Justice, Employment, and The Psychological Contract

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There were promises made across the desk! You mustn’t tell me you’ve got people to see—I put thirty-four years into this firm . . . and now I can’t pay my insurance! You can’t eat the orange and throw the peel away—a man is not a piece of fruit.¹

The United States has some of the most relaxed employment protections in the world.² The American employment regime is centered on the long-standing employment at will doctrine, which allows employers to discharge employees at any time and for any reason.³ No notice is required. Even absurd rationales, such as left-handedness, are permissible grounds for discharge. Although a number of exceptions exist, the core principle enabling broad freedom to discharge remains firmly intact.⁴ All fifty states adhere to the employment at will principle in some form, and exhortations to overthrow the regime altogether have been unsuccessful.⁵

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¹ Willy Loman, Arthur Miller, DEATH OF A SALESMAN (1949). Willy Loman’s argument did not succeed and he was fired anyway. See also Metz v. Transit Mix, Inc., 828 F.2d 1202, 1205 n.6 (7th Cir. 1987) (citing the same language). The court’s application of Willy Loman’s language in Metz suffered a similar fate as Arthur Miller’s now-famous protagonist. See Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125–26 (7th Cir. 1994) (noting that Metz had been subsequently overruled by the Supreme Court in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)).

² E.g., Donald C. Dowling, Jr., U.S.-Based Multinational Employers and the “Social Contact” Outside the United States, 43 INT’L L. 1237, 1239-47 (2009) (detailing the lack of employment protections for U.S. workers relative to their global counterparts).

³ The employment at will doctrine has a long history in American law. See generally Jay M. Feinman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118 (1976) (providing an excellent overview of the employment-at-will relationship).

⁴ Even the employment at will remains the core principle in American employment law, a number of exceptions have developed to the doctrine. Unfortunately, the exceptions are not universally adopted in the fifty states. In addition, the application of the exceptions has created a chaotic jurisprudence. The result is that an employee’s success in bring a wrongful discharge case often depends more on the state in which she brings the lawsuit than upon the facts of the case. Alternatively stated, identical cases brought in two different states’ legal system often result in different results. See 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, 301 (2005) (stating that “[i]nterestingly, there is little consistency in the case law limiting employment at will. States haphazardly adopt some proposed exceptions while rejecting others that similarly limit employers’ at-will discretion.”).

Voluminous scholarship exists evaluating the propriety and effectiveness of the employment at will doctrine. The doctrine has produced a deep secondary literature displaying a full spectrum of arguments and theories ranging from those advocating a complete overthrow of the doctrine to others advocating strict enforcement without exception. Numerous books are dedicated to explaining the law on the subject, with one forthcoming tome an estimated nine-hundred pages long. The debate over employment at will shows no signs of slowing, as scholars apply its dictates to emerging technologies and propose new ways to alleviate the sting of this harsh workplace doctrine.

While this debate continues, very little empirical legal research examines the perception of the most important constituents in the discharge process—the employees themselves who risk arbitrary and immediate termination. Employees do not approach involuntary separation from their employer with the cold detachment that legal rules convey. A loss of one’s employment to unfortunate but uncontrollable conditions such as a declining economy or lack of work is devastating. Losing a job because of perceived unfair treatment, such as a false accusation of incompetence or company politics, by an indifferent employer, can provoke deep seated anger and resentment.

While employers can, and regularly do, terminate workers without cause, notice, or reason, that does not necessarily mean that such legal discharges occur without a price. Employees do not leave without complaint, nor do they pursue redress only when the law stands in their favor. Rather, the attitudes of employees toward discharge, and their reaction to being discharged, originate from a complex set of beliefs and attitudes that do not necessarily conform to legal rules. Frivolous litigation, negative publicity, lost morale and increased stress can all arise from the retaliatory actions of discharged employees with a resultant decrease in productivity in the existing work force.

Some of these employee reactions are outside of the employer’s control. However, terminated employees may respond differently according to their beliefs of the malevolence of others, inclination toward anger in everyday life, and level of personal anxiety. Yet, some of the most important

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6 Robert C. Bird, Rethinking Wrongful Discharge: A Continuum Approach, 73 U. CIN. L. REV. 517, 517 (2004) (revealing approximately 230 law review articles published over a nearly eighteen year period in an online search). The result was obtained by searching for “at will” and some derivative of the word “employment” in the title using the Westlaw legal research database. Id. at 517 n.1.

7 E.g., LIONEL J. POSTIC, WRONGFUL TERMINATION: A STATE-BY-STATE SURVEY (1996); DANIEL M. MACKY, EMPLOYMENT AT WILL AND EMPLOYER LIABILITY (1986).


10 Professor Moss notes that “scholarship supports an argument that informal social norms and free market incentives adequately deter unjust terminations, rendering employment litigation unnecessary.” Scott A. Moss, Where There’s a Will, There are Many Ways: Redressing the Increasing Incoherence of Employment At-Will, 67 U. PITT. L. REV. 295, 342 (2005). But, the argument can also be used to support the claim that these norms and incentives are just as likely to raise employee’ expectation of a just cause termination right. The amount of employment discharge cases seem to be in the ascendancy.

11 See, e.g., Robert Eisenberger et al., Who Takes the Most Revenge? Individual Differences in Negative Reciprocity Norm Endorsement, 30 PERSONALITY & SOCIAL PSYCH. BULL. 787 (2004) (studying the impact of these and other variables on revenge behavior).
antecedents of negative employee behavior—the propriety of the discharge and accompanying termination procedures—are fully within the employer’s control. If employers can better understand how the conditions and rationales of discharge impact the affected employee, employers can avoid needless legal disputes and employees would experience less frustration from perceived inequitable treatment. While most scholarship examines the permissibility of discharge, this article uncovers the perception of discharge and its powerful impact on litigation, retaliation, or other actions taken against an employer.

Instead of merely speculating on this point, in this article we report the results of an empirical survey aimed at measuring the reactions of individuals to various employment discharge scenarios. The results of this survey offer striking insights into the perception of workers to discharge under a variety of foreseeable conditions.

Part I of this paper examines the evolving law of employment discharge. This part highlights the long history and development of the modern rule. Far from being a construction of judicial fiat, employment at will took hold in the United States as a result of a number of social and economic developments impacting employment relations during the nineteenth and twentieth centuries.

Part II then introduces the concept of the psychological contract, a bundle of expectations that an employee possesses about the mutual obligations extant between the employee and the employer. The psychological contract, a construct commonly used in the human resource literature, offers explanatory power in that it helps explains the antecedents and outcomes of employment termination. In this Part we show that the breach of psychological contracts by employers can have a meaningful effect on the attitudes employees toward their employer.

Part III provides the data and rationale of the empirical survey of employment termination. The respondents in the survey are provided one of twelve discharge scenarios involving issues of procedural and substantive justice. In some of the scenarios, the participants are provided degrees of information as to the state of the existing law of employment discharge. Respondents are then questioned on their attitudes towards the company and their willingness to seek legal redress.

Part III then reports on our findings. The study found that, while substantive and procedural fairness in isolation improve employee attitudes, having both a fair reason for discharge and a fair process considerably amplifies these positive attitudes. We also reach the conclusion, among others, that propensity to sue does correlates with the legal knowledge of the employee regarding their rights or lack thereof. It concludes that employers have a significant influence over whether former employees take legal action or retaliate against the firm.

Part IV examines the role of norms in affecting perceptions, generating expectations, and in the decision to resort to legal action. It purposes that the psychological contract can best be understood as a basket of norms. It notes the role of norms in the law creation process. This Part also examines the relational norms that form the basis of relational contract theory and the psychological contract. In the end, it notes, based upon the findings of the study, that feelings of injustice (violation of the fairness norm) is the pervasive factor in determining the outcomes of employment termination. It also analyzes the relationship between knowledge and perceptions, namely, the issue of whether greater employee knowledge of the employment at will doctrine affects their perception of the employment relationship.

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12 See Appendix A.
13 See Appendix B.
Part V builds on the analysis of the previous parts to advance ways in which employers can utilize the fairness norm to control employees’ expectations, preferences, and actions. It suggests a number of “best practices” that help merge the internal (psychological) contract and the external (legal) contract to the benefit of both employer and employee. Finally, Part VI examines ways in which employment law should be changed or applied in order to close the gap between the reasonable expectations of employees found in the psychological contract and the limited protections provided under a strict employment at will legal regime. This Part also provides ideas for future research based on the findings of the study, as well as recognizing issues not directly dealt with in the study.

I. THE EVOLVING LAW OF EMPLOYMENT DISCHARGE

The employment at will doctrine governs most non-unionized, private sector workers in the United States. The doctrine is as simple as it is far reaching—an employer can terminate an employee for good reason, bad reason, or no reason at all. This concept has been the subject of extensive scholarly debate.14 The doctrine origins date back to the English Statute of Laborers, enacted in 1562.15 The Statute provided employees a special status within the contractual nature of the employment relationship. It provided numerous employee (apprentice) protections including, the requirement of notice and that apprentices were only dischargeable for reasonable cause.16 The rule then developed that any hiring for an unfixed duration was presumed to be for a year at a time.17

The industrial revolution shifted the law of employment paradigm from status-based employee protections to the contract-based employment at will doctrine.18 Horace Wood, in his 1887 A Treatise on the Law of Master and Servant, declared that employment at will was the law of the land.19 Accurate

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14 See supra notes 6-9 and accompanying text.
15 Statute of Labourers, 1562 5 Eliz. 1, c.4 (Eng.); see also Feinman, supra note 3, at 120.
16 IRA MICHAEL SHEPARD, PAUL HEYLMAN & ROBERT L. DUSTON, WITHOUT JUST CAUSE: AN EMPLOYER’S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE 16 (1989).
17 Id.
18 For a fuller analysis of the role of status in contract has played in the development of the law see Larry A. DiMatteo & Samuel Flaks, Beyond Rules, 47 Hous. L. Rev. 297 (2010) (explores Nathan Isaacs’ thesis that legal development is not one of linear progression, but one characterized by cycles between status-based and contract-based relationships).
19 Wood’s statement on the issue is unequivocal:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the rate for whatever time the party may serve.

HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). However, he could find only four cases to support this proposition. Id. at § 134, p. 272 n.4. Scholars have questioned whether any of Wood’s cases supported his declaration. See, e.g., J. Peter Shapiro & James F. Tune, Note, IMPLIED CONTRACT RIGHTS TO JOB SECURITY, 26 STAN. L. REV. 335, 341 (1973). But see Mayer G. Freed & Daniel D. Prosby, The Doubtful Provenance of “Wood’s Rule” Revisited, 22 ARIZ. ST. L.J. 551 (1990) (“It is a factoid that Horace Wood spun the rule of at-will termination out of his own woolgathering.”). Wood’s citations do support his proposition; it did not simply spring ‘full-blown in 1877 from his busy and perhaps careless pen.’”). See also Feinman, supra note 3 (exploring Wood’s assertions in more depth).
or not, Wood’s declaration of employment at will as the common law’s default rule helped to instigate the American legal system to discard the just cause rule of termination for the at will rule. In the first few decades of the twentieth century, the U.S. Supreme Court struck down laws that regulated employer-employee regulations due to the contractual nature of the employment relationship. Although the Supreme Court would change course to allow government regulation of the workplace, Wood’s rule has remained the law of employment termination into the present.

Even though the termination at will principle has persisted, efforts have been made to limit its application to correct perceived injustices. The first exception to be recognized was the public policy exception. In 1959, a California court ruled that firing an employee for refusing to commit perjury constituted an improper violation of public policy. The public policy exception prohibits firings for reasons that society have deemed to be against the public interest. For example, termination due to missing work while serving on a jury or reporting illegal conduct to law enforcement, are recognized as violations of public policy. These more specific recognitions of public policies are used to preempt the more general policy of freedom of contract that underlies the employment at will rule.

Scholarly criticism in the 1970s and 1980s encouraged courts to adopt more systematic exceptions to the rule. The result has been the recognition of two additional exceptions in some states—the implied in fact and implied in law exceptions. The implied in fact contract exception grants rights to employees based upon representations made by an employer orally or in written materials, such as employee handbooks, company policies, and representations made through electronic means. This exception grants employees protection based upon an implied contract. In some cases, despite the express designation by the employer that the employment is at will, courts have allowed evidence to show that an implied contract had been formed requiring notice or just cause for the termination.

20 E.g., Coppage v. Kansas, 236 U.S. 1, 10-11 (1915) (“In all such particulars the employer and employee have equality of right, and any legislation that disturbs this equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”); Adair v. United States, 208 U.S. 161, 173-74 (1908).
22 Bird, supra note 6, at 538-43.
employer representations, materials, and practices worked a modification to a just cause employment contract.  

The implied in law exception primarily looks at the motives of the employer. It is more popularly referred to as the good faith exception. While the implied in fact exception focuses on the finding of an actual contract based upon the particular facts and context of the employment, the good faith exception is based upon a general duty that all employers owe to their employees. The court reviews the facts of the case to determine if there was a breach of this societal duty of good faith. However, as in other areas of the law where the good faith concept is used, there is a definitional problem. A longstanding debate in contract scholarship has centered on the problem of defining good faith. One of the approaches forwarded starts from the premise that good faith is indefinable. It then suggests that even though good faith is indefinable, the law is able to recognize acts of bad faith—like obscenity, a judge knows it when we see it. Professor Summers’ works on the recognition of bad faith as the only way to apply the doctrine of good faith is referred to as the “excluder analysis.” Under this approach, given facts are analyzed to see if they fit a category of bad faith that has been developed by the case law. For example, an employee is discharged in order to deny her the full benefits of her employment bargain such as the vesting of a pension or accruement of vacation time. These apparent motivations for terminating an employment relationship make the terminations acts of bad faith.

While not all states adopted all exceptions, all fifty states have enacted at least one of the three exceptions to the employment at will rule. The public policy exception is the most pervasive and at the same time the most narrowly construed of the exceptions. A court would need to find an explicit public policy that is being violated by the discharge. The implied contract exception is much broader in that it can apply to a large segment of employee discharges. However, the employee has the burden of proving the specific facts of her case which warrant an implication of a just cause employment contract. The implied in law or good faith exception is the broadest in scope and least recognized in the fifty states. Its breadth is unlimited in that it implies a duty of good faith into every employment relationship. The employee has the burden to prove that her employer had a bad faith motive or reason for the discharge. However, in spite of these exceptions, the doctrine of employment at will remains firmly entrenched as the default termination rule in the United States.

28 Good faith is a meta-principle or what one scholar referred to as “transubstantive,” i.e., the principle occupies an entire area of law. Good faith is an example of a meta-principle in the area of contract law. See Mark D. Rosen, What Has Happened to the Common Law?—Recent American Codifications and Their Impact on Judicial Practice and the Law’s Subsequent Development, 1994 WISC. L. REV. 1119, 1160-76.
29 The RESTATEMENT (SECOND) OF CONTRACTS (1981) states that: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.” Id. § 205. See also U.C.C. § 1-202 (2009) (codifying the good faith and fair dealing requirement).
30 See Summers, supra note 26, at 812-13 (explaining the various ways courts have applied good faith and the variety of facts where good faith has been applied); Robert S. Summers, Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercials Code, 54 VA. L. REV. 195, 195 (1968) (arguing that, while scholars can agree that good faith is a minimum standard, the varied forms that bad faith takes serves as evidence that defining it is a continued problem).
II. THE EMPLOYMENT RELATIONSHIP AND THE PSYCHOLOGICAL CONTRACT

Most employers understand the discretion that employment at will provides. The freedom to terminate employees at will has numerous benefits. Firms can make rapid shifts in employment staffing to respond to economic declines or economic expansions. Knowing that employees are relatively easy to terminate, employers are encouraged to hire workers more quickly in times of rapid growth or seasonal demand. Employment at will may also increase the incentive to invest in labor, rather than capital, investments. If a firm’s labor costs are lower due to the flexibility provided by employment at will, a bank, for example, might choose to hire more tellers, instead of building ATMs. An employer might choose to hire more workers for an assembly line, for example, instead of investing resources in mechanical automation.

Personal and societal effects notwithstanding, the employment at will rule is not purely a source of harm. The rule provides nimbleness and flexibility that allows the economy to respond to the demands of the marketplace.\textsuperscript{32} The profound safety-net of employee protections found in European countries is seen as a factor in producing higher rates of unemployment.\textsuperscript{33} The costs of discharging an employee in some European countries, such as payment of an indemnity and extensive notice periods, based on longevity of employment, tilts the decision in close cases of whether to hire or not towards not hiring.

In spite of the costs and incentives of alternative termination rules, an employment contract is not just another contract. The harm caused to the discharged employee may go far beyond a monetary loss. A person’s job is a core part of that person’s self-worth. An involuntary discharge may shatter the employee’s self-image and place enormous stress on the employee and her family.\textsuperscript{34} A loss of work can

\textsuperscript{32} As one international employment counsel explains in the context of a company acquisition:

>[A] stock (shares) buyer enjoys an unusual flexibility as to its newly-acquired American employees because of the unique U.S. doctrine of employment-at-will. A buyer that has recently acquired the stock of some other business remains free to lay off all its newly-acquired U.S. employees without paying any severance charges [unless exceptions apply]. . .

Going beyond lay-offs, U.S. employment-at-will leaves non-unionized employers—and hence stock buyers—unshackled by vested rights obligations to maintain work conditions after closing. A stock buyer is generally free to reduce existing terms/conditions of newly-acquired non-union U.S. employees, to demote them, to discontinue their benefits, to reduce their pay, to change their job titles, and otherwise to restructure . . .


\textsuperscript{34} Robert C. Bird, Employment as a Relational Contract, 8 U. PA. J. LAB. & EMP. L. 149, 162 (2005). Discharge and the unemployment that follows it trigger family strife and influences how the children of the unemployed view the world and their own future role in it. \textit{Id.}
provoke feelings of guilt and inadequacy.\textsuperscript{35} A discharged employee suffers from an increased likelihood of depression, illness, drug and alcohol abuse, and suicide.\textsuperscript{36} In many ways, the workplace has supplanted the church and neighborhood as a primary source of relationship networks, self-identity, reputational status, and social class.\textsuperscript{37} It is not surprising that an employee’s reaction to being fired might provoke a concerted defensive action, an emotional response, or a significant change in the employee’s perceptions of the former employer.

The employer is not legally responsible for the personal harm caused by termination. In the general course of running a business, hiring and firing of employees is a necessity. However, the employer is morally, and as a matter of good business practice, obligated to undertake common sense measures to mitigate the harm caused by the employment discharge. An employer who fires on a moment’s notice and without reason may not breach a legal contract with his employer, but the manner of the discharge will enhance the perceived harm of the employee. An employee is likely to feel betrayed for being a loyal employee and suffer a sense of a breach of trust based upon expectations extending from the employee to the employer. This bundle of mental expectations that an employee has with his or her employer is known as the psychological contract.

A. The Psychological Contract Construct

The psychological contract represents an employee’s perception of the mutual obligations that exist between the employee and his or her organization.\textsuperscript{38} Psychological contracts emerge in organizations when an employee perceives that contributions she makes obligate her employer to reciprocal acts.\textsuperscript{39} Psychological contracts are not legally enforceable contracts.\textsuperscript{40} Rather, they are expectations of the employee that the employer will behave in a certain fashion based upon promises or past practices. The psychological contract as used in the study of organizational behavior is an example of using contract as

\textsuperscript{35} Id. (citing Connie T. Schliebner & John T. Peregoy, Unemployment Effects on the Family and the Child: Interventions for Counselors, 72 J. COUNSELING & DEV. 368, 368 (1994) (“The stresses of unemployment can manifest themselves in depression, alcohol and other drug abuse, suicide, physical illness, and family abuse.”)); Lea E. Waters & Kathleen A. Moore, Predicting Self-Esteem During Unemployment: The Effect of Gender, Financial Deprivation, Alternate Roles, and Social Support, 39 J. EMP. COUNSELING 171, 171 (2002) (discussing the factors effecting the self-esteem of the unemployed)).

\textsuperscript{36} Bird, supra note 34, at 162.


\textsuperscript{38} Jill Kickul & Scott W. Lester, Broken Promises: Equity Sensitivity as a Moderator between Psychological Contract Breach and Employee Attitudes and Behavior, 16 J. BUS & PSYCH. 191, 192 (2001). Professors Johnson and O’Leary-Kelly provide the following definition: “The psychological contract is defined as individual expectations regarding the obligations that exist between an employee and an organization. Psychological contracts involve only the employee’s beliefs and expectations; it is not necessary that the other party in the exchange relationship share these expectations.” Jonathan I. Johnson & Anne M. O’Leary-Kelly, The Effects of Psychological Contract Breach and Organizational Cynicism: Not All Social Exchange Violations are Created Equal, 24 J. ORG. BEHAV. 627, 628-29 (2003) (citation omitted).

\textsuperscript{39} Johnson & O’Leary-Kelly, supra note 38, at 628-29.

a construct or metaphor. Research on psychological contracts has largely focused on the perceptions and expectations of employees.

Despite the disparity between contract and psychological contract, psychological contract theory has a long history, originating from social contract theorists such as Hobbes and Locke who described the presence of an overarching social contract. This social contract assumed that individuals living in a state of nature tacitly consented to develop an organized civilization. The social contract constituted a reciprocal agreement between citizens and the state whereby the state offered services in exchange for citizens paying taxes, shouldering defense responsibilities, and obeying laws. Management researchers, beginning in the late 1950s, first described a psychological contract through an inducement-contribution model, whereby employees receive pay and benefit inducements in exchange for contributions to the firm. At the same time, a leading psychiatrist of the time hypothesized that contractual relationships involve the mutual satisfaction of the parties’ psychological needs such as the pleasure of companionship in addition to the explicit contractual exchange.

When the “psychological contract” term emerged in the early 1960s, scholars characterized it at the time as an implicit understanding of terms between employees and employer. One scholar observed that workers maintained high production levels with minimal grievances in exchange for receiving fair wages and treatment from their employer. One scholar interviewed utility company employees and learned that employees perceived their employer to be duty bound to satisfy employee expectations.

As the psychological contract literature expanded, scholars redefined the term from one expressing mutual obligations to a one-sided perspective radiating from the expectations formed within the minds of employees. This shift in focus coincided with significant new trends in the workplace, including, increased instances of corporate restructuring, downsizing, and the use of contingent, temporary or

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43 Roehling, supra note 41, at 205.
44 Id.
45 JAMES G. MARCH, & HERBERT SIMON, ORGANIZATIONS (1958) (discussing a theory of formal organizations).
46 KARL MENNINGER, THEORY OF PSYCHOANALYTIC TECHNIQUE 21 (1958).
47 CHRIS ARGYRIS, UNDERSTANDING ORGANIZATIONAL BEHAVIOR 97 (1960)
48 Roehling, supra note 41, at 207 (quoting HARRY LEVINSON ET AL., MEN, MANAGEMENT, AND MENTAL HEALTH (1962)).
49 Abigail Marks, Developing a Multiple Foci Conceptualization of the Psychological Contract, 23 EMP. REL. 454, 455 (2001).
leased workers. Employees stuck in the old system of career-long employment were the victims of widespread layoffs.

Psychological contracts today are believed to possess certain characteristics. First, an employee’s psychological contract may not be perceived as an obligation by the organization. Second, psychological contracts arise from both formal and informal cues. These expectations may take the form of formal oral statements or derived from company policies, but they may also originate from casual statements, patterns of conduct, and implicit social signals. Third, employees hold psychological contracts with multiple constituencies including various individual managers and the organization as a whole. Finally, psychological contracts change as the employee’s relationship with the organization grows over time. These changes can result from task changes in the organization, entry of new management, shifting economic conditions, and updated organizational policies.

Psychological contracts play an important role in employee perceptions and decision making related to the workplace. This is especially important given the increasingly unstable workplace that modern employers have created over time, either inadvertently or by design. Cradle-to-grave employment for employees has largely disappeared, thus creating significant uncertainty as to the meaning of the employer-employee relationship. One certainty is that the corporate restructuring and downsizing policies, implemented during the 1980s and 1990s, have significantly changed the employment relationship. These strategies have arguably ignored the critical role that employees play in an organization’s long-term success. Despite the lowering of employee expectations due to changes in the nature of the employment relationship, the psychological contract continues to play an important role, especially in the area of employee discharge.

As a result of employer insensitivity and lack of commitment to retaining a loyal, long term labor force, there is evidence of the lowering of employee expectations. Employees’ expectations are lower today

50 See generally Larry A. DiMatteo & René Sacasas, Employee Leasing, 41 BUS. & ECON. REV. 16 (1995) (examining legal issues relating to employee leasing). The once stable employment relationship that characterized the American workplace was transformed into one characterized by job insecurity, increased employee mobility, and ever evolving skill sets. See also Kenneth P. De Meuse, Thomas J. Bergmann & Scott W. Lester, An Investigation of the Relational Component of the Psychological Contract Across Time, Generation, and Employment Status, 13 J. MANAGERIAL ISSUES 102, 102–03 (2001).
58 DeMeuse, Bergmann & Lester, supra note 51, at 102.
than they were in generations past. However, the lowering of expectations does not mean the elimination of expectations. As such, employers continue to break psychological contracts. For example, one study discovered that as many as 55% of recent MBA graduates believed that their employers had broken their psychological contracts within the first two years of employment. Another reported that 25% of respondents, employees surveyed during a company restructuring, reported significant psychological contract violations. An increasing number of today’s employees believe they have suffered an injustice or have been treated unfairly by their employers.

Despite the many studies of employment at will and the psychological contract, scholarship has not sufficiently illuminated the underlying factors that influence employee attitudes during a discharge. One can easily speculate that poorly treated employees are more likely to react negatively to discharge, but the specific source of the negative reaction from the relationship remains unclear. Furthermore, there is insufficient knowledge about actions that the employer can take to alleviate the negative reaction from employees that are subjected to the indignity of an employment discharge. No employee likes to be fired, but certain factors exist that can be manipulated to lessen the psychological trauma for employees and reduce unnecessary legal costs for employers.

Few workers find comfort in the knowledge that the loss of their job keeps labor costs down and allows capital to flow to more efficient companies or industries. Employment law’s at will doctrine provides a bright line rule, but employees perceive the law as providing protections, such as just cause dismissal, that it in fact does not provide. The study presented here measures employees’ perceptions of just and fair treatment at the termination of employment and whether the perceptions of fair versus unfair treatment predict employee responses to termination. Alternatively stated, is the employer able to control the psychological contract in order to minimize negative employee responses at termination?

The survey examines two broad areas relating to antecedents to employment discharge and their effects on employee responses. First, it examines whether the level of employee knowledge of the law of employment impacts an individual’s reaction to an employment discharge. Second, the survey examines whether procedural safeguards in the discharge process, as well as the substantive appropriateness of the discharge, impact an individual’s reaction to an employment discharge. The survey presented in this article aims to address these important questions. The next part discusses the nature of the survey, including methodology, findings, and results.

III. THE EMPLOYEE PERCEPTION SURVEY: DESIGN, METHODOLOGY, AND FINDINGS

The study provides the findings of an empirical survey of 763 undergraduate students enrolled in an introductory management course. Participants were randomly provided one of twelve discharge scenarios. All twelve scenarios expressed variations of three key variables: (1) substantive fairness-

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60 Bird, supra note 34, at 166.
61 Id.; Morrison & Robinson, supra note 52, at 248.
62 Sandra L. Robinson & Diane M. Rousseau, Violating the Psychological Contract: Not the Exception but the Norm, 15 J. ORG. BEHAV. 245, 252 (1994).
65 See Appendix A for a sampling of discharge scenarios.
substantive unfairness, (2) procedural fairness-procedural unfairness, and (3) no information-cueing-education of employee on employment law.

The first variable examined is the impact of procedural fairness or unfairness on employment discharge reactions. For purposes of this article, procedural fairness is the concept of whether an employment discharge decision incorporated justice-related factors. For example, procedural fairness might involve the requirement of a hearing before a neutral party, the opportunity to be heard, and an open and fair evaluation of the evidence before a discharge decision is reached by the employer, as well as a substantial amount of advance notice of discharge.

In this survey, we manipulated procedural fairness through the production of two different scenarios. One scenario given was procedurally fair. The first paragraph explained the available procedural rights in the company employee manual. The second paragraph provided showed that the process of discharge outlined in the employment manual was completely followed and involved a number of opportunities for review and improvement.

The other scenario provided treated the employee with procedural unfairness. The first paragraph was identical to the procedurally fair scenario in that it described the rights the employee possessed in the company employment manual. The second paragraph describes actual employee treatment as including a standard of evaluation and a short notice of discharge both contrary to the policies set out in the company manual.

The second variable involved the impact of substantive fairness on employment discharge reactions. Substantive fairness, a related concept to substantive justice, focuses on the fairness or correctness of a procedure’s outcomes. Substantive fairness is concerned with whether the ultimate employment decision made was correct. A substantively fair result would the case where the discharge was based on a ‘good’ reason, such as incompetence or insubordination. In essence, whereas procedural fairness focuses on just process, substantive fairness focuses on just outcomes.

Substantive fairness was manipulated in a fashion similar to procedural fairness, with the presentation of one scenario highlighting a substantively fair decision and another depicting a substantively unfair

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67 See Appendix A § 1.1.
68 Id.
69 Id.
70 See Appendix A § 1.2.
71 Id.
72 Id.
decision. In the fair scenario, the survey describes a situation where the employee was fired for poor job performance. In the unfair scenario, the employee is discharged because he is overweight.

The third variable presented was designed to examine the impact of educating employees about available legal rights. Survey respondents were presented with one of three different situations, varying according to the amount of legal information provided. The first scenario, which was used as a control variable, provided no legal information at all to the respondent. Instead, the respondent was given information about the firm’s size and competitive position unrelated to knowledge about employment law.

The second scenario provided limited information at the time of hire about employment discharge, which is defined in the study as cueing. In the cueing scenario, respondents were told about the employment at will rule and were informed about exceptions to employment at will that can arise from company policies and employee handbooks. The cueing prompt also informed respondents about the duty of employers to act in good faith. The prompt raised the possibility that an insincere reason for firing can “lead to a charge of ‘wrongful discharge.’”

The third and final scenario was called the educating prompt. In this prompt, all prior information about employment at will and its exceptions was provided to the students. In addition to this material, however, the educating prompt explained that firms can disclaim company policy statements implying discharge protection. A clause found in the firm’s employee handbook was then provided to the respondent. The clause disclaimed all employee protections from at will termination.

Once a particular procedural condition (procedural fairness or unfairness), substantive condition (substantive fairness or unfairness), and law condition (control, cueing, or educating) was provided to a respondent, the respondent received a questionnaire. The questionnaire inquired, in part, about the

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74 See Appendix A § 2.
75 Id. § 2.1.
76 Id. § 2.2.
77 Id. § 3.1.
78 Id.
79 Id. § 3.2.
80 Id.
81 Id.
82 Id. This is a broad reading of the limitations imposed by exceptions to employment at will, as employers are not required from giving sincere rationales for every discharge. See, e.g., Richard P. Perna, Deceitful Employers: Intentional Misrepresentation in Hiring and the Employment-at-Will Doctrine, 54 U. KAN. L. REV. 587, 591-92 (2006); Barbara Rhine, Business Closings and their Effects on Employees—Adaptation of the Tort of Wrongful Discharge, 8 INDUS. REL. L.J. 362, 373 (1986) (“Strict adherence to the employment-at-will doctrine in the business closing context would mean that an employer could plan to close its place of business, misrepresent this plan by giving the employees false assurances of job security, use the workers’ fear of job loss as a lever to extract concessions from them, and then close as originally planned with no liability to the employees.”).
83 Appendix A § 3.3
84 Id.
85 Id.
86 Id.
87 See Appendix B.
respondents’ attitudes toward the company given the scenario just provided. Respondents were asked about their litigation intentions, specifically answering whether they would consider legal action against the employer. The core thesis of this article is not that such intentions are realistic responses from frustrated employees, but that these reactions maybe muted or amplified by the conditions surrounding the discharge and the employee’s knowledge of the law.

As a result of this survey design, we proposed six hypotheses for testing. These hypotheses can be grouped into two categories—Knowledge Hypotheses and Fairness Hypotheses. The two Knowledge Hypotheses are expressed as follows:

Hypothesis 1: Employees with no knowledge (provided no information) of employee discharge law (employment at will doctrine) are the most likely to pursue litigation and retaliation against her employer at the time of termination, than those cued or educated on employment discharge law.

Hypothesis 2: Employees who are cued as to the employment at will doctrine at the time of hire are less likely to pursue litigation than those with no knowledge of employment law.

Hypothesis 3: Employees who are more fully educated by the employer at the time of hire are even less likely to pursue litigation than those who are simply cued as to the employment at will doctrine.

The Knowledge Hypotheses and Fairness Hypotheses were both tested with analysis of variance (ANOVA). The ANOVA compared the mean levels of litigation intentions across the procedural fairness, substantive fairness, and law conditions. With respect to the latter, the results revealed significant mean differences for litigation intentions across the control, cueing, and educating conditions: F(2, 763) = 2.94, p < .05. However, most of that effect was due to the educating condition. Thus, Hypothesis 1 was confirmed in relationship to the education variable. Respondents who were merely cued about the employment at will doctrine were only marginally less likely to intend to litigate than respondents in the control condition. That difference was not statistically significant, so Hypothesis 2 is not supported. Hypothesis 3 was supported, however, in that respondents who were more thoroughly educated by the employer at the time of hire were less likely to pursue litigation than the participants in either the control or cueing conditions. In essence, Hypotheses 1 and 2 confirmed each other.

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88 The questions presented in Appendix B were excerpted from a lengthier questionnaire examining other topics such as task performance, citizenship behavior, and withdrawal behavior. The full survey is on file with the authors.

89 See Appendix B.

90 See, e.g., Francoise Gilbert, Seven Drivers for Privacy & Security Issues in a Down Economy, 13 J. INTERNET L. 3, 4 (2009) (“Disgruntled employees may retaliate or express their anger with the lay-offs by attempting criminal actions against the company’s databases. . . . In other cases, disgruntled employees have accessed the company’s databases and modified or destroyed personal data or introduced viruses or malware into the systems.”); Susan Bisom-Rapp, Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice, 26 FLA. ST. U. L. REV. 959, 983 (1999) (citing a trade publication’s ominous warning that “[a]ll too often, terminated employees will retaliate against their former employers by bringing frivolous discrimination lawsuits.”).

91 See Exhibit B for a graphical depiction of the pattern of results.
The data confirmed two of the three hypotheses proposed (see “Exhibit A” below). Hypothesis 1 was confirmed in that respondents who were educated were less likely to consider litigation than the respondents who were provided no information about the employment at will doctrine. In the absence of such experience or other knowledge, the respondents would likely apply their own ‘fairness heuristic’ to the discharge hypothetical. Individuals use a fairness heuristic when they lack clear objective criteria for evaluating the propriety of a particular decision. In the absence of such criteria, individuals form fairness judgments from whatever information that person has readily available. This is particularly true where decisions have to be made quickly (such as in a survey). The heuristic provides a shortcut to decision making for someone not possessing full information. Such a heuristic frees up cognitive resources and provides confidence in the decision or action reached. Fairness heuristics can also be used as a shortcut to decide whether a particular authority can be trusted.

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Exhibit A
Results for Knowledge Hypotheses

<table>
<thead>
<tr>
<th>Law Condition</th>
<th>Retaliation Intentions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Control</td>
<td>2.9</td>
</tr>
<tr>
<td>Cueing</td>
<td>2.8</td>
</tr>
<tr>
<td>Educating</td>
<td>2.6</td>
</tr>
</tbody>
</table>

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92 Undergraduate students, the respondents in this survey, are not likely to have a working knowledge of the doctrine of employment at will.
94 Id.
95 See id (citing E.A. Lind, Fairness Heuristic Theory: Justice Judgments as Pivotal Cognitions in Organizational Relations, in ADVANCES IN ORGANIZATIONAL JUSTICE 56 (J. Greenberg & R. Cropanzano eds., 2001)).
96 Id.
This fairness heuristic may explain the high level of litigation and retaliation tendencies relative to the other two scenarios. Respondents lacking sufficient knowledge about employment at will and its implications for employees and employers may have applied their own sense of right and wrong to the problem. That sense of right and wrong, therefore, governs whether the discharge decision is perceived as fair or unfair. As a result, individuals will respond to a scenario that they deem unfair with a propensity toward litigation and retaliation responses.

The results did not confirm hypothesis 2, which was that individuals who received some information about the employment at will doctrine were less likely than respondents provided no information to pursue litigation or retaliation behaviors against the employer. The additional information provided in the cueing scenario was divided into two paragraphs. The first paragraph summarized the rule of employment at will.98 The second explained the various exceptions to employment at will such as the ability of employer statements to modify the at-will agreement by giving additional promises, including the impropriety of discharging someone in bad faith or without just cause. In the end, the cueing variable reduced the rate of retaliation, but not by a statistically significant amount.

Hypothesis three was confirmed. A more thorough education of the respondent of the contours of employment at will did reduce the litigation and retaliation attitudes when compared to those who were not provided additional legal knowledge. Attitudes toward litigation and retaliation were significantly reduced as compared to those who were merely cued to the doctrine of employment at will. The additional information may have modified the respondents’ fairness heuristic. Instead of perceiving all firings that seemed unfair as unjust and worthy of retaliation or litigation behaviors, respondents may have perceived the discharge less negatively because it does not deviate substantially from legal rules on which they were educated. The implication is that when the respondents were made more fully aware of the limitations of employment protection they demonstrated a lower propensity or desire to take action against the discharging firm.

In the ‘educated’ respondent scenario, respondents are told that a disclaimer in an employee manual can override other assurances of long-term employment.99 The respondents are then told that the firm has just such a disclaimer.100 In fact, the disclaimer is rather detailed, comprising a bolded ninety words which in essence inform the reader that even though a manual with policies does exist that it is not binding on the employer.101 The disclaimer clause also says the employer can amend or terminate the policies and benefits in the manual at any time.102 The inference would appear to be that respondents would be more fully aware about the limits of employment protection than their cueing or no-education counterparts. That knowledge, in turn, would reduce the propensity for legal or retaliatory action. This hypothesis, as stated above, was confirmed.

98 Appendix A, § 3.2.
99 Id. § 3.3. See generally Pedersen, supra note 30; Befort, supra note 30; Cynthia Weber Scherb, Note, The Use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions, 12 J. CORP. L. 105 (1986).
100 Appendix A, § 3.3.
101 Id.
102 Id.
Perhaps, the scenario is evidence of the power of disclaimers when properly presented to new hires. In this case, the scenario company representatives discuss the power of disclaimers in a paragraph after the exceptions to employment at will are presented. The respondent is then told that, even though the firm has a company manual that summarizes company policies and employee benefits, the company chose to include a disclaimer clause erasing any binding effects of the manual’s promises.

The key factor is likely not the disclaimer itself, but how it was presented and explained by the employer in the full education scenario. Without such a presentation and thorough explanation of the disclaimer and how it relates to company policies and employment termination, the firm’s treatment of legal rights may be construed as invidious in nature. Employees may perceive the manual as no more than meaningless puffery. But, it is more likely that a “hidden” or unexplained termination at will disclaimer may lead the employee to see the invidious nature of express policies that seemingly provide employee protections, despite the existence of a disclaimer of such protections. Such policies provide a false, but intended perception or the illusion that the firm is a fair and equitable organization. The manual acts as a prod for unsuspecting employees to construct a normative-relational mindset of the employer-employee contract that in fact does not legally exist. This scenario allows the company to project positive signals of trust by promising benefits without undertaking any obligation to provide those benefits.

Purposeful evasion of the existence of the disclaimer clause at the time of hire is likely to produce unintended consequences. First, on the legal side, courts may construe the continuance of such policies, especially when reinforced post-hire, as working a modification of the initial employment at will nature of the relationship. Second, without a full explanation of the relationship between the disclaimer and the company’s employee friendly policies relating to termination, the employee may process the multitude of employee-friendly policies to create a false perception of the firm as one that is committed to the nurturing of long-term employer-employee relationships. The study shows that a fuller explanation (education) significantly reduces employees’ rates of retaliation and litigation. The conjecture here is that if not properly done the cognitive dissonance between the firm’s employee-friendly policies and a subsequent strict or unfair use of employment at will is likely to heighten negative attitudes toward the organization. Employees wittingly or unwittingly perceive the diminishment of employee valuation as a breach of the underlying understanding (psychological contract) between the employer and the employee. In hindsight the employee perceives the dissonance of the marketing by the employer of an employee-friendly relationship and strict enforcement of employment at will as a type of misrepresentation or fraud perpetuated by the firm. The sense of being tricked or betrayed results in the ex-employee viewing the firm more negatively at the time of discharge.

As explained earlier, we also tested the reactions of respondents to various fairness-related scenarios. We express the set of three Fairness Hypotheses as follows:

Hypothesis 4: Employees who experience procedural fairness will be less likely to pursue litigation than employees who experience procedural unfairness.

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103 Joseph W.R. Lawson II, *Give your Employees a Hand (Book)*, 18 LEGAL MGMT. 24, 32 (“In an era of increasing litigation, having clearly written and communicated guidelines will help ensure a professional, equitable environment that can protect a professional service firm from legal liability.”). The trade publication also explains that employee handbooks can promote a better understanding of a firm’s policies, increase consistency and credibility, and enhance recruitment. *Id.* at 26-28.
Hypothesis 5: Employees who experience substantive fairness will be less likely to pursue litigation than employees who experience substantive unfairness.

Hypothesis 6: Employees who experience the combination of procedural fairness and substantive fairness will be less likely to pursue litigation than employees in the other fairness combinations.

The Fairness Hypotheses were tested with the same ANOVA. The results revealed significant mean differences for litigation intentions across the two procedural conditions: F(1, 763) = 72.60, p < .001. Consistent with Hypothesis 4, employees who experienced procedural fairness had lower litigation intentions (Mean = 2.50) than employees who experienced procedural unfairness (Mean = 3.12). It should be noted that the study conceived procedural fairness purely as a process. In the scenarios, the employee handbook clearly describes the process that will be followed prior to termination including, a six-month review with notice if the evaluation is considered as substandard; the notice suggests the employee seek guidance from the human resource department or the company’s informal mentoring program; a second six-month review is provided; if the second review includes another substandard review notice, then the employee is given a three month probationary period in order to improve and a senior manager is assigned as a mentor; and finally upon the determination of continued substandard performance, the employee is given a two week notice of discharge. If the employer follows this process as expressed to the employee, then this is construed as a case of procedural fairness. The study does not measure interactional justice which relates to treatment and not to the specifics of the process.104 Studies have shown that procedural fairness as a predictor of employee outcomes can be negatively affected if the employee feels mistreated or disrespected during the implementation of the procedures.105 In addition, the previous study concluded that procedural fairness is most effective when the breach relates to extrinsic values (pay, rewards) while interactive fairness is a key factor when the breach involves intrinsic values (projects, autonomy).106 Since termination is in the category of extrinsic values, testing for the impact of procedural fairness as process is most relevant to the current study.

The results also revealed significant mean differences for litigation intentions across the two substantive conditions: F(1, 763) = 167.23, p < .001. Consistent with Hypothesis 5, employees who experienced substantive fairness had lower litigation intentions (Mean = 2.32) than employees who experienced substantive unfairness (Mean = 3.26). Greenberg has previously showed that substantive explanations can reduce the rate of negative outcomes. He found that increases in employee theft occur when the employee feels they are being treated inequitably, such as being underpaid.107 However, he argues that

104 See Jill Kickul, Scott W. Lester & Jonathon Finkel, Promise Breaking During Radical Organizational Change: Do Justice Interventions Make a Difference?, 23 J. ORG. BEHAV. 469, 472 (2002). The importance of interactional justice is not to be downplayed and its impact has been measured in other studies. See, e.g., Jill R. Kickul, George Neuman, Christopher Parker & Jon Finkel, Settling the Score, The Role of Organizational Justice in the Relationship Between Psychological Contract Breach and Anticitizenship Behavior, 13 EMPLOYEE RESP. & RTS. J. 77 (2001) (interactional injustice positively correlated to increased levels of Anticitizenship behavior).
105 Kickul, Lester & Finkel note that interactional justice in the case of a psychological contract breaches include “sensitivity, concern, empathy, and above all else respect to . . . [the] disgruntled employees.” Id. at 485.
106 Id. at 471.
107 JERALD GREENBERG, THE QUEST FOR JUSTICE ON THE JOB: ESSAYS AND EXPERIMENTS 215-230 (1996). See also, Jerald Greenberg, Employee Theft as a Reaction to Underpayment Inequity: The Hidden Costs of Pay Cuts, 75 J. APPLIED PSYCH. 561 (1990) (concluding that when pay cuts are sensitively explained to employees feelings of inequity are reduced, as well as the rate of theft).
increases in employee theft “can be substantially reduced by the inexpensive tactic of explaining the basis for the inequity in clear and honest terms.” 108

Exhibit B
Results for Fairness Hypotheses

The survey also confirmed Hypothesis 6. A combination of procedural and substantive fairness produced an interaction effect in the ANOVA: F(1, 763) = 22.31, p < .001. 109 The presence of both types of fairness amplified the rate of decrease in litigation pursued by discharged employees. Some studies indicate that procedural justice accounts for more variance than distributive justice in predicting work-related attitudes. 110 However, Greenberg stresses that the “real issue is not which form of justice is more important but how they operate together.” 111 The current study supports this supposition by showing the synergistic effects that occur when procedural fairness is combined with substantive fairness. When substantive fairness exists, the effects of procedural fairness amplify perceptions of company fairness. The amplification effect is shown in “Exhibit B.” The light columns show higher rates of retaliation intents without the amplification effect. The darker column above substantive fairness shows a lowered rate of retaliation in cases of substantive unfairness, but with procedural fairness. The columns to the right show the amplified effect. The lighter column on the left shows cases of substantive fairness, procedural unfairness. The farthest column to the right show a drastic reduction in

109 See Exhibit B for a graphical depiction of the pattern of results.
111 Greenberg, supra note 107 at 403 (emphasis original).
the rate of retaliation when three is combined substantive and procedural fairness. The rate of retaliation in the amplified scenario is nearly one-half of the rates when there is substantive and procedural unfairness. Put simply, substantive fairness without procedural fairness positively, but moderately, impacts the firm fairness attitudes of employees. Substantive and procedural fairness alone only moderately reduce litigiousness. Substantive and procedural fairness together produce substantial reductions in rates of litigation and retaliation. Finally, in cases where procedural fairness existed, employees’ that received no information of their rights under employment law showed higher rates of litigation propensity than those who were educated.

IV. Norms in Contract Law and Employment Relationships

The study focused on the roles of knowledge communication and fairness in affecting employees’ perceptions at the time of termination. The findings support claims that employees’ perception of their employers at the time of termination is heavily affected by perceptions of fairness, and to a lesser extent by knowledge transfer. The findings also support an ancillary proposition that the employer can manipulate the employee’s perception of fair termination through practices of education, procedural justice practices, and by providing fair rationales for dismissal. Parts IV and V extrapolate from these findings to analyze the similarities between legal employment contracts and psychological contracts. The importance of norms to both contract law and employment relationships will be explored in this Part. The prominent role played by the fairness norm in creating expectations both psychologically and legally will provide the common ground in analyzing the role that the psychological contract theory can play in reforming employment law. The importance of expectations and the ability to manage expectations will be explored in Part V. Finally, the importance of norms and expectations as represented by the psychological contract, and their affinity to the norms of contract law, will be used in Part VI to justify reforms in employment law. The means to reform are found in existing structures within the law of contracts. The suggested guide for reforming employment law is through a process of aligning the norms and expectations of contract law with those of the psychological contract.

A. Norms and Contract Law

One theme that is common to legal employment contracts and psychological contracts is that each has a normative basis. One way of explaining the differences between legal employment contracts and psychological contracts are that they are based upon different norms. However, this would be a premature assessment of their normative frameworks. Most of the norms that underlie the psychological contract are found in relational contract theory, and most of the norms in relational contract theory are recognized, is some form or degree, in mainstream contract law. The difference is that the strength of relational norms found in the psychological contract is more pronounced than the application of those norms in contract law. Alternatively stated, the composite of norms that underlie legal and the psychological contracts possess the same ingredients, but in various degrees.112

The employment at will doctrine is closely related to the predominate norm that contract law is expected to advance—freedom. In macro terms, capitalism is based upon a private ordering system.113

112 See Cass Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903 (1996) (arguing that social norms can be used to advance legal objectives).

113 The employment relationship’s at-will principle masks a general tension between the view of employment relationships at the sole creation of market economics and the conception of the relationship as one dominated by
Contract law is the primary means by which private ordering shapes the economy and society. Individuals and entities are free to agree to any terms in the formation of a contract. In the event that the bargain struck is one-sided (unfair), it is not contract law’s role to make the contract more fair or equitable. Instead, the contract, barring major bargaining failures, is strictly enforced. Hence, if an employer and employee enter into an employment at will contract, then the at-will nature of the contract should be strictly enforced.

Freedom of contract, although dominate, is one of numerous norms that underlie contract law. The rationales for contract law stem from a composite that includes the norms of autonomy, fairness, justice, reliance, predictability, certainty, efficiency, and the morality of promise-keeping. The composite or parts of the composite are used to justify particular rules or principles of contract law. The norms also are used, often implicitly, in the application of contract rules to actual cases. Ultimately, the composite of norms listed above can be distilled into often competing meta-norms—private autonomy (freedom of contract) and fairness of the exchange. Justice Cardozo described law as a process of resolving the inner tension between freedom and fairness as one in which “[t]he social interest served by symmetry or certainty must be balanced against the social interest served by equity and fairness.” The psychological contract is built upon the fairness norm that is embedded in contract law. The principle of private autonomy is the basis of the employment at will principle. The fairness or justice norm is the rationale used to support the legal exceptions to employment at will.

B. Relational Contract Norms and the Psychological Contract

Relational contract theory, as espoused by Ian Macneil, is the foundation upon which psychological contract theory rests. Macneil’s key insight is that enforceable and unenforceable contracts are formed within a larger relational and social context. The larger social or relational exchange is based on a cadre of norms not found in classical contract law such as, the norms of reciprocity, cooperation and solidarity. The cooperation and solidarity norms reflect the complexity of long-term, relational contracts. This complexity and the changeable nature of such relationships suggest that both parties


114 Bargaining flaws primarily relate to the genuineness of consent. Contracts are legal enforceable agreements. As such, the parties must mutually consent to the bindingness of the agreement and to the terms of the agreement. If there is no mutual assent, then there can be no contract. Such consent may be seen as present at the time of the agreement, but later a court may determine that the consent was flawed. The presence of mutual mistake as to the subject of the contract, a unilateral mistake that the non-mistaken party could not have been unaware, duress or undue influence used by one party over the other party, and misrepresentation by one of the parties are all means to challenge the genuineness of consent and thereby determine if the contract is enforceable.


118 Robinson, Kraatz, and Rousseau state that “Macneil’s typology of contracts can be used to categorize psychological contracts.” Sandra L. Robinson, Matthew S. Kraatz & Denise M. Rousseau, Changing Obligations and the Psychological Contract: A Longitudinal Study, 37 Acad. MGMT. Rev. 137, 138 (1994).
expect to work together (cooperation) in order to preserve the common purposes of the contract (solidarity). Macneil states that the “[p]ossibility of trouble [is] anticipated as [a] normal part of relational [contracts], to be dealt with by cooperation and other restorational techniques.” 119 Within the notion of restorational techniques, the norm of reciprocity can be used to restore the relationship by each party giving up something or giving an additional something. However, a study showed that employees are instrumental and not reciprocal in their perceptions of the changing obligations of the psychological contract overtime. 120 The study showed that employees’ perceived their obligations under the psychological contract to decrease as their employer’s obligations increased. This type of one-sidedness questions the normative viability of the psychological contract and whether it would be prudent for employment law to recognize the breach of the psychological contract to support employee-generated litigation.

Professor Hillman acknowledges that the basket of classical contract norms needs to be expanded to include the different normative basis of relational contracts: “[R]elational norms such as cooperation and compromise, rather than promises, largely govern these parties associations.” 121 It is in this space between classical contract law’s recognition of enforceable contracts and the different normative grounding associated with unenforceable relational contracts that psychological contract theory resides. Indeed, the relational norms of planning, trust, and solidarity have moved into the mainstream of contract law. They can be seen at work in collaborative alliances, franchising, and joint venturing. 122

There is a deep literature on the role of social norms in producing appropriate decisions and actions. A theme in this literature is that a norm may be a more effective means of controlling bad behavior or encouraging good behavior than the use of law. 123 The psychological contract can be simply thought of as a bundle or basket of norms at least partially created by the employer. When the employer follows these norms there is little necessity for litigation. However, when the employer violates the norms of employment then the mantra of injustice or unfairness increases the likelihood of litigation and retaliation. The breach of the psychological contract is, in essence, a violation of relational norms embedded in certain employment relationships. The effect of an employer establishing (beginning at the commencement of employment) social norms of fairness and justice is likely to raise employee’ expectations of just and fair termination. 124 Just as conformity to norms decreases the need for law or for litigation, violation of the norms increases the likelihood of litigation and the need for legal protections for employees.

C. Analyzing the Psychological Contracts as a Two-Way Exchange

120 Robinson, Kraatz, and Rousseau concluded that the “apparent trends suggest that employees’ perceived obligations to their employer decline overtime while the obligations they attribute to their employers increase.” Robinson, Kraatz & Rousseau, supra note 118, at 147.
The norms of fairness or justice provide the strongest normative support for the psychological contract. After about two decades, however, the psychological contract literature has not fully explored the duality of expectations that form the psychological contract. Instead it has focused solely upon the expectations of the employee. The research has failed to recognize that for every breach of the psychological contract by the employer there is a corresponding psychological breach that relates to the employee. This becomes clear when we use reasonableness as a surrogate for fairness. The two-way analysis of the psychological contract rests upon a simple premise that someone who is acting unreasonably towards another is also being unfair. This simple premise leads to a two-step process in assessing expectations. First, does a party truthfully possess certain expectations? Second, are these perceptions ones that a vast majority of similarly-situated persons would possess?

In order to explain the logic of the above paragraph, an analogy to employment termination will be used. The termination of employment can be analogized to the cessation of long-term contracts. The difference between the two is that a cessation of a long-term contract may be due to a breach of a legal contract while the termination of a long-term employee may only be a breach of a psychological contract. Professor Hillman notes that when the right to cessation of a contract is unclear a “further investigation into the meaning of fairness in the cessation context” is required.

Hillman elaborates that the fairness norm is, in fact, a number of interrelated norms. Three of these norms relate well to determining the reasonableness of a psychological contract. The first norm is closest to what most feel when they consider the fairness of an action: “[A] party should not knowingly cause harm to another without justification.” The psychological contract literature assumes this to mean that the employer should not terminate an employee without justification. In the present study, the duty not to cause unnecessary harm is captured by the existence of substantive and procedural fairness. But, it is important to note, that the employee can also breach the psychological contract by acting unreasonably in causing harm to the employer (litigation or retaliation). In contract law, the determination of reasonableness is made by applying the reasonable person standard. The reasonable person standard could be used to determine if the employee’s perceptions or expectations were unreasonable. If they are considered unreasonable, then any subsequent litigation or retaliation may be a post hoc breach of the psychological contract by the employee.

The reasonable person standard applies to both transactional (discrete) and relational contracts. The difference is the fabrication of the reasonable person in a relational contract uses additional inputs. The transactional reasonable person is placed in the shoes of a party at the time of formation. The reasonable person is imbued with the characteristics of that party and the context at the time of formation. A relational reasonable person in the employment setting is placed in a chain of contexts beginning at the time of hiring to the termination of the employment. The termination of an employee is viewed not as an isolated act, but as one act within a more expansive relationship. Professor Gordley

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125 “[R]esearchers view the psychological contract as held by the employee alone.” Morrison & Robinson, supra note 52, at 229. There are studies that measures employer, as well as employees, perspectives of the psychological contract and subsequent breaches. They mostly confirm that there is considerable incongruence relating to the contract and regarding how a breach is perceived. See Scott W. Lester, William H. Turnley, James M. Bloodgood & Mark C. Bolino, Not Seeing Eye to Eye: Differences in Supervisor and Subordinate Perceptions of and Attributions for Psychological Contract Breach, 23 J. ORG. BEHAV. 39 (2002).


127 Id. at 619.

asserts that through such an expanded analysis the reasonable person must decide whether the “parties willed a certain normative relationship.” This is as close as contract law gets to the idea of the psychological contract.

The second norm in Hillman’s typology is that a party must act reasonably to avoid harming themselves. In the case of the psychological contract, the disgruntled employee may fail to take positive action to limit her harm. The mitigation principle in contract law requires the non-breaching party to mitigate their harm or damages. An example of mitigation avoidance in the employment realm is when an ex-employee doesn’t utilize employer benefits that would aid in job-seeking or fails to actively look for another job. If she does not, then the employer is relieved from any obligations regarding the harm that could have been mitigated. This is especially true when the harm is, at least, partially caused by the unreasonable expectations of the employee.

The final fairness norm involves the determination of overall cost and benefits of the employment relationship. This is the reciprocity norm. Research in the psychological contract literature demonstrates the bi-directional nature of the norm of reciprocity. The fulfillment of perceived employer obligations triggers a feeling of the need to reciprocate by the employee. Conversely, an employer’s failure to fulfill its obligations is likely to trigger a reciprocal response by the employee. More likely, the causal flow is in the direction of employee to employer. An example of a lack of reciprocity is when the employee goes beyond the performance of minimally required obligations and the employer fails to reciprocate. But given the relational nature of employment, a single case of a lack of reciprocity should be placed in the context of overall reciprocity. If the psychological contract is relational, then overall reciprocity during the course of the employment should be factored into the fairness determination. If at the time of termination the employee has received a net benefit attributed to the employment, then the breach of psychological contract approach loses some of its explanatory and normative power. Psychological contracts aside, if the employee is better off due to that particular employment relationship, then it becomes more difficult to see the harm caused by the breach of a psychological contract from the perspective of the entire relationship. The fairness and justice norms are not necessarily on the side of the discharged employee. An example of this is where an employee obtains marketable training or skill sets during the employment.

John Kotter stresses that the psychological contract includes potentially thousands of items and therefore, divergence of employer and employee expectations is inevitable. Given that assumption, the psychological contract can be seen as a bundle of matched and unmatched expectations. When the employer and employee expectations match, recognition of a breach of the psychological contract is both evident and reasonable. In the case of unmatched expectations, the employee’s expectations should be required to reach a threshold of reasonableness before being recognized as a breach of the psychological contract. A similar template is found in contract law. The matching of expectations (reasonable interpretations of reciprocal promises) is the foundation of a binding contract. In cases

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130 Hillman, supra note 126, at 619.
where only one party (employer) makes a promise, than a cause of action for promissory estoppel is available when the promisee (employee) reasonably relies upon the promise.\textsuperscript{134}

Promissory estoppel or detrimental reliance encompasses another element found in the psychological contract and justice literature. The main rationale for promissory estoppel is the prevention of injustice. The requirements of promissory estoppel are the giving of a promise or assurance, reasonable reliance, and an injustice would be done in the event the court or law fails to provide a remedy.\textsuperscript{135} Courts resort to promissory estoppel when an element needed to find an enforceable contract is missing. Promissory estoppel is used when not providing a remedy of some sort would cause an injustice. This may be the case when a promise given by an employer, within the context of an at-will contract, results in the employee reasonably relying on the promise to his or her detriment. An example would be when an employer makes promises to discourage an employee from taking a job with a competitor. After retaining the employee, the employer then fails to honor its promises. If the employee can prove damages, such as the other job was higher paying or provided additional benefits, then a cause of action in promissory estoppel is supported.

Promissory estoppel and recognition of a violation of a psychological contract both seek to address the feeling of injustice produced by a breach of express or implicit promises. The essence of psychological contract theory is that even if there is no breach of a legal employment contract the breach of a psychological contract may result in injustice, or at least a perception of injustice. Feelings of injustice are likely to elicit an emotional reaction and lead to employee actions against the employer.\textsuperscript{136} From an employer perspective it is in its best interest to recognize this injustice in order to prevent it or provide a remedy for the harm caused. This recognition advances both the interests of the employee and the self-interest of the employer. Perceptions of injustice generate costs for the employer, such as increased litigation costs, reputational costs, and retaliation costs. In the end, contract law’s principle of promissory estoppel is a much better construct to base psychological contract theory. However, there is a major difference. Promissory estoppel requires the reliance to be reasonable. The psychological contract literature generally does not distinguish between reasonable and unreasonable employee perceptions and expectations.

\textbf{D. Norms and Perceptions of Injustice}

From an employer perspective, it is important to discover the underlying conditions or factors that influence or predict discharged employees propensities to act against the firm. A variety of personal characteristics can influence a person’s proclivity towards retaliatory behavior such beliefs that others are malevolent, an inclination toward anger, and general personal anxiety.\textsuperscript{137} While these behaviors may be beyond the reasonable control of the employer, employers can influence important factors relevant to an employee’s propensity to retaliate. For example, the employer can construct discharge policies that increase the dignity and respect given to the discharged employee, increase the awareness of employees relating to the company’s employment policies at the time of entry and during

\begin{footnotes}
\item[134] Restatement (Second) Contracts §90 (1981).
\item[135] Id. See generally Charles Knapp, Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel, 81 Colum. L. Rev. 52 (1981) (analyzing the Restatements embrace of detrimental reliance or promissory estoppel).
\item[136] See Morrison & Robinson, supra note 53, at 250 (distinguishing between perceived breach and violation).
\item[137] See Eisenberger et al., supra note 11, at 788.
\end{footnotes}
employment, provide an “adequate” explanation for the discharge—one grounded in the notion of substantive fairness, as well as the use of due process mechanisms leading up to the termination.\textsuperscript{138}

The study showed that the fairness norm underlies the feelings of injustice that an employee feels at the time of termination. The study indicates that procedural fairness and substantive fairness are predictors of employees’ actions at termination relating to intent to sue and retaliation. A combination of the two forms of fairness amplified the predictive power of employees’ reactions. The unanswered question is whether the employer’s fairness needs to be genuine to be effective. Professor Greenberg labels the manipulation of fairness as an act of “hollow justice.”\textsuperscript{139} He comments that the problem with such a divergence is that a “perceived intentional ‘using’ of fairness as a tool of manipulation is likely to backfire.”\textsuperscript{140} It would seem that the effectiveness of manipulated fairness is dependent on the quality of the manipulation. However, perceptions of fairness, like trust and loyalty, is affected throughout the course of the employment. If an employee perceives her employer as being unfair, such as not treating similarly situated employees equally during the course of employment, it will be difficult for an employer to manipulate fairness factors to change established perceptions of unfairness. In the area of procedural fairness, process is inherently longitudinal in nature. The perception of procedural fairness is based upon the fairness of the employer’s practices and policies during the employment through to termination. It is difficult to envision that procedural fairness at termination can be manipulated to overcome a history of procedural unfairness—such as favoritism in promotion and benefits, inequitable application of company policies and practices, and not providing the means for the employee to succeed.

Finally, substantive fairness is more subject to manipulation than procedural fairness. The perception that the employer has a good faith reason for the termination, especially those tied to external factors like the economy, explains its predictive power over rates of litigation and retaliation. However, if procedural fairness is not provided it is likely that the employee will see the good faith reason as a shame masking an arbitrary or bad faith dismissal. The fact that the study showed an amplified effect when procedural and substantive fairness are both present, supports the premise that the two forms of fairness are interrelated, at least in the area of employment termination.

V. Knowledge, Perceptions and Expectations

This Part examines the role of knowledge, perceptions, and expectations in the election by an employee to litigate or retaliate. The first section analyzes the interrelationship between an employee’s perceptions of employment law and the fairness of the employer’s action to terminate. This Part then examines the concept of the internal versus external employment relationship. It concludes with an assessment of the ability of best practices used by an employer to condition employee expectations and perceptions.

A. Employees’ Perceptions of Employment Law and Employer Fairness

Employees’ expectations relating to job security and the employer’s rights to terminate may actually be formed prior to the commencement of employment. The focus here is on the perceptions of


\textsuperscript{139} GREENBERG, supra note 107, at 132-33.

\textsuperscript{140} Id.
employment law that employees possess a priori and whether those perceptions can be changed at the commencement of employment. Fortunately, there are empirical studies that have provided insight into employee perceptions of the protections provided under employment law. The key finding is that employees perceive that the law provides protection against arbitrary or unfair discharge. Implied in these perceptions is the belief that an employer may only discharge an employee for just cause. These perceptions are patently false yet, continue to persist. The most plausible explanation for this divergence between perception and reality is provided by behavioral decision theory. It has been shown that most individuals possess a number of biases and heuristic tools that they bring to most relationships, such as marriage, contract relationships, and employment relationships.

Pauline Kim has showed that employees’ perception of employment law is deeply flawed. Kim’s study measured the beliefs that former employees have about the protections provided by employment law. Kim challenged the assumption that the simple concept of employment at will was easily understood and acknowledged by employees. Kim found that most employees believed that the law granted far greater protection from discharge than was actually provided.

[T]he study raises serious doubts about whether workers have the most basic information necessary for understanding the terms upon which they have contracted . . . For example, although the common law rule clearly permits an employer to terminate an at-will employee out of personal dislike, so long as no discriminatory motive is involved, an overwhelming majority—89%--erroneously believe that the law forbids such a discharge.

Similarly, another study reported that 57.8% of participants believed that employment at will cannot be legally practiced even if job applicants sign an employment agreement which expressly states the employment at will nature of the relationship. Another found that fifteen percent of respondents under thirty five years old, twenty-two percent of respondents between the ages of thirty-five and forty-nine, eight percent of the fifty to sixty-five age group, and twenty percent of the over sixty-five age group knew employers had a right to terminate employment at any time even without cause. As one author concludes, “[s]urvey results confirm the presence of a Pollyannaish denial factor in which most respondents believe employees can be legally discharged only for cause.” These beliefs persist out of an employee’s desire to construct a coherent and secure reality. Employees’ misconceptions are

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141 E.g., Kim, supra note 64.
142 Id.
143 Kim, supra note 64, at 110-11.
145 Frank S. Forbes & Ida M. Jones, A Comparative, Attitudinal, and Analytical Study of Dismissal of at-will Employees without Cause, 37 LAB. L.J. 157, 165 (1986). The study further noted that ninety-three percent, ninety-one percent, eighty-six percent, and eighty-five percent in the respective age groups found the practice unethical. Id.
likely anchored by a fairness norm that equates unfairness with illegality. Employee’s beliefs are also based upon common beliefs of most employees. For example, the notion that an employer must give a minimum of two weeks of notice before discharge is widely held amongst workers. The implication of these results is that discharged employees often believe they are victims of an unfair-illegal act.

Other predispositions that inflate employees’ perceptions of job security and just cause employment include “optimism bias” and the “availability heuristic.” Optimism bias irrationally discounts the likelihood of something harmful happening to the particular individual. Employees enter into a job, much like people enter into marriages, optimistic of the long-term nature of the relationship. Important information, such as divorce rates or the high instances of downsizing or out-sourcing are generally discounted. People tend to believe that divorce or termination of employment are likely to happen to others, but is unlikely to happen to themselves.

The availability heuristic can affect an employee’s perceptions by inflating either expectations of job security or job insecurity. If an employee’s past experiences support the feeling of job security, such as knowing people who retired after long terms of service with a single company (especially if the retired employee worked for the employee’s current employer), then the employee will underestimate the risk of termination. If the employee has experienced numerous discharges, possibly working as a temporary worker, then the risk of being terminated will be arbitrarily inflated. The optimism bias and the availability heuristic can work together to inflate employee expectations. A new graduate that possesses a very positive view of her first employer’s commitment to long-term relationships, as well as knowing others inside or outside the company that have experienced long-term employment, is likely to have an irrational set of expectations of employment longevity.

The present survey measured whether providing employees with information regarding the law of employment, namely the employment at will principle, reduced or increased the rate of litigation and retaliation. We hypothesized that the more information that the employer provided to the employee at the commencement of employment relating to the lack of protections under employment at will relationships, the lesser the rate of litigation and retaliation at discharge. As noted previously, in all there were three variations in the scenarios relating to knowledge of employment law.

The first variation provided no information on the meaning of employment at will or on employment law. This variation served as the baseline for measuring the impact of cueing and educating employees on the state of employment law and the nature of their employment. The cueing variation provided basic information on the employment at will principle and the employment at will exceptions.

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151 “If a decision maker uses the availability heuristic . . . his estimate of a risk will depend on the extent to which an example of the risk coming to pass comes easily to mind.” Id. at 462 (citing AMOS TVERSKY & DANIEL KAHNEMAN, Judgment under Uncertainty: Heuristics and Biases, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (1982)).
Educating the employees involved providing additional information on the law and their particular employment. The educating variation provided the same information as the cueing along with additional information stressing the employment at will nature of the employment. In the educating variation, the company’s lawyer refers the new employee to an express disclaimer clause on the cover of the employee handbook. The disclaimer clause explicitly states that the employer is giving no assurances as to job security and that the employer: “RETAINS ALL RIGHTS TO DISCHARGE YOU AT ANY TIME, FOR ANY REASON, AND WITHOUT NOTICE.”

As was expected, those participants that were provided with no information showed the highest rate of willingness to litigate and retaliate. Once again as expected, those that were cued or educated showed a lesser rate of litigation and retaliation propensities than those that were provided no information. Therefore, some additional information on employment at will deflated the employee’s presumption or expectation that the law provides some protection against unfair or arbitrary dismissals. The survey showed that simply cueing reduced the rate of retaliation only slightly (statistically insignificant), while a fuller education provided a more dramatic decrease in the rate of retaliation. A number of conclusions may be derived from these findings. First, they show that employees are able to process legal information if properly presented to them. The internalization of the true meaning of employment at will is not so much the product of an express disclaimer provision, but the clear explanation of its meaning. While the cueing scenario provided a brief description of the basic principle of employment at will and its two exceptions, the educating went into greater detail as to the fact that the employee’s particular employment was at will.

It may be true that the content and depth of the information provided to the employee could trigger different responses at the time of termination. Behavioral decision theory indicates that individuals who are provided too much information actually do a poorer job of processing that information than those who are provided less information. Bounded rationality recognizes the limits of individual cognitive processes. One scholar notes that even in cases of express disclaimers that the employment is at will “employees do not process employers’ words and conduct as the law presumes they do.” Often time individuals use shortcuts or are biased in some way. The educating scenario in the current study failed to reach the limits of bounded rationality. The survey shows that providing a definitive explanation of at will disclaimers was able to be accurately processed by many of the new employees. This resulted in a diminishing of the effects caused by lack of knowledge of the law, optimism bias, and the availability heuristic. More finely grained surveys will need to be undertaken to measure how the differences in the information provided, the language used, and how it is presented will best lower employee perceptions and expectations of job security. The current study provides a starting point by proving that additional information regarding employment at will reduces rates of litigation and retaliation at the time of termination.

Ultimately, the fairness rationale is a more dominate predictor than education, as well as cognitive shortcuts like optimism bias, availability heuristics, and bounded rationality. This is what Christine Jolls has called the “fairness dynamic.” Behavioral decision theory recognizes the notion of bounded self-interest in which “people who are the beneficiaries of fair behavior tend to reciprocate such behavior”

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152 Estlund, supra note 147, at 7.
even when it is at a cost to themselves.\textsuperscript{155} She notes the “significant role this aspect of fairness behavior [plays] in the employment relationship.”\textsuperscript{156} Fairness considerations are particularly important in employment because of its relational aspects. This is why a breach of the psychological contract can trigger a sense of violation and a perception of profound unfairness.

In the end, the issues of disclosure, knowledge, and fairness are interrelated factors. The importance of notice or disclosure to promote the goals of informed consent\textsuperscript{157} and fairness is found throughout the legal literature.\textsuperscript{158} The survey showed that some advance notice of the “dangers” of employment at will and the use of procedural and substantive fairness practices mitigate feelings of injustice at the time of termination resulting in reduced rates of litigation and retaliation. Although not measured in the present survey, it can be conjectured that disclosure at the commencement of employment is positively related to perceptions of fairness at the time of discharge. This effect was likely captured in the measuring of procedural fairness and its positive relationship with reduced rates of litigation and retaliation. In the procedural fairness scenarios the employee refers to the employee manual, which is generally given at the commencement of employment, to determine whether she had been treated fairly. In sum, disclosure, knowledge of the law and the nature of the relationship, and fairness are powerful predicates of employee reaction at the time of termination. All three of these elements are within the control of the employer. As a best practice, a self-interested employer should implement practices that increase the level of information provided to the employee, including disclosures of the nature of the employment relationship, as well as instituting and following practices of procedural and substantive fairness.

\textbf{B. Employer Perceptions: Internal-External Employment Contracts}

Given the longstanding position of the termination at will employment regime, a common perception is that employer’s operate under the assumption that they can dismiss employees at any time even if oral assurances or a corporate culture of job security exists. An argument in favor of such an assumption is that employer’s consciously frame the external contract as one of at will employment. This is evident by the use of disclaimer clauses in employee handbooks that expressly preserve the at-will nature of the relationship. At the same time or during the course of employment, the employer fosters an employer-employee relationship more compatible to a just cause relationship. It is this divergence that is the root of the problems affecting employment termination. First, the internal contract or relationship (psychological contract) elevates employees’ expectations of job security and broadens their definition of unfair dismissal. Second, when confronted with the external or legal contract the reality of the internal or psychological relationship results in irrationally high levels of litigious and retaliatory behavior. The irrationality of pursuing litigation despite the lack of legal rights is explained by the elevated expectations stemming from the internal relationship. Lack of legal rights aside, the employee is likely to believe a sense of betrayal. This betrayal rests upon the feeling that the employer intentionally misrepresented the nature of the relationship and therefore, is deserving of punishment.

\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Craig A. McEwen & Richard J. Maiman, \textit{Mediation in Small Claims Court: Achieving Compliance Through Consent}, 18 LAW & SOC’Y REV. 11, 37 (1984) (reporting a study that found that fairness perceptions were partially determined if the mediation was undertaken by consent of the parties).
If the employer’s perception of employment is one totally at-will, then why does she feel the need to insert such disclaimers and frame the evidentiary case for at-will termination? The answer is difficult to provide other than through circular reasoning. At the high point of the at-will employment law regime, the courts were monolithic in their application of the at-will termination rights of the employer. The fact that employment law evolved out of what was called master-servant law indicates the dominant position of the employer over the employment relationship. In addition, employee perceptions of dismissal rights were more likely pro-employer or merely unrecognized. In short-term employment, workers had no illusion of job security. In long-term employment, the expectations of job security generally matched the reality of the mid-Twentieth century workplace.

Towards the later part of the last century, with the breakdown of lifetime employment as the norm, the perception of job security began to diverge with the reality of the new economy, including volatile fluctuations in company sizes and increased employee mobility. The result was a divergence between the employee perception of job security and the realities of job insecurity. The seminal cases involving the creation of at-will exceptions were largely due to this divergence. The foundation of a winning case generally involved gross instances of procedural and substantive unfairness. Some courts began to feel that the use of the at-will right of employers was resulting in injustices that the law could no longer ignore. This was especially true in the discharge of long-time employees.

As the law moved to prevent injustices in employment discharge, employers took steps to reinforce the external at-will contract through disclaimer clauses and carefully worded employee handbooks and company policies. It may also be the case that this reinforcement of the external employment contract is a result of changes in employer perceptions of the absoluteness of the at-will doctrine. This is supported by the case law in states that recognize an implied-in-fact relationship of just cause employment created subsequent to the commencement of an at-will relationship. What we are currently witnessing, with the creation of employment at will exceptions and the use of declarer clauses, is a merger of the external-legal contract with the internal-psychological contract. Ultimately, the merger of the psychological contract with employment law is possible through the law’s recognition of a public policy of “protecting the core bargains struck by employers and employees against the opportunism that sequential performance risks.” Under such recognition, the employee would still have to prove that there was an express or implicit promise of job security or of an employee-protective process before termination. Proving the existence of a promise or policy of job security should shift the evidentiary burden to the employer through a presumption in favor of the reasonable employee’s expectations of the nature of the employment relationship.

C. Perceptions, Expectations, and Best Practices

Morrison and Robinson have shown that not all breaches of the psychological contract produces the same type of employee responses. They distinguish two types of employee perceptions: perceived breach and violation. This distinction is based on the view that perceived breach is cognitive in nature and the sense of violation is emotive in nature. It is the second type of breach that produces the

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159 Professor Estreicher notes that “[f]or employers, there are as sufficient number of exceptions from the at-will rule . . . that it may be the wisest course to assume that virtually all employment decisions will be subject to legal scrutiny.” Samuel Estreicher, Human Behavior and the Economic Paradigm at Work, 77 N.Y.U. L. REV. 1, 4 (2002).
160 Moss, supra note 4, at 344.
161 Morrison & Robinson, supra note 53.
strongest response—higher rates of litigation and retaliation. Morrison and Robinson assert that perceived breach is a precursor to feelings of violation. But, not all perceived breaches produce the affective state that a sense of violation produces.\(^{162}\) They elaborate that “violation is a combination of disappointment emotions and anger emotions.”\(^{163}\) A combination of these emotions led to a feeling of betrayal which, in turn, results in “a mental state of readiness for action.”\(^{164}\) Another explanation of this phenomenon is the concept of bounded will power taken from behavioral decision theory.\(^{165}\) A breach that rises to the level of a violation may challenge the dismissed employee’s exercise of self-control relating to retaliatory responses.

The Morrison and Robinson study provides insight on how occurrences of perceived violations can be minimized. They distinguish between obligations that the employer is unable to keep versus those the employer is unwilling to keep. If the reason for the breach is the former, then one would expect that the employee’s reaction would be less emotive. The second type of breach is likely due to the incongruence between employer and employee expectations.\(^{166}\) Incongruence is due to differences in the ability to process information regarding the employment relationship—factoring in differences in cognitive and analytical abilities, as well as the complexity and ambiguity of the obligations—results in different interpretations of the psychological contract. This has significance for a theory of best practices. The employer can reduce the degree of incongruence, and thus diminish the rate of perceptions of violation, by clear and continuous communication with its employees. Communication or full disclosure of obligations reduces the occurrences of the emotive state of violation which reduces rates of litigation and retaliation. In addition, law generally recognizes disclosure as a defense to perceived breaches of contract or claims of misrepresentation.

In line with Morrison and Robinson, other research has shown that employer communications regarding employment terms and conditions can affect perceptions of fairness and trust. This research hypothesizes that the more explicit the employer is regarding the terms of the employment the greater the level of fairness and trust produced.\(^{167}\) Guest and Conway also found that information communicated at the recruitment, personal, or grassroots level is more effective than top-down communication in effectuating perceptions of fairness.\(^{168}\)

If a company fosters a “good company” persona to recruit and to increase productivity, then the perceptions it fosters lay a basis for claims of injustice. This produces a somewhat counterintuitive suggestion that a company’s best practice to preserve an absolute right to terminate at-will is to foster an image of being a “bad company.” In this way, employees’ perceptions of just cause termination rights will be greatly diminished. The problem, of course, is that the employer loses the benefits of the good company persona in the areas of recruitment, productivity, and employee loyalty. The benefits of

\(^{162}\) Id. at 230.

\(^{163}\) Id. at 231.

\(^{164}\) Id.

\(^{165}\) Sunstein, supra note 151, at 15-16.

\(^{166}\) Morrison and Robinson tie the development of incongruence to a number of factors: (1) “divergent schemata” (employer and employee may have different cognitive frameworks for interpreting or processing information), (2) “complexity” (employee is provide a large number of stimuli that they have difficulty in processing, storing, and recalling), (3) “ambiguity” (ambiguous stimuli requires the employee to construe and to fill in gaps using contextual factors and prior information). Id. at 235-36.


\(^{168}\) Id. at 35-36.
a good company reputation, especially in a mobile workforce, are the primary reason for the divergence of the internal and external employment contracts. Alternatively stated, the bad company will need to compensate by paying higher wages and benefits to attract competent workers. The ability to buy loyalty is difficult to determine. In the end, the benefits of a good company persona outweigh the costs of buttressing a strictly at-will perception of the employment relationship.

The current survey supports the notion that the best avenue is for the employer to be a smart-good employer. A smart-good employer captures the benefits of the good company persona while putting in place practices that diminish the perceptions of injustice at the time of employee termination. Based on the survey findings, best practices would include: (1) educating employees as to the external or legal contract, (2) implementing practices that buttress its good company persona while not changing the at-will status of the relationship, and (3) emphasizing substantive and procedural fairness factors leading up to and at the time of termination. Educating employees, good company practices, and fairness can be seen as part of a progression with the fairness norm playing the guiding role. The fairness norm rationalizes educating as providing fuller disclosure to the employee. If properly manipulated these best practices will allow the employer to frame employee perceptions that the employer’s acts of fairness are done because it is a good company and not because it is legally required. As a good company, it provides for the well-being of the employee not because it is legally required to treat employees fairly, but because it cares about their well-being. The fairness norm undergirds the practices employed during the employment engagement to emphasize that the employee’s failure to succeed is due to the employee’s shortcomings and not due to any malicious motive of the employer. Finally, the fairness norm is at its greatest usefulness when it guides employer actions leading up to and at the time of termination. The goal here is to manage the employee’s perception of the fairness of the discharge by framing the employee’s perceptions throughout the course of the employment.

The survey supports a theory of best practices that use knowledge, practices, and perceptions to merge the external or legal contract with the internal or psychological contract. It recognizes that the merger in the good company model will never be complete unless the company adopts a just cause termination employment regime. But, it also recognizes that the costs in terms of litigation and retaliation attached to the strong application of the at-will termination rule can be mitigated through the use or framing of the internal contract.

Finally, the harm caused by termination, especially those that are viewed as a breach of the psychological contract, harms not only the discharged employee, but also the surviving employees. The employer should take steps to minimize the effect of discharge on others in the organization. Failure to pursue substantive and procedural fairness, or to disclose relevant information during the process of termination, is likely to feedback to remaining employees and their view of the psychological contract. There is also the fear that an unfair firing will be internalized by remaining employees as a violation of their expectations of job security. One possible result is the diminishment of trust between the employee and the employer. One study showed that trust can mediate perceptions of psychological contract breach and the negative outcomes of perceived breaches. Just as the perception of fairness during the course of an employment relationship can reduce negative outcomes, the building of trust early in the relationship can minimize negative effects stemming from subsequent breaches. The feedback loop noted above can weaken the strength of prior trust.

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See Hiltrop, supra note 55, at 44.

VI. Future of the Psychological Contract and Employment Law

The common law is in a constant state of development. The major force in its development is the correcting of injustices that occur within its domain. The common law of contract’s domain focuses upon the intent of a promising party and the expectations of a promise-receiving party. In the classical contract law paradigm, there are reciprocal intents, promises, and expectations. Promissory estoppel is an example where contract law responds to injustices where the reciprocal exchange of promises is missing. In some cases, a singular promise is seen to cause an injustice through the creation of reasonable or detrimental reliance. In the employment at will scenario, the psychological contract serves to expose the injustice caused by employer-generated expectations of job security and fair dismissal. Contract law internally changed to prevent injustices caused by reasonable reliance. In the case of the breach of reasonable expectations in the employment context, the expectations found in the psychological contract can be used to fashion an employee remedy.

This part first reviews the factors that create the psychological contract: the power of context, role of education, role of fairness, and the role of a priori expectations. It also suggests avenues for future research in these four areas. The final section examines the evolution of employment at will exceptions and the role of the psychological contract in that evolution. It then looks to the future of employment law by using the psychological contract as a means of reforming employment law. The malleability and flexibility of contract law provide the means of closing the gap between a legal employment obligation and a psychological contract obligation. The rationale for such a change is the broader recognition and protection of reasonable expectations.

A. The Power of Context

Greenberg argues that it is important to analyze justice in the workplace by the application of specific issues to different contexts.\footnote{Greenberg, supra note107, at 401.} Context in the employment realm can be divided into internal and external contexts. The internal context is represented by the firm itself and how it relates to its employees. A corporate culture and socialization into that culture are examples of phenomenon found in the internal context. The common feature of the elements that make up the internal context is that they are all within the control of the employer. If done properly, the internal context can be a tool in minimizing the degree of incongruence between employer and employee expectations. Another example of internal context is the work context itself. For example, prior bad work experiences within the company may result in organizational cynicism. This organizational cynicism becomes a part of the internal context of the psychological contract. One study confirmed the cyclical nature of psychological contract breach and organizational cynicism.\footnote{Johnson & O’Leary-Kelly, supra note 38, at 641-42.} Specifically, employees who believed that the firm’s promises were broken held more cynical attitudes toward their employer.\footnote{Id.}

The external or legal context is generally outside the control of the employer. However, the employer can influence how the employee interfaces or perceives the external contract. Employers face three challenging conditions in its ability to control the appearance of fairness in the termination of employees. First, due to economic and financial conditions, employers may be limited in their ability to
create a stable employment security environment. Second, employees’ beliefs that the law protects them from unfair or arbitrary discharge are likely to persist at some level. Third, employees have a a larger menu of legal remedies, which has been growing over the last few decades with which to punish employers for unfair decisions. The result is a situation where employers perceive themselves under constant threat of litigation or retaliation from discharged employees. More research needs to be done to determine the ways an employer can frame the internal context of a relationship to combat the larger societal and legal context that encourage employee litigation and retaliation.

A number of studies have noted the “changed world” of employment. Morrison and Robinson note that “assurance of job security and steady rewards in return for hard work and loyalty no longer exist in most cases.” Although such assurances may not be as forthcoming from employers, employees’ expectations of job security are more likely to resist such a radical shift in the employment relationship. More study is needed to measure the persistence of employee expectations despite a change in context at the macro level. Optimism bias supports the employee’s positive opinion of their employment relationship and their ability to obtain job security.

Previously, it was noted that the psychological contract is a bundle of many matched and unmatched expectations. Due to this complexity and the uncertainty of the market for job security, the divergence of employer and employee expectations is likely to widen in the short-term. The increase in the incongruence of expectations necessarily increases the rate at which employees’ perceive employers’ violations of the psychological contract. However, a feedback loop may eventually lower employees’ expectations that make up the psychological contract. It would seem that if an employer consistently violates the psychological contract this pattern of violations should feedback to its employees. The feedback should reduce employees’ expectations and thereby, diminish the scope and strength of the psychological contract. 

B. Role of Education

The survey showed that providing employees’ information about the nature of employment law and their particular relationship relates to an employee’s perceptions of fairness. As noted earlier, more finally grained research should further explore the relationship between employee knowledge of employment at-will and persistent beliefs in the existence of rights that protect against other than just cause termination. Would a more in-depth explanation of employee rights than presented in this survey produce better results in further reductions in the rates of litigation and retaliation? Would a better process in framing those rights, such as annual re-education, produce better results? Would too much information overwhelm an employee’s cognitive abilities leading them back to the use of heuristics (availability, fairness) and biases (optimism)?

174 Cf. Rita Murphy, OSHA, AIR21 and Whistleblower Protection for Aviation Workers, 56 ADMIN. L. REV. 901, 914-15 (2004) (discussing whistleblower protection and noting that its protections and low burdens of proof “disgruntled or troublemaking employees may find it easier to file frivolous complaints and engage in needless litigation with hopes of increasing costs for employers and getting revenge.”).
176 Morrison and Robinson, supra note 52, at 226.
177 Id.  
178 See Robinson & Rousseau, supra note 62.
C. The Role of Fairness

The fairness norm is the most robust predictor of an employee’s reaction at the time of termination.\(^{179}\) If there is a perception of unfairness there is a more likely a perception that the termination was unjust. A feeling of injustice is the strongest rationale for an employee’s perception of violation as opposed to a merely cognitive recognition of breach. The sense of violation produces the emotive response most likely to result in litigation and retaliation by the employee. More research is needed to see how the fairness norm can be used to lower employee feelings of violation and help merge the legal and psychological contracts. In the area of the impact of procedural and substantive fairness, the avenues for future research are many. A number of them became apparent in undertaking the current survey. Since the current study focused on substantive-procedural fairness at the time of termination, an extended look at procedural and substantive fairness at the time of hire and throughout the employment relationship should be undertaken to see if that history frames the perceptions of fairness at discharge. If the employee views her employer as generally unfair, does that provide a framing bias or availability heuristic that is likely to result in a negative response even in instances where the discharge is both procedurally and substantively fair? Is there ways for the employer to reframe or overcome such biases prior to discharge?

Another study could try to measure the long-term effects on perceptions of a variety of procedural and substantive fairness practices. In the procedural or process realm, the role of performance reviews, the frequency of reviews, and whether the employee perceives the evaluations as merit-based or based upon inappropriate factors need to be researched. In addition, a survey should test how employee perceptions of the goodness or badness of their relationship with the reviewers or evaluators impacts employees’ intentions to litigate or retaliate at the time of discharge. Other factors that should be measured include the role of mentoring, of providing ample notice regarding changes in the terms and conditions of employment, and the perceptions of equality-inequality in the application of company policies,\(^{180}\) and whether these perceptions substantially influence the employee’s reactions at the time of termination?

D. The Role of A Priori Expectations

The current study also did not make any distinctions between the impact of long-term employment and the development of firm-specific skill sets and shorter lengths of employment and the development of

\(^{179}\) The perception of fairness or unfairness has been acknowledged as a prime motivator of human behavior. See, e.g., Nancy L. Welsh, Perceptions of Fairness in Negotiations, 87 Marq. L. Rev. 753 (2004) (fairness perceptions are the key factors to understanding negotiating behaviors); E. Allan Lind et al., The Perception of Justice: Tort Litigants’ Views of Trials, Court-Annexed Arbitration, and Judicial Settlement Conferences 59 (1989) (noting that litigants perceived procedures to be more fair and were more satisfied with their outcomes).

\(^{180}\) In an examination of the effect of corporate mission statements on organizational decision-making, one study asks in relationship to employees: “Do firms practice what they preach in their mission?” The answer reported was “no.” Barbara R. Bartkus & Myron Glassman, Do Firms Practice What They Preach?: The Relationship Between Mission Statements and Stakeholder Management, in Leading Organizations: Perspectives for a New Era 297, 305 (Gill Robinson Hickman 2d ed. 2010). The authors did indicate that despite the failure to practice what they preach the incorporation of the employee as stakeholder in the mission state serves a symbolic purpose: “[E]veryone feels a little better when included in the mission statement, even with full knowledge that their inclusion does not really make a difference.” Id. at 305.
marketable skills sets. It has generally been conjectured that such factors go to the core of employee expectations and influence an employees’ feelings of injustice at the time of termination. From the perspective of law, this leads to a host of questions. The length of employment and acquisition of firm specific skills creates the problem of employee vulnerability and economic dependence. Should the law provide added protections or should the employer owe a heightened duty to long-term employees? If long-term employees are less marketable, does the employer have a duty to provide retraining opportunities? It is unlikely that the law will recognize such a duty anytime soon. However, the answer is clearer if approached from the perspective of ethics or morality. Psychologist Carol Gilligan’s study of female moral development lead to a school of ethics called the “ethics of care.” Under such an approach, an employer does owe a greater duty of care towards long-term employees. Implied in such relationships are the norms of loyalty and trust, as well as factors of dependence and mobility. Gilligan labels these as “concrete relationships.”

A more in-depth study should measure the impacts along a continuum of mostly a priori employee expectations on rates of litigation and retaliation. An employee with expectations of short term employment based upon the employee’s belief that the job will be a stepping stone to a better job at another company may still have feelings of injustice at termination. What effect does the timing of the termination (prior to skill acquisition, during skill acquisition, or after skill acquisition) have on such an employee at the time of termination? What is the effect of the employee’s feelings that the company’s skill training is of lesser quality than expected? What is the effect of the failure of the employee’s expected career path, such as having to stay with the company for a longer than expected period, have on the employee’s feelings at termination?

E. Employment Law: Past and Future

This section looks to the past and future of employment law. It suggests that the psychological contract played a role in the development of exceptions to the termination at will principle. It then recommends that the psychological contract be used as a base to reform employment law in the future. The merging of the legal and psychological employment contracts advances contract’s law’s goal of preventing or remedying contractual injustices. Employment law reform may take the form of a broad recognition of a just cause termination rule. It is more likely to come through the application of existing contract law structures, such as the more expansive use of promissory estoppel and contextual interpretation.


182 E.g., Tally Kritzman-Amir, Looking Behind the “Protection Gap”: The Moral Obligation of the State to Necessitous Immigrants, 13 U PA. J. L. & SOC. CHANGE 47, 80 (2010) (“The ethics of care approach is based on psychological research performed by Carol Gilligan, who analyzed the problem-solving attitudes of women and men in the hopes of determining whether women have a different “voice”--or approach--than men. Gilligan concluded that females apply an ethics of care approach and perceive ethical dilemmas in terms of relationships, responsibility, caring, context, and communication.”); Karin van Marle, “Meeting the World Halfway”: The Limits of Legal Transformation, 16 FLA. J. INT’L L. 651, 662 (2004) (similar). See generally CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

183 Deborah L. Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617, 624 (1990). The author explained that one feminist strategy is to “claim that women’s distinctive attributes promote a distinctive form of understanding.” Id. The author explains that, “[t]his line of analysis, popularized by Carol Gilligan, argues that women tend to reason in “a different voice”; they are less likely than men to privilege abstract rights over concrete relationships and are more attentive to values of care, connection, and context.” Id.
1. Evolution of At-Will Exceptions and the Psychological Contract

Despite the lowering of expectations due to the new employment marketplace—one characterized by instability and mobility—psychological contract theory is still useful to assess the beliefs and practices of employers, employees, and the legal system. It can be conjectured that the implied in fact and good faith exceptions were developed in response to breaches of the psychological contract. Fairness and reasonable expectations have a long tradition in contract law, and at times act as counterweights to freedom of contract. The creation of contract law is essentially a grassroots phenomenon. Contract law adjusts to novel developments in business transactions and in changes in societal norms. As the model of lifetime employment began to disintegrate at the same time companies provided assurances through employee handbooks, benefit packages, and oral promises of job security, the clash between employee expectations and the reality of the employment relationship resulted in increased feelings of unfairness and injustice at the time of termination. The courts began to respond to perceived unfairness and injustice by crafting exceptions to the termination at will doctrine.

General rules or standards of law generally begin as absolutes. Eventually, a category of cases show that when the rule is applied to specific fact patterns the rule application results in injustice. Judges move to prevent systemic injustices by fabricating exceptions to the general rule. In utilitarian terms, the benefits of a general rule applied to a general area of law or society may be justified. Overtime, however, it becomes clear that there are groups of similar applications of the general rule that result in injustices. Rule utilitarianism justifies a rule exception based on a utilitarian calculation that dealing with a group of cases by adopting an exception rule yields greater benefits than merely applying the general rule across all cases. The key element in the rule utilitarian approach is the importance of category or group. The law should only respond when there is a well-defined and sizeable group that justifies an exception or a new rule. If this is not done properly then the benefits of certainty and predictability provided by general rules will be lost.

Standards, such as unconscionability and good faith, are different than rules. They serve as meta-principles that cover potentially all contractual relationships. Their application is done on an ad hoc basis for each case is different in some way than any other case. Even though a workable definition of good faith may be out of reach, Professor Summer’s excluder analysis can assist in determining types of bad faith. The court in Busman Motor Sales v. Ford Motor Co., described the essence of an excluder analysis: “It is possible that previous acts or course of conduct would have shown a pattern of conduct from which the required bad faith could be properly inferred.” If such patterns of conduct reoccur in a significant number of cases, then that lays the foundation for the recognition and application of the duty of good faith.

There is a strong argument that in a covert way psychological contract theory or, at least, the contextual elements that are recognized in the theory, lies at the basis of the good faith and implied in fact exceptions that developed in the law. The consistent breach of employee expectations (psychological contract) allowed courts to witness the injustice caused by the shield of the employment at will doctrine.

See DiMatteo, supra note 115, at 444-45 (noting the detachment of underlying norms and contract rules and that the fairness norm plays a fundamental role in judicial decision-making); LARRY A. DI MATTEO, EQUITABLE LAW OF CONTRACTS (2001) (reviewing the equitable reformation of contracts in the Twentieth century and the immutability of equitable contract principles). 203 F.2d 469 (6th Cir. 1953) (dealing with a termination of an automobile franchise).
doctrine. It is unlikely that the courts were familiar with the Human Resource Management literature and it is equally unlikely that the implied in fact or good faith exceptions were the impetus for psychological contract theory. But, both the development of the exceptions and of psychological contract theory respond to the sense of injustice caused by the intentional breach of employee expectations whether the breach is recognized as a legal breach or not. The exceptions close the gap between the psychological contract and the legal contract.

2. The Future of Employment Law: Using the Psychological Contract Law to Reform Employment Law

The harm caused by violations of the psychological contract has only partially been recognized in contract and employment law. This harm is never more present than at the time of termination. Termination is the most important condition or term of employment because it’s one in which the employee can no longer adjust expectations and actions to preserve the relationship. The analysis in this article suggests that the employment law of the future should take fuller cognizance of the psychological contract. In sum, both contract law and the psychological contract are expectations based. Contract law serves to protect the expectancy interests of the contract parties. The psychological contract focuses on the unmet expectations of the employee and the harm caused to them by violations of the psychological contract. The problem is that such contracts do not fit into the framework of classical contract law which requires clearness of intent, preference for written agreements, and a matching of bilateral expectations. However, a fuller incorporation of relational contract norms would narrow the divergence between enforceable employment contracts and unenforceable psychological contracts.

The move to merge the two types of employment contracts is not based purely on the employee’s perspective and feelings of injustice. It is also based on the employer’s role in creating and manipulating employee perceptions and expectations relating to the job and the intentions of the employer. In essence, the employer is procuring additional benefits (loyalty, productivity) without incurring additional costs or providing additional remuneration. As the study showed, unilateral actions taken by the employer (procedural fairness, substantive fairness, and educating) influence the reaction of the employee at the time of termination. If done properly, such actions prevent the elevation of a perceived psychological breach to the level of a violation which in turn explains the reduced rates of litigation and retaliation. The study, like all empirical studies, is purely descriptive in nature. It shows that the employer may take actions that reduces employee and employer harm. The law uses descriptive understandings to convert the “may” into a “should” or a “must.” The “should” response uses the breach of the psychological contract as one factor in determining employer liability. The “must” response results in the breach of the psychology contract being recognized as a breach of a legal contract. The “must” version is best left to the legislative regulation of the workplace. Federal and state regulations pervade most employment relationships from workplace safety to minimum wage to plant closing and maternity leave laws. Legislative mandates attempt to provide bright line rules of absolute

186 Professor Estlund notes that because of the gap between the psychological contract and a legal contract the employer has it both ways in that they “enjoy the benefits of employee expectations of legally enforceable job security without legal accountability.” Estlund, supra note 148, at 7.

187 Professor Estlund suggests closing the gap between psychological contracts and legal employment contracts by adopting a waivable default in favor of job security. This forces the employer to obtain a waiver of job security from her employees. This way the employer cannot obtain the benefits of employee expectations of job security and the legal reality of employment at will. See Estlund, supra note 148.
requirements. However, the “should” version can be more adeptly implemented by the courts. Given the complexity of the psychological contract, recognition of a breach of the psychological contract can be utilized as a factor by the courts in determining employer liability.

A strong reason for reforming the law of employment to better reflect an employee’s sense of injustice at termination is that the employee’s sense of injustice is within the employer’s ability to control. Through practices of strict adherence to procedural fairness, including proper disclosures and education, the employer can minimize the sense of violation and reduce rates of employee-generated litigation. The law can be reformed to recognize these contextual factors and thereby, reduce the cognitive dissonance of the employee confronting both legal and psychological contracts. The issue of substantive fairness is more problematic. Requiring substantive fairness is likely to require a transformation of employment law from at-will to just cause. Short of such a radical change would be the use of a contextual analysis to determine whether the requirement of substantive fairness was self-imposed by the employer. Self-imposition of a just cause requirement can be determined by the employer’s role in building the expectations of employees relating to job security and just cause termination. The practice of procedural fairness is likely to support the employee’s expectations of just cause termination.188

The above discussion provides the rationales for the partial merging of the legal employment contract with the psychological contract. This merging can be performed within the framework of already existing law. The sections below provide ways in which current law may more fully recognize the psychological contract.

a. Employment at Will Exceptions

First, the implied in fact exception to employment at will should be universally recognized. The elements of the psychological contract should be utilized in determining if an implied in fact contract has been formed.189 Psychological contracts focus on expectations of the employee based upon the employer’s assurances and practices. Research in psychological contracts can help understand which explicit and implicit statements create the expectation in the employee’s mind that an employment contract superseding employment at will has been formed. While by no means should every employee expectation establish a contractual obligation because not every employee expectation is reasonable,190 inquiry into the psychological contract can help illuminate otherwise opaque implied promises or expectations.

Second, the same rationale for making the implied in fact exception more universal supports the claim for expanding the good faith exception. The creation of reasonable employee expectations by the employer are captured in the finding of an implied in fact contract. The malicious creation of such expectations with the intent to procure employee-generated benefits can be captured by application of the good faith exception. Since the employer is the primary generator of such expectations, especially concerning job security, then it should be required to meet a threshold of substantive and procedural

188 See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 66-70, 205 (1988) (describing field studies that show that greater perceptions of procedural justice generally produce greater perceptions of distributive justice, regardless of whether the outcome is positive or negative).
189 See Stone, supra note 51, at 551-52 & n.110; DiMatteo, supra note 122, at 782 (“It can be argued that the psychological contract is akin to the implied-in-fact or good faith duty exceptions to the employer’s right to discharge an employee without cause.”).
190 See Bird, supra note 34, at 208-15.
good faith in terminating employees. Psychological contract theory can illuminate employee expectations; it can also help understand attitudes. Understanding good faith looks to, among other sources, the attitudes and communications of the parties in their interactions with one another. Psychological contract theory can be used to trace employees’ expectations to employer-employee or manager-employee interactions and thereby supporting or refuting a claim of bad faith.

**b. Promissory Estoppel**

The expansion or more liberal use of promissory estoppel in the area of employment discharge makes conceptual sense. Promissory estoppel primarily focuses upon the reasonable expectations of the promisee. The psychological contract literature demonstrates that the employee’s expectations of job security and employer good faith are substantially related to employer representations or to other phenomena within the control of the employer, such as organizational culture. If these employer-generated expectations are reasonable and are causally connected to employer actions, then a claim of promissory estoppel should be allowed to prevent an injustice to the discharged employee.

All the requirements of a promissory estoppel claim—promise (express or implied), reasonable reliance, and injustice—are present. It is important to note that the burden of proof remains with the employee. However, a broader recognition by the courts of the psychological contract will lessen the evidentiary burden. The integrity of applying promissory estoppel to the employment discharge setting is that it does not require a finding of a contract or a bilateral exchange of promises. It is a justice-based claim found within contract law that requires only the giving of promises or assurances by one party—the employer. If the employer is the cause of the employee’s expectations, then it should be held accountable if a breach of those expectations works an injustice. In the end, it is not whether promissory estoppel is applicable to employment discharge; it is whether the courts will be willing to recognize the harm caused by violations of the psychological contract. Such recognition provides the evidentiary foothold needed to make a successful promissory estoppel claim.

**c. Tort of Bad Faith and the Good Faith Exception**

Another potential legal response is found in the tort of bad faith. The tort of bad faith breach was recognized by the California Supreme court in *Seaman’s Direct Buying Service v. Standard Oil Company of California*. There is no reason why the tort of bad faith cannot be theoretically applied to any type of contract. Nonetheless, it has almost primarily been used against insurance companies who fail to pay

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191 See, e.g., Burton Kainen & Shel D. Myers, *Turning off the Power on Employees: Using Employees’ Surreptitious Tape-Recordings and E-Mail Intrusions in Pursuit of Employer Rights*, 27 STETSON L. REV. 91, 110 (1997) (“Good faith and fair dealing mean an attitude or state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, being faithful to one's duty or obligation.”).


193 Professor Hillman notes “that the theory [of promissory estoppel] should be especially significant in the non-union employment setting where through their communications, employers seek to create the expectation of a stable, secure work environment and where, because of their general lack of contractual job security and their material and psychological investments in their jobs, employees are prone to rely on these messages.” Id. at 2.

out legitimate claims in a timely fashion. The concept of bad faith breach as enunciated in the Seaman’s case could be made to apply to bad faith termination in the employment setting. The court based the claim of bad faith on the “special relationship” of the insured and insurer. The employment relationship should be designated as such a special relationship. The Seaman court described the special relationship of insured-insurer as “characterized by elements of public interest, adhesion, and fiduciary responsibility.” A strong case can be made that the employer owes at least a quasi-fiduciary duty to its employees to act in good faith. The good faith exception to employment at will is fashioned out of the same public policy rationales. In most employment relationships, the employer is seen as possessing superior bargaining power. At entry into the firm, employees are given the policies and practices of the firm, along with the representation that employment is at-will. This “contract” of employment is given on a take it or leave it basis. Bargaining power asymmetry and take-it-or-leave contracting are the hallmarks of adhesion contracts.

The courts have generally not elected to expand the tort of bad faith outside the realm of insurance law. Even though the tort of bad faith generally is based on a breach of an implied duty in an insurance contract, a tort of bad faith termination can be fabricated so as to not require a breach of a legal employment contract as a precursor. For example, the claim of tortuous interference with business relations is not based upon a contract breach. Instead of requiring a bad faith breach of a legal contract, evidence of breach of the psychological contract can be used to prove the bad faith nature of the termination.

Since employment law is contractually based the general recognition of the good faith exception would be the more conceptually sound manner in which to respond to serious violations of the psychological contract. We believe that the current study supports the more expansive use of the good faith exception, as well as the expansion of the tort of bad faith into the employment setting. The study showed that it is in the employer’s control to manage the employee’s perception of the termination as one of good faith or bad faith.

Given the bold claims of the preceding paragraph, it is important to note that we are not suggesting that any breach of the psychological contract at the time of termination equates to wrongful discharge and employer liability. This is because not all psychological contract breaches are the same. This was alluded to in the literature distinguishing between perceived breaches and perceived breaches that rise to the level of a violation. Thus, like contract interpretation, whether a breach of the psychological

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197 Id.
198 The California Supreme Court subsequently rejected the application of the tort of bad faith into the employment relationship. See Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (failed to apply the tort of bad faith to the employee discharge scenario); see also E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436 (De. 1996) (confining tort of bad faith to insurance cases).
199 It has been argued that “relational opportunism” used by employers should be held in check through the law’s recognition of an “Implied Covenant of the Employment Relation.” See Bird, supra note 34, at 195-215.
200 Classical contract law was my formal in the interpretation of contracts limiting admissible evidence to the written contract or direct, express communications between the parties. Neoclassical contract law embraces the concept that the meaning of a contract cannot be fully known without considering the context in which it was
contract reaches the level of a breach of a legal contract depends on a broad range of contextual factors including company representations, policies and practices; organizational culture; reasonableness of employee expectations; longevity of employment; teaching of firm-specific versus marketable skills, and so on. If the implied in fact or good will exceptions were fully recognized the same contextual factors that are prominent in psychological contract theory could be used to prove claims for breach of an implied contract or the duty of good faith.

Conclusion

The employment at will doctrine is unique to the American legal system. The doctrine allows broad discretion to employers to hire and fire for virtually any reason. The doctrine enables both the employer and employee to terminate the employment relationship with a minimum of time and cost. Viewed literally, it presupposes a regime where employers and employees bargain for their wage-labor agreement in good faith and with equal bargaining power. Based on this model of employment, separation from employment should be an emotionally neutral event. Yet, neither employer nor employee treats the employment relationship as simply a bargained for wage-labor agreement. Studies reveal that most employees do not understand the actual discretion that employment at will grants employers. Instead, employees perceive the employment relationship as based upon fundamental fairness principles. The employee’s sense of fairness imbues their perception of the employment relationship regardless what the law dictates or the protections actually available.

The employee’s sense of being treated unfairly—largely due to perceived breaches of non-legally recognized expectations—has been the subject of significant study in the area of psychological contract theory found in the human resource research literature. When an employee is discharged, she does not simply refer to the applicable law for guidance, but rather perceives the employment separation through the lens of fairness or justice. A feeling of being treated unjustly generates a significant negative emotional reaction. If the employment termination is viewed by the employee as a violation of employer-generated expectations, then the likelihood of employee retaliation increases. This reaction is not something that an employer, from the perspective of self-interest, should ignore. Employee retaliation can take the form of theft or sabotage to creating negative reputational effects for the employer, as well as increased rates of litigation. Bad faith termination also produces a feedback loop that may affect the remaining employees’ view of the company. Some measure of equitable treatment by the employer in the discharging of employees is not only ethically correct, but is cost-effective from the perspective of the employer.

The article presents the findings of an empirical survey of 763 participants. Through the use of twelve discharge scenarios, the study tested the role of procedural and substantive fairness factors in predicting negative employee reactions. As expected, scenarios of procedural or substantive unfairness were positively related to increased propensities to retaliate and litigate. In scenarios, involving both procedural and substantive unfairness the effect on propensities to retaliate or to litigate was amplified.

formed. Relational contract law broadens the contextual factors that should be considered in interpreting and enforcing contracts.

201 Corporate culture is defined “as an internal consistency with an organization that influences the behavior and values of employees.” Id. at 180.

The reverse was also true. Scenarios involving both procedural and substantive fairness reduced rates of retaliation and litigation to nearly half of those where both procedural and substantive unfairness factors were used. The study also measured the effects of educating employees on the employment at will rule on employees’ feelings of injustice or violation at the time of termination. The study found that educating employees at the time of hire reduced the rates of retaliation and litigation intentions at the time of discharge.

The study’s findings highlighted the high degree of employee sensitivity to perceived senses of unfairness or injustice at the time of discharge. The reason for being terminated, as well as the process by which an employee is discharged, influenced the employee’s reactions to being discharged. Termination for a fair reason is helpful, as well as implementing a fair process for termination. When both are present the rate of retaliation and litigation are substantially reduced. In addition, educating employees in the law of termination diminished the rates of retaliation and litigation at the time of termination. It can be conjectured that early disclosure of the lack of employee protections dampens the feeling of injustice or violation at the time of discharge, thusly, reducing rates of retaliation and litigation.

The article concludes that psychological contract theory can be used to explain the creation of the existing exceptions to the employment at will doctrine. It also suggests that psychological contract theory can be used as a guide to reforming employment law. The article suggests that this reformation can be done by a wholesale change from the employment at will to a just cause termination legal regime. It recognizes that this is unlikely to happen and suggests the use of existing doctrines, such as promissory estoppel and the tort of bad faith, as well as an expansion of the implied in fact and duty of good faith exceptions to employment at will. Such reform is not solely for the benefits of employees. Our empirical findings and analysis suggest that such reform will result in the merging of the legal employment contract and the psychological contract with resulting benefits for employers, as well as employees.
Appendix A

Variables used in Twelve Employment Scenarios

Upon graduating from business school you accept an offer of employment from APEX Corporation. After accepting APEX’s job offer you attended a mandatory orientation for new employees.

1 Procedural Conditions: Fair and Unfair

1.1 Procedural Fairness

Upon receiving the news of your firing, you consulted your Employee Manual which described the procedures governing terminations. The section on “Employee Discharge” noted that each employee should be evaluated every six months and should be notified of areas that required improvement. Before an employee can be fired, the Manual requires two notices of sub-standard work and a final three-month probationary period. If after the probationary period the employee had not improved satisfactorily, then the employee is issued a 2-week notice of discharge.

True to the process outlined in the manual you received your first review at the 6-month mark. That review did indeed include a “Notice of Sub-Standard Evaluation.” The evaluation stated the specific reason for the notice and suggested that you seek guidance through the human resource department or the organization’s informal mentoring program. You decided to attempt to make the necessary changes to improve, but it was more difficult than you had foreseen. Thus your second 6 month review again included a “Notice of Sub-Standard Evaluation,” along with a notice that you would be given a 3-month probationary period to improve. The review acknowledged some areas of improvement, but the improvement was not sufficient. The review also assigned a more senior member of the company to act as a mentor to whom you could seek help. Despite, some helpful suggestions and continued effort on your part, little changed in the coming months. As a result, the 3-month period was followed by a “Two Week Notice of Discharge.” Thus the procedures laid out in the Employee Manual had been followed completely.

1.2 Procedural Unfairness

Upon receiving the news of your firing, you consulted your Employee Manual which described the procedures governing terminations. The section on “Employee Discharge” noted that each employee should be evaluated every six months and should be notified of areas that required improvement. Before an employee can be fired, the Manual requires two notices of sub-standard work and a final three-month probationary period. If after the probationary period the employee had not improved satisfactorily, then the employee is issued a 2-week notice of discharge.

Your first 6-month evaluation by your new boss was uneventful, with your performance being satisfactory in almost all respects. To your surprise you suddenly received a “Notice of Sub-Standard Evaluation” only three weeks later. This was followed almost immediately by a “Two Week Notice of Discharge.” Thus the procedures laid out in the Employee Manual had not been followed at all. You immediately complained to the Personnel Director, who stated that there had been a change in company policy giving department heads greater discretion in employee discharges. The director said there was nothing that could be done about your termination.
2 Substantive Conditions: Fair (performance) and Unfair (obesity)

2.1 Substantive Fairness

It has now been more than a year since you accepted APEX’s job offer and attended the new employee orientation. The manager who hired you was hired by another company soon after your arrival, and you have worked under the new manager for a full year.

Unfortunately, you have been advised that your job performance is sub-standard. You find the work especially difficult and fall behind the performance numbers of most of your co-workers. You have failed to improve your overall performance, though you did get better in one or two specific areas. Despite these efforts, you are fired due to poor job performance.

2.2 Substantive Unfairness

It has now been more than a year since you accepted APEX’s job offer and attended the new employee orientation. The manager who hired you was hired by another company soon after your arrival, and you have worked under the new manager for a full year.

Unfortunately, your new boss complains to you and others in the department about the fact that you are overweight. Your boss suggests that your overweight appearance was not the image that the department should project. You failed to lose weight in the months following these comments, though you did attempt to improve your professional appearance by altering your clothes and other aspects of your appearance. Despite these efforts, you are fired due to being overweight.

3 Law Conditions: Non-Cueing, Cueing, Educating

3.1 No Law Cueing

This orientation was fairly typical for corporations of APEX’s size and industry. Historical information was provided about the company, and economic information on the company’s performance was reviewed. This information included market share information, positioning of relevant products vis a vis competitors, and profitability information for the last several quarters. Various procedures governing compensation, benefits, and discharge policies were also discussed, and new employees were given a chance to ask questions about such policies.

3.2 Cueing

One important aspect of the orientation was a presentation made by the company lawyer that discussed the nature of your employment. The lawyer noted that the employment relationship is primarily based upon the law of contract, where the employer and employee agree to the terms of the employment. An express employment contract is one that is in a written form, but most jobs do not actually have an express contract. Instead, the law generally presumes that an employment relationship is at-will. This means that the employee may quit at any time without notice and the employer may fire the employee at any time and without cause (reason).
Some states, however, have begun to develop two exceptions to the employer’s rights to freely fire an at-will employee. Both of these relate to the notion of implied contracts. First, even when there is no express contract providing job security, statements made by the company orally or in its documents (policies, procedures, and employee handbooks) create a modification of the at-will nature of the employment. This is called an implied-in-fact contract. Therefore, firing an employee in violation of such oral or written statements may lead to a charge of “breach of contract.” Second, the courts may imply a duty on the employer to “act in good faith” in the discharge of an employee (implied-in-law). Therefore, giving an insincere reason for firing any employee may lead to a charge of “wrongful discharge”.

3.3 Educating

One important aspect of the orientation was a presentation made by the company lawyer that discussed the nature of your employment. The lawyer noted that the employment relationship is primarily based upon the law of contract, where the employer and employee agree to the terms of the employment. An express employment contract is one that is in a written form, but most jobs do not actually have an express contract. Instead, the law generally presumes that an employment relationship is at-will. This means that the employee may quit at any time without notice and the employer may fire the employee at any time and without cause (reason).

Some states, however, have begun to develop two exceptions to the employer’s rights to freely fire an at-will employee. Both of these relate to the notion of implied contracts. First, even when there is no express contract providing job security, statements made by the company orally or in its documents (policies, procedures, employee handbooks) create a modification of the at-will nature of the employment. This is called an implied-in-fact contract. Therefore, firing an employee in violation of such oral or written statements may lead to a charge of “breach of contract.” Second, the courts may imply a duty on the employer to “act in good faith” in the discharge of an employee (implied-in-law). Therefore, giving an insincere reason for firing any employee may lead to a charge of “wrongful discharge”.

The company lawyer went on to say that express provisions in the Employee Manual can maintain the legal enforceability of “at-will” relationships despite any assurances of long-term employment. These “express disclaimer clauses” will win out over any policy statements in the Employee Manual or statements made by company representatives regarding long-term job security. The lawyer noted that the extended process of evaluation and notice in the Employee Manual was simply a statement of “current” company policy that was subject to change at any time. Therefore, either you or the company may end the employment relationship at any time without cause and “for any or no reason.” The lawyer then referred you to the “disclaimer clause” that appeared on the front cover of the Employee Manual in bold letters. It stated that: This manual and the policies contained within are given to you for information purposes only. Nothing contained within this manual is to be considered binding on the employer. This manual does not represent a contract and is not meant to impose any legal obligations upon the employer regarding job security or the process of discharging employees. The employer retains all rights to discharge you at any time, for any reason, and without notice. The employer may amend or terminate at any time the policies and benefits described in this manual. The lawyer concluded by stating that such disclaimer clauses are enforced by the courts.
Appendix B
Survey Questions
(Excerpted)

LAW & JUSTICE IN THE WORKPLACE: SURVEY

Once you’ve completely read the scenario, please answer the following questions with the scale provided. They ask about the facts included in the version of the scenario that you read. Some of these facts may have been present in your version, some of the facts may not have been. Please look back at the scenario if you are uncertain what to answer.

1 2 3 4 5
Strongly Disagree Not Sure Agree Strongly
Disagree Agree

According to the version of the scenario that you read…

(Law Condition Manipulation Check)
1. APEX’s orientation included a presentation made by the company lawyer.
2. APEX’s orientation included a presentation that discussed at-will employment issues.
3. APEX’s orientation discussed something called a “disclaimer clause.”
4. APEX’s employee manual includes a “disclaimer clause” on the front cover.

(Substantive Fairness Manipulation Check)
5. The specific reason given for your firing seemed fair.
6. The specific reason given for your firing seemed appropriate.

(Procedural Fairness Manipulation Check)
7. APEX followed all the necessary procedures when implementing your firing.
8. APEX failed to follow some of the necessary procedures when carrying out your firing.

The following questions ask you about your opinions of APEX, its conduct, and the law. Please answer honestly using the scale provided.

1 2 3 4 5
Strongly Disagree Not Sure Agree Strongly
Disagree Agree

(Global Fairness Perceptions)
9. In general, APEX seems like a fair company.
10. In general, APEX seems to do things fairly.
11. Overall, I believe APEX is a fair employer.

(Law and Fairness)
12. APEX’s conduct violated the law.
13. APEX’s conduct was legal but unfair.
14. The current state of the law strikes a fair balance between the interests of employers and employees.
15. The law on employment discharge should be changed to be more protective of employees.
16. Ultimately what is fair in firing employees is what law recognizes as legally sufficient.
17. The trend in employment discharge law is toward greater protection of employees.
18. The law of employment discharge should change according to society’s sense of fairness.
19. The employment-at-will rule need not be changed because employees’ are free to negotiate better terms of employment.
20. Most employees do not know or understand the meaning of the employment-at-will rule.
21. Most employees believe that they cannot be fired without a good cause or reason.
22. Most employees believe that it should be illegal for an employer to fire an employee without following the rules outlined in the employee handbook.
23. The law needs limits on employment-at-will because employees do not possess the required information to make an informed employment decision.
24. Even when employees are educated as to the employment-at-will doctrine they fail to understand its importance.
25. Even when employees understand the employment-at-will doctrine they are powerless to negotiate better terms with a new employer.

Assume that you were asked to work for two more weeks before officially leaving APEX. You were therefore what’s called a “lame duck employee”—someone who has been fired but must still come into work for some specified amount of time. The questions to follow ask how likely it is that you would engage in various behaviors during those last two weeks. Please answer honestly using the scale below.

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<th>1</th>
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<tr>
<td></td>
<td>Very</td>
<td>Unlikely</td>
<td>Neither Likely</td>
<td>Likely</td>
<td>Very</td>
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<tr>
<td></td>
<td>Unlikely</td>
<td>nor Unlikely</td>
<td>Likely</td>
<td>Likely</td>
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During those last two weeks at APEX, I would:

**(Task Performance)**
26. Adequately complete my assigned duties.
27. Fulfill the responsibilities specified in my job description.
28. Perform tasks that are expected of me.
29. Meet the formal requirements of my job.
30. Engage in those activities that directly affect my performance.
31. Neglect aspects of my job that I am obligated to perform.
32. Fail to perform essential duties.

**(Citizenship Behavior)**
33. Help others who have been absent.
34. Willingly give your time to help others who have work-related problems.
35. Adjust your work schedule to accommodate other employees’ requests for time off.
36. Go out of the way to make newer employees feel welcome in the work group.
37. Show genuine concern and courtesy toward coworkers, even under the most trying situations.
38. Give up time to help others who have work or nonwork problems.
39. Assist others with their duties.
40. Share personal property with others to help them work.
41. Attend functions that are not required but that help the organizational image.
42. Keep up with the developments of the organization.
43. Defend the organization when other employees criticize it.
44. Show pride when representing the organization in public.
45. Offer ideas to improve the functioning of the organization.
46. Express loyalty toward the organization.
47. Take action to protect the organization from potential problems.
48. Demonstrate concern about the image of the organization.

(Withdrawal Behavior)
49. Think about being absent.
50. Chat with co-workers about non-work topics on work time.
51. Leave my work station for unnecessary reasons.
52. Daydream during work.
53. Spend work time on personal matters.
54. Put less effort into the job.
55. Think about leaving the job.
56. Let others do your work.
57. Leave work early without permission.
58. Take longer lunch or rest breaks than allowed.
59. Fall asleep at work.

(Counterproductive Behavior)
60. Damage property belonging to my employer.
61. Say or do something to purposely hurt someone at work.
62. Do work badly, incorrectly, or slowly on purpose.
63. Gripe with co-workers.
64. Deliberately bend or break a rule(s).
65. Criticize people at work.
66. Do something that harms my employer or boss.
67. Start an argument with someone at work.
68. Say rude things about my supervisor or organization.

Once you had officially left APEX, would you be tempted to pursue legal action against the company? The questions to follow ask how likely it is that you would engage in various courses of legal action against APEX. Please answer honestly using the scale below.

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<tr>
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<th>Very Likely</th>
<th>Unlikely</th>
<th>Neither Likely</th>
<th>Likely</th>
<th>Very Likely</th>
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After being fired from APEX, I would:

(Litigation Intentions)
69. Pursue legal action against APEX.
70. Sue APEX for wrongful discharge.
71. Take APEX to court over my firing.
72. Sue APEX for unfair discharge, even though it did not do anything technically illegal.
73. Take legal action against APEX, even though no laws were broken.

If I did bring suit against APEX, I would:

(Settlement Intentions)
74. Settle before reaching trial if an equitable agreement could be reached.
75. Settle before reaching a verdict if a fair compromise could be found.
76. Refuse to settle so APEX could experience the stress of a guilty verdict.
77. Refuse to let APEX “off the hook” by settling out of court.

After any legal action was concluded, I would:

(Retaliation Intentions)

78. Continue to say bad things about APEX to potential clients or customers.
79. Let everyone know that APEX is not a company to be trusted.
80. Try to steer people away from doing business with APEX.
81. Discourage friends or family from applying for jobs with APEX.

I would be less likely to pursue legal action or retaliate against APEX if:

(Employability Security)

82. I received state of the arts training while employed at APEX.
83. APEX had an industry reputation for educating their employees with cutting edge employment skills.
84. Ex-employees of APEX were considered highly marketable in the industry because of APEX’s in-house training programs.
85. APEX was considered an industry leader in innovation and employee development.