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EMPLOYMENT AT-WILL AND EMPLOYEE DISCHARGE: A JUSTICE PERSPECTIVE ON LEGAL ACTION FOLLOWING TERMINATION

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In contrast to statutory constraints on employment-related discrimination, the primary legal context for employee discharge is the common law doctrine of employment at-will. Although some attention has been given to legal issues surrounding employee discharge, there has been little systematic effort to identify the psychological antecedents of the decision to bring suit against organizations for discharge-related reasons. This paper provides an overview of employment at-will and its history in the U.S. and reviews legal developments related to at-will since the late 1980s. We then offer a preliminary model addressing the decision by a discharged employee to bring suit against an organization and the factors influencing the likelihood of liability. We end with a number of practical suggestions that follow from the literature review and model.

The doctrine of "employment at-will" states that employers and employees have the right to initiate and terminate employment relationships at any time, for any reason or no reason at all. For the last 100 years or so, employment at-will has been presumed by the courts to be in effect unless expressly nullified by statutory law, personal contract or collective bargaining agreement. As a result, an estimated 60 million U.S. employees are subject to employment at-will (Stieber, 1985).

However, where employers once enjoyed no legal constraint on their ability to discharge employees, things have changed. Since a ground-breaking court case in 1959, three types of "exceptions" to employment at-will have emerged in common law applicable to these employees. In the last 25 years, the number of discharge-related court cases has increased steadily and damages associated with liability have grown as well (Franz, 1990; Geslewitz, 1986; Ledvinka & Scarpello, 1992; Pepe & Hayward, 1994). The average award to victorious plaintiffs in wrongful discharge cases heard in California between 1982 and 1986 was $652,100

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(Ledvinka & Scarpello, 1992) and $1.41 million for 115 cases between 1989 and 1991 (Pepe & Hayward, 1994). In addition to damages associated with liability, other negative outcomes of legal action by discharged employees include preparation time, attorney fees, settlement costs, lowered morale on the part of workers and a tarnished public image. These outcomes may result in the organization "losing" as soon as a discharged employee decides to file suit, even if the suit never goes to trial.

In view of these negative outcomes, it is critical that organizations consider the factors that underlie discharge-related lawsuits and conduct discharges in a fashion that limits the likelihood of legal action and the chances that the organization will be found liable if the suit goes to trial. Although attorneys will handle the situation once a suit has been filed, HR personnel are primarily responsible for the design and implementation of policies and activities that will affect the likelihood of a lawsuit in the first place. At a minimum, HR practitioners should be familiar with statutory and common law developments relevant to discharge that will allow them to recognize troublesome practices that could potentially lead to litigation. Ideally, this knowledge can be applied proactively in the design and implementation of HR policies that reduce the threat of lawsuit.

The purpose of this paper is twofold. We provide a review of recent developments in the common law doctrine of employment at-will since an earlier review by Koys, Briggs, and Grenig (1987). We then present a model of legal action by discharged employees that integrates the psychological antecedents and legal consequences. Although some research has examined reactions to discharge on the part of "victims" (Konovsky & Brockner, 1993; Leana & Ivancevich, 1987; Stokes & Cochrane, 1984) and "survivors" (Brockner, DeWitt, Grover, & Reed, 1990; Brockner, Grover, & Blonder, 1988; Greenlagh & Jick, 1979), there has been little attention given to the initiation of legal action by discharged employees (Konovsky & Folger, 1991). Given the substantial impact that lawsuits may have on organizations, this seems to be a serious omission. We hope this model will stimulate research on the factors leading discharged employees to sue as well as allow applied psychologists to minimize the likelihood of lawsuit and the adverse outcomes resulting from them.

The Legal Context of Employee Discharge

Common Law: Employment At-Will

Unlike the statutory basis of employment-related discrimination law,

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employment at-will is a common law doctrine that has emerged over time and varies across jurisdiction. The doctrine began in England where courts came to recognize that employees hired for an unspecified amount of time were hired for a period of 1 year. During the first year, an employer was required to show just cause in order to fire an employee whereas afterwards workers could be fired for any or no reason. Courts in Colonial America (and later in the U.S.) came to recognize the 1 year implied duration of the employment contract and it remained the default legal assumption for more than 100 years. However, in 1877, a legal paper written by an Albany lawyer named Horace G. Wood had a sweeping influence on the courts' view of employer-employee relations. In "A Treatise on Master and Servant," Wood argued that employment relationships without an explicit duration should be viewed as terminable "at-will" by either party. Although Wood provided only four cases to support his arguments, his proposed standard was explicitly accepted by the New York Court of Appeals in *Martin v. New York Life Insurance Co.* (1895) and by the U.S. Supreme Court in *Adair v. United States* (1908).

Once at-will employment was established, two factors combined to make it very difficult for employees to argue that employment relationships were something other than at-will (Bompey, Brittain & Weiner, 1991; Rothstein, Craver, Schroeder, Shoben & Vandervelde, 1994). First, employers were given the benefit of the doubt in that at-will was presumed to be in effect by courts without "additional consideration." Second, courts at all levels tended to hold a very narrow interpretation of "additional consideration," essentially requiring a signed written agreement before recognizing that employment at-will was not in effect. In the absence of an explicit contract specifying the duration of employment, courts were unwilling to enforce alleged promises of long-term employment. The presumption of employment at-will and the strict standard for rebuttal combined to make it very difficult for employees to win lawsuits based on claims of unfair or inappropriate discharge.

When an at-will employee is discharged and decides to bring suit, the case will more than likely be heard as a civil suit by a state trial court. In contrast to employment discrimination, state courts (as opposed to the federal courts) handle most cases involving discharge. The two most relevant categories of civil law are contract law and tort law. In cases involving contract law, the courts must determine whether or not an enforceable contract existed and whether or not it was broken. If a contract existed and was broken, damages awarded to the defendant may include income, benefits, commissions or other compensation that could reasonably have been expected from fulfillment of the contract, including "back pay" and sometimes "front pay." Tort law applies to situations involving

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personal injury, broadly defined. Basically, in addition to all the damages available under contract law, plaintiffs in tort cases may be awarded punitive damages to punish the defendant for actions leading up to or causing physical injury or emotional suffering. Most jurisdictions do not allow recovery of punitive damages in cases involving breach of contract unless a tort is also involved (Rothstein et al., 1994). Discharge cases involving tort law thus have the potential to be much more costly to an organization.

The primary alternative to at-will is discharge based on "just cause" (or "for cause"). Just cause discharge policies identify a set of conditions detailing when discharge is warranted and often a set of procedures to be used to ensure that those conditions are met. As a result of the increasing legal vulnerability of the at-will doctrine, an increased number of employers have abandoned it in favor of just cause policies. In the next section, we briefly review the statutory limitations on discharge that apply regardless of discharge policy.

Statutory Law: Increasing Legislation Relevant to the Workplace

Despite the scope of employment at-will via common law, it is important to recognize that there are some constraints on employee discharge as a result of federal statutory legislation. The first statutory limitation on at-will occurred with the passage of the Pendleton Act of 1883, which placed many federal jobs on a merit system to limit termination based on partisan politics. In 1912, the Lloyd-La Follette Act then took the greater step of requiring just cause before employees could be dismissed from most positions in the federal government. Constraints on at-will expanded to the private sector with passage of the National Labor Relations Act of 1935. This law recognized the legitimacy of labor unions and their collective bargaining agreements, formally limiting at-will when in effect and opening the door for negotiated just cause policies. Since then, limitation has continued in the form of civil rights legislation (e.g., Americans with Disabilities Act of 1990; Title VII, Civil Rights Act of 1964) and legislation protecting the rights of individual workers (e.g., Employee Polygraph Protection Act, 1988; Occupational Safety and Health Act, 1970; Whistleblower Protection Act, 1993). Although these laws make it illegal to discharge employees for certain specific reasons, they do not nullify the "default" status of at-will.

In addition to federal legislation, many states have passed statutes that further limit the ability of employers to terminate employees. These laws vary in scope from making it illegal to discharge for specific reasons (e.g., exercising rights entitled by state law, refusing to perform illegal acts) to broadly defining and comprehensively identifying various types

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of wrongful discharge (e.g., Montana's Wrongful Discharge from Employment Act of 1987). Put simply, there is a great deal of variation with regard to constraints imposed by the states beyond those stemming from federal legislation. Given the small number of relevant federal laws and their highly specific nature, state law tends to be much more important in discharge-related lawsuits, and interested readers are referred to Walsh and Schwarz (1996) for a more extensive discussion of state legislation. However, many discharge-related issues are not covered by federal or state law and are thus interpreted in light of common law, which highlights the primary importance of employment at-will. In the next section, we review a number of common law constraints on employment at-will.

Common Law Constraints on Employment At-Will

Although limited by federal and state legislation, at-will is still viewed as the default employment condition where laws or collective bargaining agreements do not prohibit it. Accordingly, the most significant constraints on the doctrine have come via common law decisions made by judges in the state court systems. In particular, many state court systems have come to recognize three types of "exceptions" to employment at-will that constitute valid reasons why at-will employees should not be fired. These exceptions are: (a) breach of implied contract to discharge for certain reasons only, (b) breach of the implied covenant of good faith and fair dealing relevant to the resolution of contracts in a market society, and (c) wrongful discharge in violation of public policy (Holley & Wolters, 1987; Pepe & Hayward, 1994; Rothstein et al., 1994). The first two exceptions have evolved under principles of contract law; the latter exception is generally heard under tort law. In addition to these three exceptions, two additional torts can arise in discharge situations—constructive and abusive discharge. Table 1 depicts the major points of each of these exceptions.

In the next section, we review the status of these constraints on at-will and note significant developments since 1987. Cases included in this review were identified based on a search of legal periodicals and books and, due to space constraints, represent a selective sample chosen to highlight important issues (Binetti, 1997; Bompey et al., 1991; Ledvinka & Scarpello, 1992; Pepe & Heyward, 1994; Rothstein et al., 1994; Weiss, 1995). We feel this qualitative approach offers several advantages over a statistical compilation of case outcomes and associated hypothesis testing. First, unlike federal statutory law on employment-related discrimination, employee discharge is primarily an issue of common law, which varies drastically across and within states; as such, quantitative

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TABLE 1

Common Law Exceptions to the Doctrine of Employment At-Will

Contract law	
Implied contract	Covenant of good faith and fair dealing
• Written statements (e.g., policy handbooks) • Oral statements (e.g., recruitment promises) • Individual history with organization • Inconspicious disclaimers	• Depriving benefits or commissions • Preventing employees from vesting pensions • Misrepresenting employment duration

Tort law		
Public policy	Constructive discharge	Abusive discharge
• Refusing to perform illegal acts • Internal and external whistleblowing • Exercising rights provided by law • Performing civic duties (e.g., jury duty)	• Intolerable working conditions • Salary reduction • Loss of meaningful job duties	• Outrageous treatment • Defamation of character • Invasion of privacy (e.g., refusal to take drug test)

summaries are relatively meaningless. To further complicate the matter, common law can vary within a jurisdiction over time as the statutory context changes as well as the composition of the judiciary. Thus, if quantitative analysis revealed that 90% of wrongful discharge cases involving one of the three at-will exceptions were decided in favor of plaintiffs during the last *x* years, this fact would not be very relevant to an organization located within a jurisdiction which did not recognize the particular exception in question. On the other hand, as in all areas of law, legal interpretation is heavily influenced by precedent, even when influential cases occur in other jurisdictions. Thus, there seems to be more value in examining precedent-setting cases. We now review recent developments in the three exceptions to employment at-will.

Exceptions to Employment At-Will Based on Contract Law

The two common law exceptions to employment at-will relevant to principles of contract law are breach of implied contract to discharge for cause and breach of the implied covenant of good faith and fair dealing. At issue in either type of case is whether or not an enforceable contract existed that limited the ability of the employer to discharge the employee, and whether it was breached. Of the two exceptions, breach of implied contract is widely recognized by the states and more likely to be unintentionally violated by an organization. Breach of the

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implied covenant is not recognized by many states and has been narrowly interpreted in those that do.

Breach of implied contract. This exception involves implicit or explicit promises that an employee will either not be fired or fired only for certain reasons. Promises can be made orally or in writing, formally or informally (O'Donnell-Allen, 1995). The watershed case for this exception occurred in 1980 at the Michigan Supreme Court. In *Toussaint v. Blue Cross* (1980), the court found that an enforceable contract had unilaterally been created by statements made in the employee handbook which stipulated that employees who had successfully completed a probationary period would be discharged "for just cause only." The precedent established by the Michigan Supreme Court was quickly adopted by many other states. Koys et al. (1987) identified 33 states where courts had recognized the breach of implied contract exception in either the oral (13 states) or written (26 states) form. Walsh and Schwarz (1996) reported that 38 states recognized the exception, with 15 taking a "broad" interpretation (i.e., recognizing both written and oral contract forms and limitations to the use of at-will disclaimers) and 23 holding to a "narrow" interpretation (i.e., not recognizing oral contracts or limitations on disclaimers). We now examine the status of this exception in more detail.

By the end of the 1980s, it was fairly well established that oral or written statements establishing just cause discharge, probationary periods, or formal grievance procedures would be treated as enforceable contracts by the courts. Since then, some courts have expanded their interpretation of implied contracts to include more general statements not necessarily refering to specific procedures. For example, implied contracts have been recognized from written statements promising "maximum" or "lifetime" job security (*Preston v. Claridge Hotel & Casino Ltd.*, 1989) or termination after progressive discipline (e.g., *Bobbit v. The Orchard*, 1992; *Long v. Tazwell/Pekin*, 1991), as well as spoken comments referring to "indefinite employment" (*Kestenbaum v. Penzoil*, 1989), a "long-term future" with the company and full support from management in the event of conflicts (*Coelho v. Posi-Seal International*, 1988), a promise of continued employment contingent on adequate performance (*Conrad v. Rofin Sinar, Inc.*, 1991) and guaranteed raises or promotions (*Gorwara v. AEL Industries*, 1992). In general, whether in written or oral form, the courts in most states seem willing to recognize implied contracts in language other than straightforward promises of discharge for "just cause only."

In contrast to the general expansion in the scope of qualifying language, some courts appear to be toughening their standards with regard to the specificity of that language. Most courts now require "clear and

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unequivocal" language before determining that an implied-in-fact contract has been established (*Rowe v. Montgomery Ward Co.*, 1991). For example, courts have refused to infer implied contracts from comments conveying positive sentiments or general encouragement (e.g., *Anderson v. Post/Newsweek*, 1992; *Peterson v. Beebe Medical Center*, 1993; *Watkins v. United Parcel Service*, 1992), promises of "fair and dignified" treatment (*Miller v. CertainTeed*, 1992), listings of punishable offenses (*Hatfield v. Johnson Controls*, 1992) or isolated statements without a history or pattern (*Barber v. SMH, Inc.*, 1993). Even more reliably, the courts have generally supported the use of disclaimers that explicitly dismiss the notion of just cause dismissal if the disclaimers are clear and conspicuous (*Kramer v. Medical Graphics*, 1989; *Ferrera v. A.C. Nielsen*, 1990; *Pratt v. Brown Machine*, 1988). However, disclaimers are only accepted by some jurisdictions, and in those that do, their acceptance is not unconditional. For example, when written disclaimers are the same size and font as other material (*Arellano v. Amax Coal*, 1991) or are inserted in materials after distribution and without "reasonable notice" having been given (*Lytle v. Malady*, 1996), the courts have been sympathetic to plaintiffs.

However, the change with perhaps the most profound implications for organizations since the 1980s is a move towards recognizing implied contracts on the basis of an employee's personnel history with the organization. In two important cases, courts have ruled in favor of plaintiffs when they interpreted statements pertaining to tenure, performance, and compensation as implied enforceable contracts. In *Foley v. Interactive Data* (1988), the court sided with a plaintiff who had been discharged after consistently receiving superior performance evaluations, promotions, awards and bonuses in his 6.5 year tenure. Similarly, in *Tonry v. Security Experts* (1994), the court found for a plaintiff fired after a substantial period of satisfactory service, numerous raises and promotions, and an organizational practice of firing for just cause. Although Roehling (1993) has identified the need for caution when inferring the reasons for judicial decisions, the evidence here suggests that courts may recognize implied contracts based on circumstances that do not necessarily include explicit statements or promises.

Breach of the covenant of good faith and fair dealing. An established principle of contract law is the notion that both parties must act "in good faith" to fulfill their contractual obligation. A breach of the implied covenant of good faith and fair dealing typically involves malicious effort on the part of one party to deprive the other of benefits resulting from the contract. In 1987, Koys et al. reported that only eight states had recognized this exception; a recent review found 10 states that do so (*Walsh & Schwarz*, 1996). Two key cases in the 1980s established that courts would reliably support employees who were discharged to avoid

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payment of earned benefits or commissions (*Khanna v. Microdata*, 1985; *Wakefield v. Northern Telecom*, 1985). Few important cases have been heard under this exception since 1987. When there is clear intention to deprive a discharged employee of commissions or earned benefits, courts have tended to find in favor of the plaintiff (e.g., *Fortune v. National Cash Register*, 1977).

The only recent development involving the implied covenant of good faith and fair dealing is one that suggests courts may recognize a breach of the covenant in situations where earned benefits or commissions are not involved. For example, two cases were decided in favor of plaintiffs when employees were falsely led to believe that their jobs would be long-term (*Merril v. Crothall-American Inc.*, 1992; *Sheppard v. Morgan Keegan*, 1990). On the other hand, two other cases suggest that courts are unwilling to apply the covenant broadly even when it is recognized. For example, courts have sided with the employer when a discharged employee was given the option to retire with benefits (*Edwards v. Massachusetts Mutual Life*, 1991) and when an employee was fired after falsely being told that their position had been eliminated (*Frankina v. First National Bank of Boston*, 1992).

Summary. Since 1987, the breach of implied contract exception has increased modestly in general acceptance and witnessed several important developments. One development represents the consolidation of earlier cases in reliably establishing that written statements in employee manuals or handbooks will be construed as implied contracts if they clearly promise discharge for just cause only, maximum or lifetime job security or progressive disciplinary procedures. Beyond this, the implied contract exception has apparently expanded in some jurisdictions and contracted in others. In progressive states (and, to some extent, individual jurisdictions within states), "incriminating" language has expanded to include more open-ended references and even the pattern of an individual's history with the organization may be seen as an indication of an implied contract. Conversely, more conservative jurisdictions now require clear and specific language before a contract will be inferred and the use of explicit at-will disclaimers is routinely supported. In contrast, the breach of good faith and fair dealing exception remains more or less unchanged in terms of acceptance and interpretation. In the few states that recognize it, the covenant of good faith and fair dealing continues to be rather narrowly applied to cases involving efforts on the part of the employer to avoid paying earned benefits or commissions.

Exceptions Involving Tort Law

Tort law is the second branch of civil law relevant to employment at-

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will. When an employee brings suit over a tort, employers may be liable for contractual damages associated with failing to uphold a contract as well as additional punitive damages if a tort is found to have occurred. Tort violations include discharging an employee for a reason that runs counter to society's interests (wrongful discharge in violation of public policy), forcing a non-at-will employee to quit (constructive discharge) or inflicting mental anguish or emotional distress during the act of discharge (abusive discharge). In this section, we review the status of these three areas of tort law.

Violations of public policy. The third exception to employment at-will involves the termination of employees in violation of public policy. Public policy is an amorphous term referring to the laws, codes, and morals that maintain and further society's interests (Weiss, 1995). Beginning with the landmark *Petermann v. Teamsters Local 396* (1959) case, public policy exceptions to employment at-will have been recognized in four areas: (a) refusing to break a law or engage in illegal activity, (b) exercising legal rights provided by law, (c) reporting criminal conduct to superiors or outside agencies ("whistleblowing"), and (d) performing a civic duty (Rothstein et al., 1994). In 1987, 28 states formally recognized the public policy exception to employment at-will (Koys et al., 1987). Since then, the number has increased to 42, with 26 states holding to a "narrower" version that essentially restricts the source of public policy to statutory law and 16 states holding a "broader" view recognizing sources other than federal, state or local statutes (Walsh & Schwarz, 1996). At the same time, as with implied contracts and the covenant of good faith and fair dealing, differences exist within states as well. We now examine each of these four areas in greater detail.

First and most clearly, the courts have continued to prohibit termination for refusal to engage in illegal activities. This category represents the narrowest (i.e., most conservative) interpretation of public policy and is recognized by most of the jurisdictions that acknowledge the exception in some form. Exemplary rulings in the past 10 years have prohibited termination for refusing to submit fraudulent documents to the government (*Lorenz v. Martin Marrietta Corp.*, 1990), plant contraband on a union steward (*Radwan v. Beecham Laboratories*, 1988), break into tenant residences (*Kessler v. Equity Management*, 1990) and engage in fraudulent billing practices (*Brown v. Hammond*, 1993). However, it is not sufficient for employees to contest a discharge merely because they *thought* their behavior was in accord with the law. In *Hamman v. Gates Chevrolet* (1990), the court ruled that no violation of public policy occurred when the plaintiff was fired after refusing to legitimately alter vehicle titles.

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Second, since 1987 courts have continued to find reliably for plaintiffs who have been terminated for exercising rights granted by constitutional or statutory law. In what is perhaps the clearest type of case favoring plaintiffs, the courts have continually affirmed the public policy nature of federal and state laws regarding occupational health and safety. For example, courts have sided for plaintiffs who have been terminated for refusing to perform work involving cyanide (*D'Angelo v. Gardner*, 1991), filing OSHA complaints against a former employer (*Skillsky v. Lucky Stores*, 1990) and refusing to report to work due to the onset of heart attack symptoms (*Wilcox v. Niagara of Wisconsin Paper*, 1992).

Two new types of cases involving the exercise of individual rights concern responding to sexual harassment and refusing to take drug tests. In a case involving the former, public policy was found to have been violated when a plaintiff was fired for pursuing sexual harassment charges against another employee (*Watson v. People's Security Life Insurance Co.*, 1991). With regard to drug testing, in some cases courts have upheld employees' refusals to take drug tests on the basis of their right to privacy under state constitutional (*Semore v. Pool*, 1990) or statutory law (*Borse v. Piece Goods Shop*, 1992; *Twigg v. Hercules*, 1990). However, where there is no clear statutory or constitutional basis for protecting privacy at the state level, courts appear likely to side with the defendant (e.g., *Ritchie v. Walker Manufacturing*, 1992).

Third, courts have continued to prohibit termination for reporting illegal activities to authorities. It is now clear that the courts will support plaintiffs in situations where discharge occurred in the face of clear statutory legislation mandating a report to an external authority. Recent rulings consistent with this conclusion have involved reporting violations of civil service procedures (*Zamboni v. Stamler*, 1988), city code violations (*Prince v. Rescorp Realty*, 1991), faulty airline maintenance (*Norris v. Hawaiian Airlines Inc.*, 1992), and the mistreatment of animals (*Leuthans v. Washington University*, 1992).

However, there is less consensus among courts with regard to the interpretation of whistleblower cases involving reports to internal authorities without a clear obligation to do so. In these situations, the courts appear to weigh the totality of the circumstances. One element of consideration is the risk to customers or clients; when the risk is substantial, the courts have been sympathetic to plaintiffs. For example, in *Foley v. Interactive Data Corp.* (1988), the court ruled in favor of a plaintiff who was terminated for reporting to company officials that his supervisor was being investigated by the FBI for embezzlement from a prior job. Similarly, in *Verdzucco v. General Dynamics, Convair Division* (1990), wrongful discharge was found when the plaintiff was fired for reporting security

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breaches and the use of shoddy materials on government contracts. On the other hand, several cases have shown that the courts are generally more sympathetic to defendants when employees overstep their bounds by complaining to an internal review committee (*Wright v. Shriners Hospital*, 1992), suing the organization over an internal dispute (*Whitman v. Schlumberger*, 1992), reporting internal administrative errors (*Thompson v. Memorial Hospital at Easton*, 1996) or mistakenly reporting illegal activity (*Hunger v. Grand Central Sanitation*, 1996). In general, plaintiffs appear to have better chances when they are required by law to report real or suspected violations, when the report is made to an outside authority, and when the risk (whether physical or financial) to customers or clients is great.

Fourth, there continue to be some types of civic duties that are strongly protected on a wide basis whereas other civic duties vary in terms of the degree of reliable protection. Indeed, one type of civic duty—serving on a jury—is now protected by legislation at the federal level (and further in most states) and is thus almost outside the bounds of common law (e.g., *Schaffer v. Frontrunner Inc.*, 1990). Obeying a subpoena to provide testimony in a government investigation also seems likely to be protected (e.g., *Gantt v. Sentry Insurance*, 1992). A notable development in this area is the apparent expansion of public policy into the realm of ethical behavior consistent with being a "good citizen." In *Gardner v. Loomis Armored, Inc.* (1996), the court ruled in favor of the plaintiff, an armored car driver, who was fired for leaving his vehicle unattended in order to save a woman's life. "Heroic" conduct in the aid of a fellow citizen was seen as behavior that society should encourage and support even though there was no statutory basis for it. In the long run, developments such as this may have a profound impact on how "public policy" is interpreted and may open the door to a much wider variety of claims under this exception.

Constructive discharge. Constructive discharge involves forcing an employee out of a job with an ultimatum to resign or face demotion, reassignment, or subjecting an employee to intolerable conditions that would prevent an ordinary individual from remaining in the position (Sovereign, 1989; Weiss, 1995). Rothstein et al. (1994) noted that constructive discharge is not actually an exception to the at-will doctrine; rather, it is a tort that applies when there is some legal basis for preventing the employee from being discharged openly (i.e., contract or collective bargaining agreement). When employer intent is clear, the courts have generally agreed with plaintiffs in finding that a tort has been committed. For example, constructive discharge was found in *Kelly v. Metro North Commuter* (1989) when the plaintiff resigned after her salary was reduced to less than minimum wage and in *Kestell v. Heritage Heath Care*

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Corp., (1993), where the plaintiff resigned after being forced out of his office, moved to an isolated area and deprived of meaningful responsibility. However, in other courts, recent rulings have narrowed the interpretation of constructive discharge in requiring that termination be explicitly stated as an alternative to resignation (*Knee v. School District 139*, 1989) or that truly "egregious" treatment be involved (*Hallbrook v. Reichhold Chemicals Inc.*, 1990).

Abusive discharge. Abusive discharge is a tort that arises when an employee is deemed to have been intentionally injured by an organization in the act of discharge. Injury may occur as a result of the manner in which employees are told they have been released and how they are treated in the process. Abusive discharge is generally viewed as "outrageous or demeaning treatment," but there is little consensus on what constitutes such treatment. A classic example of abusive discharge occurred in *Wilson v. Monarch Paper Company* (1991), where a company vice-president was demoted and assigned janitorial duties and subsequently suffered clinical depression and respiratory problems before quitting. Since 1987, a recent issue that has arisen under the general notion of abusive discharge is whether or not it includes defamation of character. For example, in *Diamond Shamrock Refining & Marketing Co. v. Mendez* (1992), a tort was found when false rumors accusing a long-time employee of theft were spread throughout the company in order to provide a pretext for the discharge. Abusive discharge may also involve an invasion of privacy when it involves the unlawful procurement of information pertaining to an employee's past. Recent cases have seen employers assessed punitive damages for terminating employees after seeking out information about previous drug use (e.g., *Baggs v. Eagle-Picher Industries, Inc.*, 1992), medical problems (e.g., *Miller v. Motorola*, 1990), alcohol abuse (e.g., *Ellenwood v. Exxon Shipping Co.*, 1991) and even job performance (e.g., *Ferregamo v. Signet Bank/Maryland*, 1992).

Summary. In general, a considerable number of additional states have recognized the public policy exception since 1987 and several significant issues have arisen in the areas of public policy and abusive discharge. Just as importantly, the number of discharge-related cases involving torts appears to be increasing every year due to the possibility of obtaining punitive damages (Pepe & Hayward, 1994). Almost all courts recognize a violation of public policy when an employee is discharged for upholding a law, failing to break a law, reporting criminal or suspicious behavior to an outside authority, exercising statutory rights or serving on a jury. Since the late 1980s, some courts have shown a greater willingness to back employees discharged for internal whistleblowing, ethical (heroic) behavior, adhering to professional codes of conduct, and refusing to submit to procedures believed to involve invasion of privacy. Al-

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though there has not been considerable change in the area of constructive discharge, further developments seem likely in the area of abusive discharge as a result of increasing constraints on the use of personal information by employers. However, the diversity of interpretations across states (and jurisdictions within states) is great, more so with this exception than any other.

To this point we have reviewed the common law developments that have combined to weaken the influence of employment at-will. The preceding review has focused on legal variables that influence litigation outcomes, and sheds some light on what may be done to limit organizational liability. However, our review is silent with regard to the psychological variables that lead an individual to file a lawsuit against his or her former employer. It is critical that HR professionals have an understanding of the reasons why discharged employees initiate litigation. The next section will attempt to address these issues by providing a preliminary model of the antecedents and consequences of legal action on the part of discharged employees.

A Preliminary Model of Legal Action by Discharged Employees

Although some attention has been devoted to the legal issues associated with employment at-will in both the legal (e.g., Pepe & Hayward, 1994; Walsh & Schwarz, 1996) and applied psychological literature (Koys et al., 1987), there has been no effort to our knowledge to identify the psychological factors leading discharged employees to sue. Neither has there been an explicit attempt to integrate the various factors that come into play in affecting the outcome of legal action. In this section, we present a preliminary model of the factors underlying lawsuit initiation and trial outcome. Although there are certainly other behavioral outcomes of interest pertaining to the actions of discharged employees, filing suit against the organization has not received much attention in the applied psychological literature even though it clearly represents one of the most important and costly organizational outcomes that may result from discharge. The model is intended to be of both diagnostic and prescriptive value for HR professionals who design and implement policies relevant to employee discharge. In particular, the model is intended to help organizations assess the likelihood of a lawsuit given the current organizational context as well as identify preventative measures that may reduce that likelihood in the future. We first briefly describe the overall model and then consider the various linkages in greater detail.

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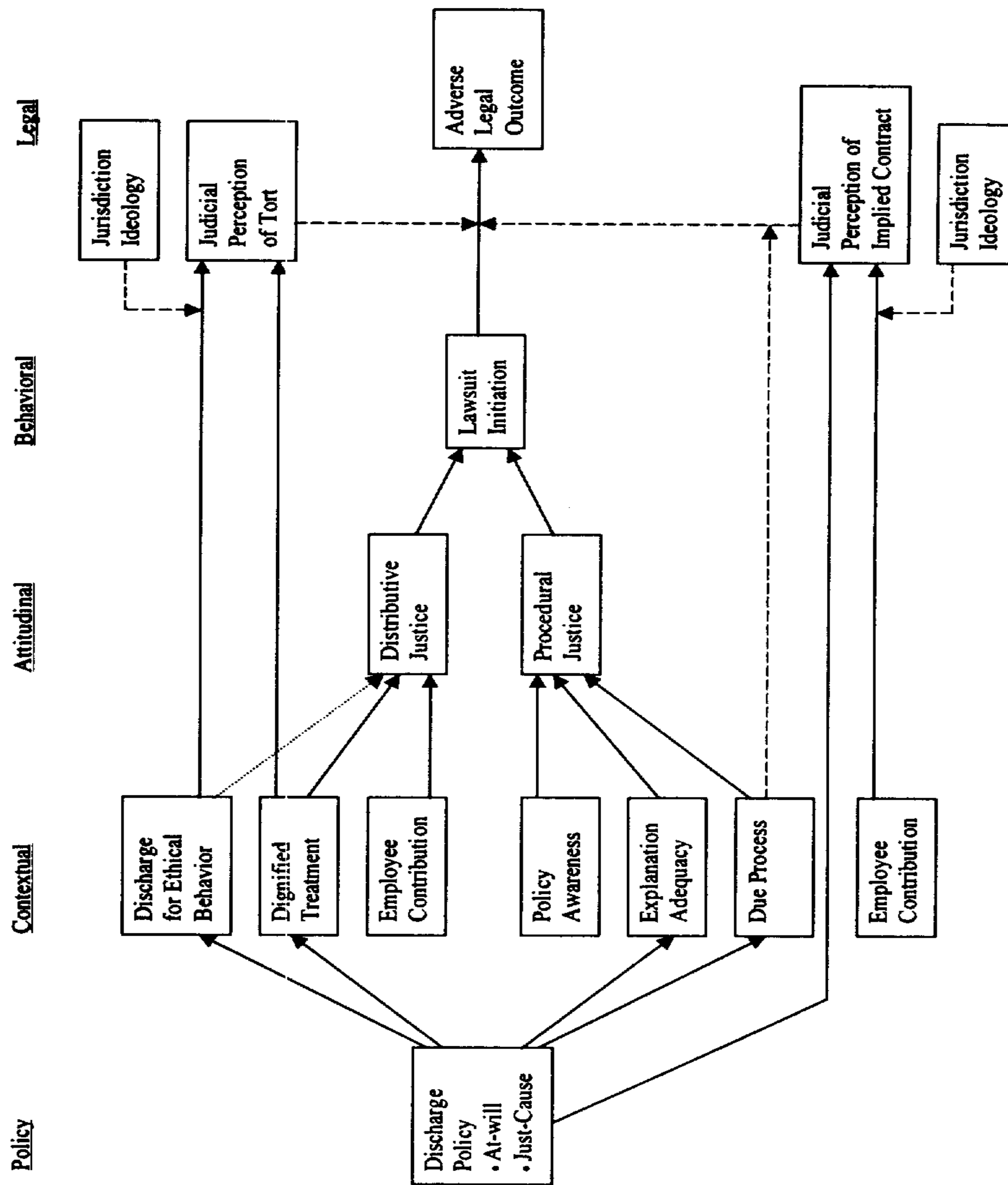

Figure 1: **A Preliminary Model of Contextual and Psychological Antecedents of Legal Action by Discharged Employees.**

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Overview

Figure 1 presents a model which identifies the antecedents and consequences of legal action by discharged employees. Variables in the model can be grouped into five categories: (a) Policy, (b) Contextual, (c) Attitudinal, (d) Behavioral, and (e) Legal. The first four categories include variables that are familiar to most HR professionals and consist of "psychological" variables relevant to the workplace. The last category, which we have termed "legal," consists of several variables directly relevant to the court system and the resolution of lawsuits.

Beginning with the first variable from the left, "Policy" refers to the conscious implementation of employment at-will or some form of just cause on the part of the organization. "Contextual" variables are those factors that may affect perceptions of justice associated with a discharge decision and the way it is carried out. Discharge for ethical behavior involves situations where an employee is released for "doing the right thing" or performing some action that would generally be considered to be moral and good but one not necessarily furthering the organization's goals. It is important to note that in some cases, ethical behavior will be consistent with prevailing law and in other situations it will not. Dignified treatment refers to the degree to which the organization displays respect for the rights of the individual during the discharge process. This amounts to treating employees like responsible, intelligent adults, showing concern for the their welfare and not acting in a vindictive fashion. Employee contribution concerns the degree to which the discharged employee has invested in the organization and worked hard to further its goals. Tangible indicators include years of service, quality of job performance, promotions and merit raises or bonuses. Policy awareness pertains to the degree to which the discharged employee understands how the organization's discharge policy will be implemented before the discharge occurs. Explanation adequacy corresponds to the sincerity and logic of the reason provided to a discharged employee and is seen as independent of the content of the message. Finally, due process refers to a variety of procedures that provide the employee an active role in the discharge process. This may include formal warnings, progressive discipline procedures, hearings or meetings where the employee has a chance to explain his or her position and an appeals process that might correct a bad decision. The two "attitudinal" variables identified by the model correspond to perceptions of organizational justice on the part of the discharged employee. Distributive justice concerns the perceived fairness of discharge outcomes whereas procedural justice concerns perceptions of fairness related to the discharge process. The focal "behavioral" variable in the model, lawsuit initiation, refers to a discharged individual's

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act of filing a lawsuit seeking damages from the organization as a result of a broken contract or tort related to the discharge.

After a lawsuit is initiated, the remaining "legal" variables will manifest themselves during the course, or at the conclusion of legal proceedings. Adverse legal outcomes are seen here as court-ordered actions on the part of the organization that run counter to the organization's preferences. This will usually correspond to monetary damages (both compensatory and punitive), but may also include reinstatement of the discharged individual and "cease-and-desist" orders with regard to one or more HR practices. The occurrence of an adverse legal outcome is largely dependent on judicial perceptions of an implied contract and judicial perceptions of a tort. Typically, "judicial" will refer to the decision of an individual judge but may sometimes involve a jury. The final variable, jurisdiction ideology, reflects the statutory context for a given suit in terms of local and state laws, as well as the tendency for judges (and juries) to interpret principles of contract and tort law either narrowly (conservatively) or broadly (liberally). A fundamental assumption we make is that jurisdiction ideology varies considerably across and even within states.

In essence, the model suggests that an organization's discharge policy will affect aspects of the discharge context which in turn affects perceptions of justice (or fairness) relating to the discharge. Perceptions of justice are viewed as the primary antecedents of the decision to initiate a lawsuit against the former employer and this lawsuit has some corresponding probability of a negative judgment against the organization (i.e., an "adverse" legal outcome). The linkage between lawsuit initiation and an adverse legal outcome depends on the judicial perception (i.e., judge or jury) of an implied contract that was broken or the occurrence of a tort. Judicial perceptions are in turn hypothesized to be affected by an organization's discharge policy, aspects of the discharge context, and the ideology of the jurisdiction where the suit is filed.

Core Concept: Organizational Justice

As evident from the previous discussion and Figure 1, a central component of the model is the perception of justice associated with a discharge. Organizational justice is a well known and widely accepted framework for understanding the behavior of individuals in organizations that has been applied to many phenomena (Cropanzano, 1993; Greenberg, 1996).

The key element underlying perceptions of justice is a sense of fairness. Early work by Homans (1961) and Adams (1963, 1965) viewed organizational justice in terms of the perceived fairness of rules used to

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allocate valued outcomes and focused on one of those rules, equity. According to the equity principle, a sense of fairness arises in individuals when their perceived ratio of inputs to outcomes is equal (or very similar) to the perceived ratio of other persons in the organization. Other allocation rules, such as the notion that everyone should have an equal chance at an outcome or receive an equal share (equality) or outcomes should be given to those who have the least (need) were identified later (e.g., Deutsch, 1975; Leventhal, 1976). The type of justice that focuses on the perceived fairness of allocation rules has come to be known as distributive justice.

For more than a decade, the focus remained on distributive justice until Thibaut and Walker (1975) introduced procedural justice. Procedural justice concerns the fairness of the process underlying organizational decisions independent of the outcome. Thibaut and Walker suggested that the key element behind perceptions of procedural justice was process control, or the extent to which an individual perceives some degree of influence over the outcome. Leventhal (1980) identified six different elements contributing to perceptions of procedural justice, including consistency in procedures over time and across persons, a lack of bias/impersonality, the use of accurate information, potential correctability, a chance to speak and be heard by the concerned parties, and morality.

Other types of justice have been identified since 1975. Hogan and Emler (1981) proposed the concept of retributive justice or the fairness of punishment meted out by the organization, Bies and Moag (1986) identified interactional justice as the fairness with which people are treated by others in the organization, and Sheppard, Lewicki, and Minton (1992) introduced the notion of systemic justice, or the fairness of the system generating outcomes with regard not only to the individual, but also to the organization as a whole and even society. Nonetheless, the distinction between distributive and procedural justice remains the most fundamental and widely accepted (Greenberg, 1996), and several studies have supported the distinction between distributive and procedural justice (e.g., Alexander & Ruderman, 1987; Greenberg, 1986; Tyler & Caine, 1981).

In an effort to integrate the splintering concept of organizational justice, Greenberg (1987) offered a taxonomy of justice types that recognized two sub-types for both distributive and procedural justice—social and structural. Cross-classifying the two factors yields four types of organizational justice: systemic (procedural, structural), configural (distributive, structural), informational (procedural, social) and interpersonal (distributive, social). Systemic and configural aspects were seen

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as being closely aligned with the traditional views of procedural and distributive justice in the literature in focusing on the impersonal structural issues underlying allocation. On the other hand, informational justice referred to the degree to which individuals possess knowledge about the rules and procedures and the extent to which a reasonable explanation is offered for the decision. Interpersonal justice is similar to the notion of interactional justice proposed by Bies & Moag (1986) and views interpersonal treatment as one outcome associated with discharge. Although there has not been time for consensus to emerge on the integrative value of Greenberg's taxonomy, it represents perhaps the most comprehensive approach to organizational justice and we have used it to help identify important elements of the discharge context.

Component linkages

Discharge policy → discharge context. Starting at the left of Figure 1, the model identifies two primary types of discharge policies that may be adopted by organizations: employment at-will and discharge for cause (i.e., just cause). Employment at-will and just cause discharge can be viewed as two categorical policies for the sake of simplicity or as two ends of a continuum corresponding to the ease with which an employee can be discharged by the organization. According to the model, an organization's discharge policy affects four important elements of the discharge context: (a) The frequency of discharge for ethical behavior counter to the organization's goals, (b) the level of dignity and respect afforded to discharged employees, (c) the adequacy of the explanation provided to employees, and (d) the use of due process mechanisms.

In particular, in comparison to at-will, it seems reasonable to expect that just cause policies will tend to result in fewer discharges for ethical actions deemed contrary to organizational goals, higher levels of dignified treatment given to discharged employees, superior explanations, and the use of more mechanisms promoting due process. The thinking behind this is that employment at-will may promote a mindset on the part of managers and executives that there are no constraints whatsoever on their ability to discharge, leading to occasional situations where employees are discharged for reasons that constitute a violation of public policy. Further, just cause policies tend to be associated with rules and restrictions that ensure that discharge conditions have been met; these mechanisms usually coincide with opportunities for the employee to make appeals to allegations or charges and be granted a probationary period to change their behavior. With regard to both dignified treatment and the adequacy of explanation, it seems likely that at-will discharges will tend to occur within a shorter time span, possibly without any notice

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or prior intention. To the extent that at-will discharges occur quickly or even spontaneously, they allow less time for organizational representatives to compose a credible explanation and mentally prepare for potentially negative interactions (Folger, 1993). When a discharge situation begins to go poorly, it may lead to arguments, insults, irrationality, and eventually degrading comments or behavior toward the discharged employee (Baron, 1990). The greater temporal constraints associated with just cause discharge should allow for more extensive preparation on the part of organizational representatives. To summarize more formally:

> *Hypothesis 1*: Employment at-will policies will have a tendency to be associated with more discharges for ethical behavior than just cause policies.
>
> *Hypothesis 2*: Employment at-will policies will have a tendency to result in lower levels of dignified treatment afforded discharged employees compared to just cause policies.
>
> *Hypothesis 3*: Employment at-will policies will have a tendency to utilize fewer due process mechanisms related to discharge than just cause policies.
>
> *Hypothesis 4*: Employment at-will policies will tend to be associated with explanations which are perceived as less adequate compared to just cause policies.

Discharge context → justice perceptions. An important feature of our model is the association between elements of the discharge context and resulting perceptions of justice following discharge. Although many things could be thought of as representing the context of discharge, we have chosen to focus on six which are at least partially under the control of the organization: (a) discharge for ethical behavior, (b) the dignity and respect given to the discharged individual, (c) the discharged employee's contribution to the organization, (d) the discharged employee's policy awareness, (e) the adequacy of the explanation offered at the time of discharge, and (f) the use of due process mechanisms during the discharge process. For the most part, we have attempted to identify contextual factors that correspond to structural and social aspects of Greenberg's (1987) taxonomy. Employee contributions to the organization and due process mechanisms represent the "classic" structural approaches to distributive and procedural justice (respectively) whereas levels of dignified treatment correspond to the social element of distributive justice and policy awareness and explanation adequacy reflect the social elements of procedural justice.

The three antecedents of distributive justice are linked by their focus on the perception of equity. Essentially, each link focuses on a different

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allocation rule and we make the assumption that employees may feel justice (or injustice) from the violation of multiple rules. In particular, discharges that involve ethical behavior (including upholding the law) may provoke a sense of injustice stemming from the belief that a society-wide rule has been violated (i.e., good behavior should be rewarded, not punished). Discharges that involve employees with many years of service and strong performance records acknowledged by the organization via bonuses and promotions may violate the notion of equity (Adams, 1965). In addition, discharges that involve demeaning or degrading treatment may violate the notion of equality, or the feeling all individuals are owed a certain minimal level of civility and decorum regardless of what they've done. The link between dignified treatment and perceptions of distributive justice has been strongly supported by several studies which suggest that individuals shown interpersonal sensitivity (i.e., politeness, respect, sympathy) have less adverse reaction to negative outcomes (e.g., Bies & Moag, 1986; Brockner et al., 1990; Greenberg, 1991; Konovsky & Folger, 1991; Sheppard & Lewicki, 1987; Tyler, 1989).

On the other hand, the three antecedents of procedural justice have to do with how the discharge is carried out. Underlying all three antecedents is the notion that the organization was clear in announcing its standards and consistent in applying them. Policy awareness and explanation adequacy correspond to Greenberg's (1987) notion of informational justice, or the perception that procedures are carried out consistently over people and time, without bias to parties; due process corresponds to Greenberg's notion of systemic justice. The basic rationale is that people have a fundamental desire to know how decisions will be made in general (policy awareness) and why decisions that affect them were made in particular (explanation adequacy). There is a good deal of evidence that supports the notion that people respond positively to having accurate information and receiving honest, candid and logical explanations (Bies, 1987; Bies & Moag, 1986; Bies, Shapiro, & Cummings, 1988; Folger, Rosenfeld, & Robinson, 1983; Greenberg, 1991; Rousseau & Anton, 1988; Shapiro & Buttner, 1988). Due process corresponds to the classic notion of procedural justice (Thibaut & Walker, 1975; Leventhal, Karuza, & Fry, 1980), and a number of studies have found support for the impact of structural mechanisms on perceptions of fairness in organizational settings (e.g., Barrett-Howard & Tyler, 1986; Greenberg, 1986; Greenberg & Folger, 1983; Landy, Barnes, & Murphy, 1978; Landy, Barnes-Farrell, & Cleveland, 1980). Thus, we propose:

> *Hypothesis 5*: Discharges associated with ethical behavior will be negatively related to perceptions of distributive justice following discharge.
>
> *Hypothesis 6*: The level of dignified treatment afforded employees during

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discharge will be positively related to perceptions of distributive justice following discharge.

Hypothesis 7: Employee contribution to the organization in the form of years of service and perceived job performance will be negatively related to perceptions of distributive justice following discharge.

Hypothesis 8: The level of awareness that an employee has with regard to the organization's discharge policy will be positively related to perceptions of procedural justice following discharge.

Hypothesis 9: The adequacy of the explanation offered to justify discharge will be positively related to perceptions of procedural justice following discharge.

Hypothesis 10: The use of due process mechanisms will be positively related to perceptions of procedural justice following discharge.

Justice perceptions → lawsuit initiation. Numerous studies have found justice perceptions to be related to a variety of attitudes, including perceived negativity of job loss (Brockner, Konovsky, Cooper-Schneider, Folger, Martin, & Bies, 1994), job satisfaction (Martin & Bennett, 1996), organizational commitment of survivors (McFarlin & Sweeney, 1992), and coping strategies (Bennett, Martin, Bies, & Brockner, 1995). In addition, several studies have suggested a variety of negative behavioral responses to layoffs. Individual responses to discharge may be seen as falling along a behavioral continuum ranging from mild to severe retaliation, and researchers have linked justice perceptions to anti-company campaigns (Feldman & Leana, 1989), employee resistance or withdrawal (Jermier, Knights, & Nord, 1994), refusal to recruit for a former employer (Konovsky & Folger, 1991), vandalism (DeMore, Fisher, & Baron, 1988), and theft (Greenberg & Scott, 1996; Hollinger & Clark, 1983). In perhaps the most comprehensive examination of a wide variety of organizational retaliatory behaviors (ORBs), Skarlicki and Folger (1997) demonstrated that the occurrence of ORBs was predicted by an interaction of procedural, distributive, and interactive justice perception.

The initiation of a lawsuit can be seen as a retaliatory behavior falling towards the severe end of the continuum, but one that has not received much attention from researchers (Baik, Hosseini, & Ragan, 1987). It is no surprise that discharged employees who feel they have been treated unjustly may seek legal redress. Schuster and Miller (1984) noted that over 60% of the cases heard under the Age Discrimination in Employment Act of 1967 were related to claims of wrongful discharge. Given the increased protection of employees due to the erosion of employment at-will over the last 25 years, suing a former employer seems likely to

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increase in popularity as the retaliation of choice. Although most discharge situations do not seem likely to arouse a severe enough sense of injustice to motivate bringing suit, some most certainly do. Therefore, we propose:

Hypothesis 11: Perceptions of distributive justice following discharge will be negatively related to the initiation of legal action.

Hypothesis 12: Perceptions of procedural justice following discharge will be negatively related to the initiation of legal action.

Lawsuit initiation → adverse legal outcomes. Once a discharged employee has decided to initiate legal action, the model moves into the realm of legality. At this point, judicial perceptions of the relevant issues become important in determining the probability of an adverse judgment against an organization. The preceding review of legal developments indicated that an adverse legal outcome will necessarily depend on the perception of an implied contract that was violated, or the perception of a tort. Further, given the perception of an implied contract, the contract must be seen as having been violated before it can adversely affect the organization. When due process characterizes a discharge decision, it seems more likely that judges will agree with an organization that a contract was not violated. For example, if an implied contract exists not to discharge an employee without progressive warnings and the employee is discharged after receiving such warnings, the organization is not likely to be held liable for the discharge. This leads to the following hypotheses:

Hypothesis 13: Judicial perceptions of a tort will be positively related to adverse legal outcome given the initiation of a lawsuit.

Hypothesis 14: Judicial perceptions of an implied contract will interact with the extent of due process during discharge in affecting the likelihood of an adverse legal outcome such that a positive relationship between the two will be weaker when due process characterizes the discharge.

Antecedents of judicial perceptions. The model posits several antecedents of the two primary judicial perceptions, but also suggests that relationships may vary as a function of jurisdiction. Our previous review of important legal cases is consistent with the findings of Koys et al. (1987) in that the same case may be decided very differently simply as a function of where it is heard. We suggest jurisdiction ideology will play a moderating role with regard to the antecedents of judicial perceptions regarding torts and implied contracts. All other things being equal, jurisdictions with relatively "narrow" interpretations of the at-will exceptions should be less likely to perceive instances of torts or implied contracts.

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This seems especially likely in novel cases where there is no clear precedent or applicable statutory law. With regard to the perception of an implied contract, our literature review suggests that discharge policy will be a primary factor in determining judicial perceptions of a contract. In particular, it now seems clear that just cause conditions that are made known to employees through memos, handbooks, and even oral statements will likely be viewed as the basis of a contract. Conversely, the primary strength of employment at-will remains the deference given to it by the courts with regard to preempting contract implications. Our review also suggests that in some areas, courts will examine the extent of an employee's contribution as indicated by his or her personnel history with the company when determining whether an implied contract exists. In some courts, employees with longer tenure, superior performance, and a history of merit raises and promotions will be more likely to be seen as protected by an implied contract. With regard to judicial perceptions of a tort, it seems clear that the more outrageously an employee is treated at discharge, the more likely the court will perceive an intention to inflict harm on the employee (i.e., abusive discharge). Finally, discharge for performing a "purely" ethical action (i.e., one not protected or mandated by the law) does not yet seem likely to lead to perceptions of a tort for public policy violation, but this seems to be changing (e.g., *Gardner v. Loomis Armored*, 1996). In the future, we propose that actions leading to discharge which are viewed as morally correct will be supported by the courts, especially those with a broad interpretation of the at-will exceptions. Thus we propose:

Hypothesis 15: The level of dignified treatment afforded to discharged employees will be negatively related to judicial perceptions of a tort.

Hypothesis 16: Just cause discharge policies will be much more likely to be associated with judicial perceptions of an implied contract than will employment at-will policies.

Hypothesis 17: Jurisdiction ideology will moderate the degree to which discharge for ethical behavior is related to judicial perceptions of a tort such that the positive relationship between the two will be stronger in jurisdictions characterized by broad interpretations of the at-will exceptions.

Hypothesis 18: Jurisdiction ideology will moderate the degree to which employee contribution is positively related to perceptions of an implied contract such that the positive relationship between the two will be stronger in jurisdictions which tend to have broad interpretations of the at-will exceptions.

Contributions of the Model

Several interesting implications stem from the model just discussed.

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First and foremost, the model attempts to identify the various ways in which an organization's discharge policy is linked to subsequent outcomes such as lawsuits and liability. Previous legal reviews have tended to focus on the factors that affect judicial decision-making, but have not presented a testable model that also considers the psychological factors that lead to legal action in the first place. Second, given the presumed independence of the justice antecedents, the model implies that the lowest levels of distributive justice will correspond to situations where a high-contributing employee is discharged for acting in an ethical fashion and treated outrageously in doing so. Similarly, the lowest levels of procedural justice should occur in cases where an employee has little or no knowledge of an organization's discharge policy, is given an insincere and illogical explanation, and the discharge process does not allow the individual any say or chance to appeal. Conversely, to the extent that each of these is at least partially under the control of the organization, the contextual factors can be viewed as potential "levers" that can be modified to maximize distributive and procedural justice during the process of discharge. A third contribution lies in highlighting the important role of justice in determining an employee's response to discharge. The model identifies two types of justice perceptions and two separate paths through which elements of the discharge context can affect an employee's willingness to bring suit. Thus, a lawsuit might result from a perceived lack of fairness with regard to the rules used to determine discharge or a perceived lack of fairness in the way the discharge was handled, or both. Further, by integrating individual behavior and institutional outcomes, the model highlights the tradeoffs associated with both at-will and just cause discharge polices. Previous reviews have highlighted the legal advantages of employment at-will without addressing the possible negative side effects. True, employment at-will may have the advantage of being less likely to invoke an implied contract and therefore less chance of liability should a suit come to trial, but the policy may produce lower levels of perceived justice (especially procedural justice) and thus lead to more lawsuits. On the other hand, just cause policies seem likely to result in a greater sense of justice on the part of discharged employees, but provide grounds for the perception of an inconsistency between what an organization promised and the manner in which the discharge actually occurred. Finally, the model calls attention to the very real differences in common law across jurisdiction and highlights the need for organizations to become aware of the status of the three at-will exceptions in their state and county.

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Conclusion

After more than 100 years, employment at-will remains the predominant employee relations policy in the United States and is presumed in effect unless superceded by a contract, collective bargaining agreement, or statutory law. Despite the scope of employment at-will, three common law exceptions have emerged in tort law or contract law since 1959 that constrain the ability of employers to legally discharge at-will employees: breach of implied contract, breach of the covenant of good faith and fair dealing and discharge in violation of public policy. Two other types of torts, constructive discharge and abusive discharge, may arise depending on how an employee is made to leave. The model depicted in Figure 1 is an effort to link what we know about how discharge-related trials are resolved with a psychological understanding of why they occur in the first place. It is our hope that a review of research on employee discharge policies in another 10 years will encounter a good deal more research on the many effects that discharge policies have on the attitudes and behaviors of applicants, employees and discharged employees.

Our review of the three exceptions to the employment at-will doctrine suggests that the scope and acceptance of these exceptions has generally increased, although there is considerable variability in interpretation across jurisdictions. Barring federal legislation defining wrongful discharge and its remedies, this fragmented situation seems likely to continue. As such, it is extremely important that practitioners become familiar with common law developments in their own jurisdiction and not rely too heavily on gross generalizations. However, we feel that it is possible and helpful to identify a few considerations that emerge from our review that may prove useful as a first step in protecting at-will organizations from liability associated with discharging employees:

1. Recruitment materials and employee handbooks should have clear and conspicuous employment at-will disclaimers.
2. Organizational representatives involved in recruitment, selection, and performance appraisal should avoid promising job security or the use of progressive discipline before dismissal.
3. HR procedures that promote inferences of contingency between job performance and continued employment (e.g., management-by-objectives, quotas, piece-rate bonuses, merit raises) may imply a contract not to terminate if successful performance is maintained or achieved, and should involve at-will reminders or disclaimers.
4. Employees should not be fired for refusing to break laws, reporting violations of the law, exercising rights entitled by law, or engaging in what a reasonable person would consider to be ethical or heroic behavior.

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5. Discharges that involve employees with many years of organizational tenure and strong performance records stand a greater than normal chance of being seen as breaching an implied contract.
6. Discharges should involve genuine, rational explanations, and maximal due process to ensure that perceptions of procedural justice are maximized.
7. Discharges should be conducted privately in a fashion that does not demean or degrade the employee.

Ultimately, it is important to keep in mind that lawsuits that go to trial are ambiguous and are not likely to involve clear precedents. In such cases, jurors can be expected to use their common sense and decide in favor of what "seems right." When considering the appropriateness of HR policies and procedures relating to discharge, perhaps the most useful question to ask is will 12 "reasonable" people agree with us?

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