If an employer has established a just-cause system, the standards will be clear. More important, there may be no case. An employer who has set up a just-cause regime will have given regular feedback, which its files will reflect. Giving employees feedback, fair notice, and a reasonable opportunity to respond means that there will be a record that explains why this employee was fired. An employee’s attorney who sees an orderly file that demonstrates no-

tice and fair and consistent treatment is likely to recommend not filing at all. If an employer has abided by reasonable just-cause standards, any case that gets to the point of being filed will be quickly dismissed.

The bottom line is that, while the default law of most – but not all – states is at-will, that does not mean it is a good choice for employers.

### **III. COST TO SOCIETY FROM MAINTAINING AT-WILL: FIRING GOOD EMPLOYEES**

In each of the Pennsylvania cases discussed at the start of this article, the courts upheld the sanctity of at-will by finding that the employer had the right to fire the workers. So far, we have not considered why the employees were fired, whether at-will led to a reasonable result, and, since the justification for at-will is currently being made in economic terms, whether the permission at-will gives employers to fire workers imposes negative externalities.

In one case,<sup>30</sup> the employer physicians group, Gastrointestinal Specialists, fired Mary McLaughlin, its office manager, after she complained about fumes from gluteraldehyde, a disinfectant. OSHA has designated gluteraldehyde as a toxic, highly noxious solution to be used only in an open, well-ventilated area. However, the employer stored it in a small closet that had no ventilation. Whenever the closet door was opened, “a strong, noxious odor was emitted and toxic vapors were released,” causing McLaughlin to suffer from migraine headaches, nausea, fatigue, shortness of breath and dizziness. After her complaints were ignored, she sent an air sample for testing. The laboratory found that the sample was two-and-a-half times OSHA’s maximum exposure limit. When McLaughlin reported this information to a manager, she was told not to discuss it for fear other workers would file workers’ compensation claims. The employer then fired her.

In the second Pennsylvania case,<sup>31</sup> Mark Consolmagno had received nothing but commendations through his five years with Home Depot. That stopped once he reported to a

manager that he had seen a supervisor loading lumber onto shelves in a way that had caused it to fall, endangering shoppers and his co-workers. Consolmagno also reported violations of company policy by the same supervisor. Within a few weeks he began receiving disciplines and then was fired in a manner that did not comply with Home Depot’s stated policies. The court stated that Pennsylvania law permits an employer to fire an employee even if the employer violated health and safety policies and its stated rules.

Putting aside the legal requirements for the moment, what is the impact of approving the discharge of a worker under these circumstances? Since these employees were both correct that there was a serious problem, we should consider the impact of firing a worker who raises a genuine safety concern. What is the impact on an employee fired for acting in good faith and being a conscientious worker?<sup>32</sup> What is the impact on fellow workers and the public who will continue to be exposed to dangerous conditions? How will co-workers react after they receive a dramatic lesson in what happens to workers who speak out about health and safety? What values are promoted when a court upholds actions by an employer who demonstrates a desire to evade the state’s laws and breaks its word to employees? What is the impact on the economy when a worker fired for being a good worker – and a good citizen – is unable to find a new job because the worker has been fired?

There is a price to pay for retaining at-will employment as our default employment law, and employers are not the only ones who are paying it. The at-will doctrine creates problems for the governance of a modern workplace in a democratic society. As discussed earlier, studies have found that the vast majority of employees and most managers believe that the law of the United States is just cause.<sup>33</sup> Employees who believe that employers are legally obligated to be fair in their treatment of employees are more likely to believe that they have an obligation to reciprocate. One scholar argues:

Employees who believe that they have job security are more loyal than employees who feel insecure about their job. Loyal employees produce more and turn over less. Such loyalty, difficult to obtain but easy to lose, positively correlates with shareholder value. One study of more than 3000 companies revealed that firms who implemented employee motivation initiatives to increase loyalty had higher stock-price to book-value ratios than companies that did not. One company that instituted a loyalty development initiative reported as much as a \$41,000 increase in market value per employee as a result. Employers receive these benefits but still exercise the right to fire at any time, loyal employee or not.<sup>34</sup>

It seems logical that when workers learn that their loyalty is not reciprocated, they feel betrayed, disillusioned, and angry and may share those feelings with friends and families. This may, in turn, have a negative effect on companies' success.

While some of those costs are financial, others affect our society's values. If at-will is not the relationship the parties agreed to and yet we impose it, does our economy or society really benefit? If we are creating a legal system for the workplace whose logic is allowing one party - and usually the employer - to evade the agreements they have made, how does this

promote a government of laws? And if we are at the same time holding that any pre-dispute arbitration agreement binds a worker, even when imposed through duress, unilaterally, and overreaching, what impact does this have on employees who are also supposed to be free citizens of a democracy? We need to consider whether a democracy can operate when this lesson is instilled in its workers.

If we are to assess the social costs of at-will we need to consider the full cost of firing workers. Since the justification for at-will is currently being made in economic terms, we need to consider whether the employer fully bears the costs of its decision to fire a worker or whether they are imposed on others. Put in economic terminology, does the permission at-will gives employers to fire workers impose negative externalities?

Furthermore, employers should think about who they want to be and how they want to be known to the world and within their workplaces. For some employers, at-will may be a good fit. But other employers, particularly those whose work links them with a humane image and a social conscience, having an at-will policy may be so completely at odds with their internal and external identities that it undermines their mission.

Finally, if we are a democracy, should our institutions be built on values that support the functions of a democracy? If they should, in what way does the at-will doctrine promote or undermine the governance of a modern workplace in a democratic society? ▲

## ENDNOTES

<sup>1</sup> Consolmagno v. Home Depot, Case No.06-1097, at 10-12 (W.D. Pa. Dec. 6, 2006); see also McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. 307; 750 A.2d 283 (2000); Luteran v. Loral Fairchild Corp., 455 Pa. Super. 364, 370, 688 A.2d 211 (1997).

<sup>2</sup> Bammert v. Don's Super Valu, Inc., 254 Wis. 2d 347, 356; 646 N.W.2d 365, 369-70 (Wis. 2002).

<sup>3</sup> Thomas C. Kohler, *The Employment Relation and*

*Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. Rev. 103, 106 (1999); see also John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

<sup>4</sup> Fulbright & Jaworski, L.L.P., *Third Annual Litigation Trends Survey 10* (Oct 10, 2006) <http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitiga->

[tionTrendsSurveyFindings.pdf](http://www.fulbright.com/mediaroom/files/2006/FulbrightsThirdAnnualLitigationTrendsSurveyFindings.pdf). (Site last visited Jan.1, 2007).

<sup>5</sup> Jaffe Legal News Service (JLNS), *Litigation as a Growth Industry: Fulbright* (Oct. 10, 2006) <http://www.jlns.com/index.cfm?fuseaction=Home.ShowArticleDetail&ArticleID=4903&SectionTitle=Litigation%20as%20a%20Growth%20Industry:%20Fulbright%20&%20Jaworski%20Survey%20Finds%20U.S.%20Businesses%20Face>

[%20an%20Average%20of%20305%20Lawsuits%20W.](http://www.jlns.com/index.cfm?fuseaction=Home.ShowArticleDetail&ArticleID=4903&SectionTitle=Litigation%20as%20a%20Growth%20Industry:%20Fulbright%20&%20Jaworski%20Survey%20Finds%20U.S.%20Businesses%20Face) (Emphasis added) (Site last visited Jan.1, 2007)

<sup>6</sup> Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311; 171 Cal. Rptr. 917 (1981); see also Foley v. Interactive Data Corp., 47 Cal. 3d 654; 765 P.2d 373 (1988).

<sup>7</sup> Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579; 292 N.W.2d 880 (1980).

<sup>8</sup> See, e.g., Darlington v. General Electric Co., 350

- Pa. Super. 183; 504 A.2d 306 (1986) (consideration relevant to interpreting party intent); Woolley v. Hoffmann-La Roche, Inc., 491 A. 2d 1257 (N.J. 1985) (employment manual can constitute employment contract); Ohanian v. Avis Rent A Car System, Inc., 779 F.2d 101 (2<sup>nd</sup> Cir. 1985) (oral contract and parole evidence principles applicable); Grouse v. Group Health Plan, Inc., 306 N.W. 2d 114 (Minn. 1981) (promissory estoppel).
- <sup>9</sup> Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997). Kim repeated this study and found similar results. Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447; see also Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 196-97 (2005).
- <sup>10</sup> Denise M. Rousseau & Ronald J. Anton, *Fairness and Implied Contract Obligations in Job Terminations: The Role of Contributions, Promises, and Performance*, 12 J. ORG. BEHAV. 287, 296 (1991). A survey of Chicago workplaces and what people there say they have found that 78.7% (79.5% of nonsupervisors) believed that the employer must give reasons for terminating an employee; 48.9% (49.4% of nonsupervisors) thought the employer must give reasons for termination in writing; and 62.3% (56.7% of nonsupervisors) believed that employers must give advance notice of termination or severance pay. WILLIAM P. BRIDGES & WAYNE J. VILLEMEZ, *THE EMPLOYMENT RELATIONSHIP: CAUSES AND CONSEQUENCES OF MODERN PERSONNEL ADMINISTRATION* (1994)
- <sup>11</sup> Rowe v. Montgomery Ward & Co., 437 Mich. 627; 473 N.W.2d 268 (1991).
- <sup>12</sup> Guz v. Bechtel National, Inc., 24 Cal. 4th 317; 8 P.3d 1089 (2000) (overruling *Pugh*).
- <sup>13</sup> DeMasse v. ITT Corp., 194 Ariz. 500; 984 P.2d 1138 (1999).
- <sup>14</sup> Doyle v. Holy Cross Hosp., 186 Ill. 2d 104; 708 N.E.2d 1140 (1999).
- <sup>15</sup> Asmus v. Pacific Bell, 23 Cal. 4th 1; 999 P.2d 71 (2000); In re Certified Question (Bankey), 432 Mich. 438; 443 N.W.2d 112 (1989); Fleming v. Borden, Inc., 316 S.C. 452; 450 S.E.2d 589 (1994).
- <sup>16</sup> Mont. Code Ann. §§ 39-2-901 to 39-2-914 (2006).
- <sup>17</sup> A.R.S. §§ 23-1501 to 23-1502 (2006).
- <sup>18</sup> Murphy v. American Home Products Corp., 58 N.Y.2d 293; 448 N.E. 2d 86 (1983).
- <sup>19</sup> Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). For an interesting discussion of *Gilmer*, see Matthew W. Finkin, "Worker's Contracts" Under the *United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996).
- <sup>20</sup> First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). Contract doctrines used to interpret pre-dispute arbitration agreements included construing ambiguous terms against the drafter and requiring mutuality of obligation, that is, if one party is bound, both must be bound. See, e.g., McCauley v. Halliburton Energy Services, Inc., Case No.05-6011 (10th Cir. Dec. 30, 2005) (Parties not required to arbitrate issues they have not agreed to submit to arbitration, and since the right to court access is protected by the constitution, a waiver of the right must be clear, voluntary, and knowing); Harris v. EPS, Inc., Case No. 2:05-CV-212 at 13-14 (D. Vt. May 16, 2006) (employer's disclaimer that the employment handbook created a contract meant that the pre-dispute arbitration agreement could not bind employees); Heurtebise v. Reliable Business Computers, Inc. 52 Mich. 405; 550 N.W.2d 243 (1996) (employer's regaining a right to unilaterally modify its employment manual demonstrated no intent to be bound and thus did not create an enforceable arbitration agreement); Denise Matteocci v. Oakwood Healthcare, Case No.263812 (Mich. Ct. App. Jan. 12, 2006). Other courts have required that to be enforceable, pre-dispute arbitration agreements must include basic safeguards that preserved at least some elements of litigation that ensure basic fairness. See, e.g., Cole v. Burns Int'l Security Servs., 105 F.3d 1465 (D.C. Cir. 1997); Armendariz v. Foundation Health Psychcare Services, 24 Cal. 4th 83; 6 P.3d 669 (2000).
- <sup>21</sup> See, e.g., Kenneth Geniuk, Note: *Tippling the Scales: Using State Contract Law to Protect At-will Employees from Unfair Mandatory Arbitration Agreements*, 74 UMKC L. REV. 197 (2005); Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203 (2002).
- <sup>22</sup> Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 434-458 (2006); Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005)..
- <sup>23</sup> Luteran v. Loral Fairchild Corp., 455 Pa. Super. 364, 370, 688 A.2d 211 (1997).
- <sup>24</sup> McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. at 321-22 (citing to the Pennsylvania Health and Safety Act sections concerning "toxic and noxious dusts, fumes, vapors, gases, fibers, fogs mists or other atmospheric impurities" in areas where they can injure the health of employees and the Occupational Safety and Health Act (OSHA) whose stated policy is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."
- <sup>25</sup> Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 300-02 (2005).
- <sup>26</sup> Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 347-48 (2002).
- <sup>27</sup> Fear of being sued may also be driving the increasing use of workers through temporary placement firms or leasing employees or trying to convert employees to independent contractors. These strategies may not be effective, however, in achieving these goals.
- <sup>28</sup> In an interview concerning *Reeves v. Sanderson Plumbing Products*, Stephen Bokat, General Counsel of the US Chamber of Commerce advocated honesty with workers: "There's a strong message for employers that they must be brutally honest with employees and not misstate to them, not lie to them about the reasons for any adverse actions. Sometimes people lie just to spare an employee's feelings. That will get you in trouble is the clear message of this case." *Supreme Court Rules Employees Do Not Have to Show a Company Intentionally Discriminated Against Them in Order to Get Their Case Before a Jury*, All Things Considered (June 12, 2000).
- <sup>29</sup> A new study to be published in the Fall 2007 *Leadership Quarterly* finds: Employees stuck in an abusive relationship experienced more exhaustion, job tension, nervousness, depressed mood and mistrust. They also were less likely to take on additional tasks, such as working longer or on weekends, and were generally less satisfied with their job. Also, employees were more likely to leave if involved in an abusive relationship than if dissatisfied with pay. [http://www.fsu.edu/news/2006/12/04/bad\\_boss/](http://www.fsu.edu/news/2006/12/04/bad_boss/)
- <sup>30</sup> McLaughlin v. Gastrointestinal Specialists, Inc., 561 Pa. 307; 750 A.2d 283 (2000).
- <sup>31</sup> Consolmagno v. Home Depot, Case No.06-1097, at 10-12 (W.D. Pa. Dec. 6, 2006).
- <sup>32</sup> For a discussion of the motives and fates of whistleblowers, see C. FRED ALFORD, *WHISTLEBLOWERS* (2001).
- <sup>33</sup> Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997). Kim repeated this study and found similar results. Pauline T. Kim, *Norms, Learning, and*

*Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447; see also Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 196-97 (2005).

Denise M. Rousseau & Ronald J. Anton, *Fairness and Implied Contract Obligations in Job Terminations: The Role of Contributions, Promises, and Performance*, 12 J. ORG.

BEHAV. 287, 296 (1991). A survey of Chicago workplaces and what people there say they have found that 78.7% (79.5% of nonsupervisors) believed that the employer must give reasons for terminating an employee; 48.9% (49.4% of nonsupervisors) thought the employer must give reasons for termination in writing; and 62.3% (56.7% of nonsupervisors) believed that employers must

give advance notice of termination or severance pay. WILLIAM P. BRIDGES & WAYNE J. VILLEMESZ, *THE EMPLOYMENT RELATIONSHIP: CAUSES AND CONSEQUENCES OF MODERN PERSONNEL ADMINISTRATION* (1994).

<sup>24</sup> Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 198 (2005). An empirical study shows that many managers also believe in just cause based on commitments made

between employer and employee. "Time on the job and commitments of long-term employment give rise to the belief that the firm is under an obligation to continue employment." Denise M. Rousseau & Ronald J. Anton, *Fairness and Implied Contract Obligations in Job Terminations: The Role of Contributions, Promises, and Performance*, 12 J. ORG. BEHAV. 287, 296 (1991).