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Justice, Employment, and the Psychological Contract

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INTRODUCTION

There were promises made across this 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

¹ ARTHUR MILLER, *DEATH OF A SALESMAN* 82 (Penguin Books 1976). Willy Loman's argument did not succeed, and he was fired anyway. See *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1205 n.6 (7th Cir. 1987) (citing a portion of the same). The court's application of Willy Loman's language in *Metz* suffered a similar fate as Arthur Miller's now-famous protagonist. See also *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 Contract" Outside the United States*, 43 INT'L LAW. 1237, 1239–47 (2009) (detailing the lack of employment protections for U.S. workers relative to their global counterparts).

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

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.⁶ Numerous books are dedicated to explaining the law on the subject,⁷ with one forthcoming tome an estimated nine hundred pages long.⁸ The debate over employment at will shows no

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 overview of the employment-at-will relationship).

⁴ Even though 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 bringing 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 systems often result in different outcomes. *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) ("Interestingly, 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.").

⁵ *See, e.g.*, Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594; David Dominguez, *Just Cause Protection: Will the Demise of Employment at Will Breathe New Life into Collective Job Security?*, 28 IDAHO L. REV. 283 (1992); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996); Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137 (1989). *But see* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

⁶ Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517 & n.1 (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.*, DANIEL MURNANE MACKEY, *EMPLOYMENT AT WILL AND EMPLOYER LIABILITY* (1986); LIONEL J. POSTIC, *WRONGFUL TERMINATION: A STATE-BY-STATE SURVEY* (1994).

⁸ *See* EMPLOYMENT AT WILL: A STATE-BY-STATE SURVEY (Melinda J. Catherine ed., forthcoming 2011); *see also* BNA BOOKS: LEGAL PUBLICATIONS CATALOG 2011–2012,

signs of slowing, as scholars apply its dictates to emerging technologies and propose new ways to alleviate the sting of this harsh workplace doctrine.⁹

While this debate continues, very little empirical legal research examines the perception of the most important constituent in the discharge process: the employees themselves who risk arbitrary and immediate termination. Employees do not approach involuntary separation from their employers 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 a 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 reactions to being discharged, originate from a complex set of beliefs and attitudes that do not necessarily conform to legal rules.¹⁰ Frivolous litigation, negative publicity, low 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 beyond the employer's control. However, terminated employees may respond differently according to their beliefs regarding the malevolence of others, their inclination toward anger in everyday life, and their level of personal

<http://www.bna.com/uploadedfiles/Content/Products/Books/catalog.pdf> (last visited Oct. 12, 2011).

⁹ E.g., Stephen D. Lichtenstein & Jonathan J. Darrow, *At-Will Employment: A Right to Blog or a Right to Terminate?*, 11 J. INTERNET LAW 1 (2008); Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62 (2008); Shelbie J. Byers, Note, *Untangling the World Wide Weblog: A Proposal for Blogging, Employment-at-Will, and Lifestyle Discrimination Statutes*, 42 VAL. U. L. REV. 245 (2007).

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." Moss, *supra* note 4, at 342. But the argument can also be used to support the claim that these norms and incentives are just as likely to raise employee expectations of a just-cause termination right.

anxiety.¹¹ Yet, some of the most important 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 employers.

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 workers’ perceptions of discharge under a variety of foreseeable conditions.

Part I of this Article 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 that impacted employment relations during the nineteenth and twentieth centuries.

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

Part III provides the data and rationale for the empirical survey of employment termination presented in this Article. The respondents in the survey were provided one of twelve discharge scenarios involving issues of procedural and substantive justice.¹² In some of the scenarios, the participants were provided degrees of information as to

¹¹ See, e.g., Robert Eisenberger et al., *Who Takes the Most Revenge? Individual Differences in Negative Reciprocity Norm Endorsement*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 787 (2004) (studying the impact of these and other variables on revenge behavior).

¹² See *infra* Appendix A.

the state of the existing law of employment discharge.¹³ Respondents were then questioned on their attitudes toward the company and their willingness to seek legal redress.¹⁴ Part III then reports our findings. The study found that while substantive and procedural fairness in isolation improve employee attitudes, having both a fair reason and a fair process for discharge considerably amplifies these positive attitudes. We also reach the conclusion, among others, that propensity to sue correlates with the legal knowledge of employees regarding their rights or lack thereof. This Article 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 proposes 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 outcome 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 the employee's perception of the employment relationship.

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, recognizing certain issues not directly dealt with in the present study.

¹³ *Id.*

¹⁴ *See infra* Appendix B.

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.¹⁵ Its origins date back to the English Statute of Labourers, enacted in 1562.¹⁶ The statute provided employees a special status within the contractual nature of the employment relationship.¹⁷ It provided numerous employee (apprentice) protections, including the requirement of notice and the rule that apprentices were only dischargeable for reasonable cause.¹⁸ The rule then developed that any hiring for an unfixed duration was presumed to be for a year at a time.¹⁹

The Industrial Revolution shifted the law-of-employment paradigm from status-based employee protections to the contract-based employment-at-will doctrine.²⁰ Horace Wood, in *A Treatise on the Law of Master and Servant*, declared that employment at will was the law of the land.²¹ Accurate or not, Wood's declaration of

¹⁵ This concept has been the subject of extensive scholarly debate. *See supra* notes 6–9 and accompanying text.

¹⁶ Statute of Labourers, 5 Eliz., c.4 (1562); *see also* Feinman, *supra* note 3, at 120.

¹⁷ *Id.*

¹⁸ IRA MICHAEL SHEPARD ET AL., WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE 16 (1989).

¹⁹ *Id.*

²⁰ *Id.* For a fuller analysis of the role 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) (exploring Nathan Isaacs's thesis that legal development is not one of linear progression, but one characterized by cycles between status-based and contract-based relationships).

²¹ 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 upon 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 fixed for whatever time the party may serve.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT: COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES § 134, at 272 (1877). However, he could find only four cases to support this proposition. *Id.* § 134, at 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 (1974). *But see* Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 552 (1990) ("It is a factoid that Horace Wood spun the rule of at-will termination out of his

employment at will as the common law's default rule helped to trigger the American legal system to discard the just-cause rule of termination. 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 private contractual nature of the employment relationship.²² Although the Supreme Court eventually changed course to allow government regulation of the workplace, "Wood's Rule" has remained the law of employment termination.

Even though the termination-at-will principle has persisted, efforts have been made to limit its application to correct perceived injustices. The first recognized exception 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.²³ The public policy exception prohibits firings for reasons that society has 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 is recognized as a violation of public policy.²⁴ These more specific recognitions of public policy 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.²⁵ The result has been the recognition of two additional exceptions in some states—the implied-in-fact and implied-in-law exceptions.²⁶ The implied-in-fact

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. . . .'" (original alteration omitted); see also Feinman, *supra* note 3, at 125–27 (exploring Wood's assertions in more depth).

²² E.g., *Coppage v. Kansas*, 236 U.S. 1, 11 (1915) ("In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that 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).

²³ *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25, 28 (Cal. Dist. Ct. App. 1959).

²⁴ Bird, *supra* note 6, at 542.

²⁵ E.g., Kurt H. Decker, *At-Will Employment in Pennsylvania—A Proposal for Its Abolition and Statutory Regulation*, 87 DICK. L. REV. 477 (1983); Jeffrey L. Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*, 56 IND. L.J. 207 (1981); Donald H.J. Hermann & Yvonne S. Sor, *Property Rights in One's Job: The Case for Limiting Employment-at-Will*, 24 ARIZ. L. REV. 763 (1982); Philip J. Levine, Comment, *Towards a Property Right in Employment*, 22 BUFF. L. REV. 1081 (1973).

²⁶ Robert C. Bird & Donald J. Smythe, *The Structure of American Legal Institutions and the Diffusion of Wrongful-Discharge Laws, 1978–1999*, 42 LAW & SOC'Y REV. 833, 837 (2008); Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1243–

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.²⁷ This exception grants employees protection based upon an implied but legally binding 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.²⁸ A number of courts have used the rationale that though the employment was at will at the time of commencement, employer representations, materials, and practices worked a modification to a just-cause employment contract.²⁹

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.³⁰ The court reviews the

44 (1992); Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647, 678–80 (1994); Julia Barnhart, Comment, *The Implied-in-Fact Contract Exception to At-Will Employment: A Call for Reform*, 45 UCLA L. REV. 817 (1998).

²⁷ E.g., Philip H. Dorff, Jr. & Hugh J. Cain, *The Evolution of the Implied Contract Exception to the Employment-At-Will Doctrine in Iowa: From Young to French and Beyond*, 43 DRAKE L. REV. 359, 360 (1994); see also Tammy Harris, Case Note, *Brodie v. General Chem. Corp.*, 934 P.2d 1263 (Wyo. 1997), 33 LAND & WATER L. REV. 351 (1998) (reviews the use of employee handbooks in implied-in-fact employment lawsuits).

²⁸ See *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925–27 (Cal. Ct. App. 1981) (longevity of employment is a factor in finding a just-cause contract); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 890–92 (Mich. 1980) (enforced terms in an employee handbook that policy of the company was discharge only for just cause); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837. See generally Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982) (advancing excluder analysis, noting that good faith cannot be defined, but bad faith is recognizable); Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) (introducing the excluder analysis). But see Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497 (1984) (asserting that good faith can be conceptualized).

²⁹ E.g., *Torosyan v. Boehringer Ingelheim Pharms., Inc.*, 662 A.2d 89, 97–98 (Conn. 1995); *Toussaint*, 292 N.W.2d at 892; *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 445–46 (N.Y. 1982).

³⁰ Good faith is a metaprinciple or what one scholar referred to as “transubstantive”; in other words, the principle occupies an entire area of law and is not context specific. See Mark D. Rosen, *What Has Happened to the Common Law?—Recent American*

facts of the case to determine if there was a breach of this societal duty of good faith.³¹ 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 starts from the premise that good faith is indefinable.³² 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 bad faith when she sees it. Professor Summers's 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."³³ Under this approach, given facts are analyzed to see if they fit a category of bad faith that has been developed in the case law.³⁴ Good faith, under this definition, existed only in the absence of bad faith.³⁵

While not all states have adopted these three 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-in-fact 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 that the facts of her case 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

Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development, 1994 WIS. L. REV. 1119, 1161.

³¹ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) states, "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." See also U.C.C. § 1-304 (revised 2001) (codifying the good faith and fair dealing requirement).

³² See Summers, *The General Duty of Good Faith*, *supra* note 28, at 812–13 (explaining the various ways courts have applied good faith and the variety of facts where good faith has been applied); Summers, "Good Faith" in *General Contract Law*, *supra* note 28, at 195 (arguing that, while scholars can agree that good faith is a minimum standard, the varied forms that bad faith takes serve as evidence that defining it is a continued problem).

³³ Summers, *The General Duty of Good Faith*, *supra* note 28, at 820–21.

³⁴ *Id.*; see also Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1086–87 (2006).

³⁵ Bird, *supra* note 6, at 559–60.

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.

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 also increases the incentive for employers to make labor, rather than capital, investments. For example, the flexibility provided by employment at will may lead a bank to elect to hire more tellers instead of building ATMs, or an employer might choose to hire more workers for an assembly line instead of investing resources in mechanical automation.

As noted above, from personal and societal perspectives, 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.³⁶ The extensive safety net of employee protections found in European countries correlates with higher rates of unemployment.³⁷ The costs of discharging an

³⁶ 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 . . .

Donald C. Dowling, Jr., *International HR Best Practice Tips: Summer 2010: Conducting Internal Employee Investigation Outside the U.S.*, 19 INT'L HR J. 1 (2010).

³⁷ See, e.g., John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 921 (1996) (“The

employee in some European countries, such as through the payment of an indemnity and extensive notice requirements, tilt the decision in close cases toward not hiring.

Despite the above benefits of the at-will rule, 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 a person's self-worth. An involuntary discharge may shatter the employee's self-image and place enormous stress on the employee and her family.³⁸ A loss of work can provoke feelings of guilt and inadequacy.³⁹ A discharged employee suffers from "an increased likelihood of depression, alcohol and drug abuse, physical illness, and even suicide."⁴⁰ In many ways, the workplace has supplanted the church and neighborhood as a primary source of relational networks, self-identity, reputational status, and social class.⁴¹ 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 professionally, obligated to mitigate the harm caused by the employment discharge.

neglect of laissez-faire policies among continental members of the European Union is now so notorious that a new word—"Eurosclerosis"—has been coined to describe the high unemployment and slow growth engendered by excessive regulation and taxation."); Council Directive 94/45/EC, art. 1, 1994 O.J. (L 254) 64, 66 (requiring large companies to establish employee work councils that need to be consulted before a workforce reduction). For a discussion of the Directive's role in employment termination, see Brian Bercusson, *Labour Regulation in a Transnational Economy*, 6 MAASTRICHT J. EUR. & COMP. L. 244, 265–66 (1999).

³⁸ 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 influence how the children of the unemployed view the world and their own future role in it. *Id.*

³⁹ *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."); see also 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 affecting the self-esteem of the unemployed).

⁴⁰ Bird, *supra* note 38.

⁴¹ *Id.* at 161.

An employer who fires an employee on a moment's notice and without reason may not breach a legal contract, but the manner of the discharge will enhance the perceived harm of the employee. A loyal employee is likely to feel betrayed 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/her organization."⁴² Psychological contracts emerge in organizations when an employee perceives that the contribution she makes obligates her employer to reciprocate.⁴³ The psychological contract represents the bundle of employee expectations that the employer will behave in a certain fashion based upon promises or past practices. Research on psychological contracts has largely focused on the perceptions and expectations of employees.⁴⁴ In organizational behavior literature, the word "contract" in psychological contract is used as a construct or metaphor.⁴⁵ Psychological contracts are not legally enforceable contracts.⁴⁶

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

⁴² Jill Kickul & Scott W. Lester, *Broken Promises: Equity Sensitivity as a Moderator Between Psychological Contract Breach and Employee Attitudes and Behavior*, 16 J. BUS. & PSYCHOL. 191, 192 (2001). Professors Johnson and O'Leary-Kelly provide the following definition: "The psychological contract is defined as an individual's 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 L. 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. ORGANIZATIONAL BEHAV. 627, 628–29 (2003) (citation omitted).

⁴³ See Johnson & O'Leary-Kelly, *supra* note 42, at 629.

⁴⁴ The perceptions of the employer relating to the psychological contract have also been examined. See, e.g., Amanuel G. Tekleab & M. Susan Taylor, *Aren't There Two Parties in an Employment Relationship? Antecedents and Consequences of Organization—Employee Agreement on Contract Obligations and Violations*, 24 J. ORGANIZATIONAL BEHAV. 585, 585–86 (2003) (noting the prevalence of employee-focused research and focusing instead on employer perceptions).

⁴⁵ Mark V. Roehling, *The Origins and Early Development of the Psychological Contract Construct*, 3 J. MGMT. HIST. 204, 204 (1997).

⁴⁶ See Johnson & O'Leary-Kelly, *supra* note 42.

presence of an overarching social contract.⁴⁷ This social contract assumed that individuals living in a state of nature tacitly consent to develop an organized civilization.⁴⁸ The social contract constitutes a reciprocal agreement between citizens and the state whereby the state offers services in exchange for citizens paying taxes, shouldering defense responsibilities, and obeying laws.⁴⁹ 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.⁵⁰ 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.⁵¹

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 employers. One scholar observed that workers maintained high production levels with minimal grievances in exchange for receiving fair wages and treatment from their employer.⁵² One scholar interviewed utility company employees and learned that employees perceived their employer to be duty bound to satisfy employee expectations.⁵³

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.⁵⁴ This shift in focus coincided with significant new trends in the workplace, including increased instances of corporate restructuring; downsizing; and the use of contingent,

⁴⁷ Roehling, *supra* note 45, at 205.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1958) (discussing a theory of formal organizations).

⁵¹ KARL MENNINGER, *THEORY OF PSYCHOANALYTIC TECHNIQUE* 21 (1958).

⁵² CHRIS ARGYRIS, *UNDERSTANDING ORGANIZATIONAL BEHAVIOR* 96 (1960).

⁵³ Roehling, *supra* note 45, at 207 (quoting HARRY LEVINSON ET AL., *MEN, MANAGEMENT, AND MENTAL HEALTH* 20 (1962)).

⁵⁴ Abigail Marks, *Developing a Multiple Foci Conceptualization of the Psychological Contract*, 23 *EMP. REL.* 454, 455 (2001).

temporary, or leased workers.⁵⁵ Employees stuck in the old system of career-long employment were the victims of widespread layoffs.⁵⁶

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.⁵⁷ Second, psychological contracts arise from both formal and informal cues. These expectations often take the form of explicit oral promises or are derived from company policies, but they may also originate from casual statements, patterns of conduct, and implicit social signals.⁵⁸ Third, employees hold psychological contracts with multiple constituencies, including various individual managers and the organization as a whole.⁵⁹ Finally, psychological contracts change as the employee's relationship with the organization grows over time.⁶⁰ These changes can result from task changes assigned by 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.⁶¹ Cradle-to-grave employment for employees has largely disappeared, thus creating significant uncertainty as to the meaning of

⁵⁵ See generally Larry A. DiMatteo & René Sacasas, *Employee Leasing: No Panacea*, BUS. & ECON. REV., July–Sept. 1995, at 16 (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 Kenneth P. De Meuse et al., *An Investigation of the Relational Component of the Psychological Contract Across Time, Generation, and Employment Status*, 13 J. MANAGERIAL ISSUES 102, 102–03 (2001).

⁵⁶ Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 551 (2001).

⁵⁷ Elizabeth Wolfe Morrison & Sandra L. Robinson, *When Employees Feel Betrayed: A Model of How Psychological Contract Violation Develops*, 22 ACAD. MGMT. REV. 226, 228 (1997).

⁵⁸ Jill Kickul & Matthew A. Liao-Troth, *The Meaning Behind the Message: Climate Perceptions and the Psychological Contract*, 18 MID-AM. J. BUS. 23, 24 (2003).

⁵⁹ Peter Herriot & Carole Pemberton, *Contracting Careers*, 49 HUM. REL. 757, 760–62 (1996).

⁶⁰ De Meuse et al., *supra* note 55, at 102.

⁶¹ T. Leigh Anenson & Karen Eilers Lahey, *The Crisis in Corporate America: Private Pension Liability and Proposals for Reform*, 9 U. PA. J. LAB. & EMP. L. 495, 514–15 (2007); see Scott W. Fielding, Note, *Free Competition or Corporate Theft?: The Need for Courts to Consider the Employment Relationship in Preliminary Steps Disputes*, 52 VAND. L. REV. 201, 229 n.141 (1999).

the employer-employee relationship.⁶² One certainty is that the corporate restructuring and downsizing policies implemented during the 1980s and 1990s have significantly changed the employment relationship.⁶³ These strategies have arguably miscalculated the critical role that employees play in an organization's long-term success.⁶⁴ Despite the 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 than they were in generations past.⁶⁵ However, the lowering of expectations does not mean the elimination of expectations. As such, employers continue to break psychological contracts.⁶⁶ For example, one study discovered that as many as fifty-five percent of recent MBA graduates believed that their employers had broken their psychological contracts within the first two years of employment.⁶⁷ Another study reported that twenty-five percent of respondents, employees surveyed during a company restructuring, reported significant psychological contract violations.⁶⁸ 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 remains unclear. Furthermore, there has been insufficient research into what types of actions employers can take—prior to and at the time of discharge—to mitigate an employee's negative reaction. No employee likes to be fired, but certain factors

⁶² Ronald R. Sims, *Human Resource Management's Role in Clarifying the New Psychological Contract*, 33 HUM. RESOURCE MGMT. 373, 374 (1994).

⁶³ DeMeuse et al., *supra* note 55, at 102.

⁶⁴ See Jeffrey Pfeffer, *Seven Practices of Successful Organizations*, 40 CAL. MGMT. REV. 96, 97–100 (1998).

⁶⁵ Bird, *supra* note 38, at 166.

⁶⁶ *Id.*; Morrison & Robinson, *supra* note 57, at 248.

⁶⁷ Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception but the Norm*, 15 J. ORGANIZATIONAL BEHAV. 245, 252 (1994).

⁶⁸ William H. Turnley & Daniel C. Feldman, *Psychological Contract Violations During Corporate Restructuring*, 37 HUM. RESOURCE MGMT. 71, 74 (1998).

exist that can be manipulated by the employer to lessen the psychological trauma of employees and reduce the legal costs to 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.⁶⁹ The study presented here measures employee 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 reactions 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 present study provides the findings of a written, empirical survey of 763 undergraduate students enrolled in an introductory management course. Participants were randomly provided one of twelve discharge scenarios.⁷⁰ All twelve scenarios expressed variations of three key variables: (1) procedural fairness–procedural unfairness, (2) substantive fairness–substantive unfairness, and (3) no information–cueing–education of employee on employment law.⁷¹

⁶⁹ See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

⁷⁰ See *infra* Appendix A for a sampling of the discharge scenarios.

⁷¹ *Id.*

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.⁷² For example, procedural fairness might involve the opportunity to be heard and an open and fair evaluation of the necessity for the discharge before the employer reaches the decision to terminate. This should be followed by a reasonable 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.⁷³ The first paragraph explained the available procedural rights in the company employee manual.⁷⁴ The second paragraph showed that the process of discharge outlined in the employment manual was followed completely and provided a number of opportunities for review and improvement.⁷⁵

The other scenario treated the employee with procedural unfairness.⁷⁶ The first paragraph was identical to the procedurally fair scenario in that it described the rights the employee possessed in the company employment manual.⁷⁷ But, the second paragraph described the actual employee's treatment as involving standards of evaluation and a shorter notice of discharge, contrary to the policies set out in the company manual.⁷⁸

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

⁷² See, e.g., David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 4 (2008) ("[P]rocedural justice' involves the extent to which citizens value a process because of its procedural features."); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988) (defining "procedural justice" as a measurement of participants' satisfaction with the decision-making processes underlying a particular decision).

⁷³ See *infra* Appendix A § 1.1.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *id.* § 1.2.

⁷⁷ *Id.*

⁷⁸ *Id.*

appropriateness of a procedure's outcomes."⁷⁹ Substantive fairness is concerned with whether the ultimate employment decision made was correct. A substantively fair result would be the case where the discharge was based on a "good" reason, such as incompetence or insubordination. Where 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 decision.⁸⁰ In the fair scenario, the survey described a situation where the employee was fired for poor job performance.⁸¹ In the unfair scenario, the employee was discharged because she is overweight.⁸²

The third variable was designed to examine the impact of educating employees about available legal rights. Survey respondents were presented with one of three scenarios, 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.⁸³ Instead, the respondent was given information about the firm's size and competitive position unrelated to employment law.⁸⁴

The second scenario provided limited information at the time of hire about employment discharge, which was defined in the study as cueing.⁸⁵ 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.⁸⁶ The cueing prompt also informed respondents about the duty of employers to act in good faith.⁸⁷ The

⁷⁹ Markell & Tyler, *supra* note 72. See generally Nancy Ehrenreich, *Foreword: Conceptualizing Substantive Justice*, 13 J. GENDER RACE & JUST. 533 (2010) (exploring broader definitions of substantive justice).

⁸⁰ See *infra* Appendix A § 2.

⁸¹ *Id.* § 2.1.

⁸² *Id.* § 2.2.

⁸³ *Id.* § 3.1.

⁸⁴ *Id.*

⁸⁵ *Id.* § 3.2.

⁸⁶ *Id.*

⁸⁷ *Id.*

prompt raised the possibility that an insincere reason for firing can “lead to a claim of ‘wrongful discharge.’”⁸⁸

The third and final scenario was the educating prompt.⁸⁹ In this prompt, all prior information about employment at will and its exceptions were provided to the survey participant.⁹⁰ In addition to this material, however, the educating prompt explained that firms can disclaim company policy statements implying discharge protection.⁹¹ A clause found in the firm’s employee handbook was then provided to the respondent.⁹² The clause disclaimed all employee protections against at-will termination.⁹³

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.⁹⁴ The questionnaire inquired, in part, about the respondent’s attitudes toward the company given the scenario provided.⁹⁵ Respondents were asked about their litigation intentions, specifically, whether they would consider legal action against the employer.⁹⁶ The core thesis of this Article is not that such intentions are realistic responses from frustrated employees, but that these reactions may be muted or amplified by the conditions surrounding the discharge and the employee’s knowledge of the law.⁹⁷

⁸⁸ *Id.* This is a broad reading of the limitations imposed by exceptions to employment at will, as employers are not required to give 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.”).

⁸⁹ *See infra* Appendix A § 3.3.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See infra* Appendix B.

⁹⁵ 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.

⁹⁶ *See infra* Appendix B.

⁹⁷ *See, e.g.,* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 983 (1999)

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 three Knowledge Hypotheses are expressed as follows:

HYPOTHESIS 1: The control variable involves scenarios where employees were provided no information on the law of employment. Hypothesis 1 proposes that employees with no knowledge (and provided no information) of employee discharge law (the employment-at-will doctrine) are the most likely to pursue litigation and retaliation against their employer at the time of termination compared to 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: $F(2,763) = 2.94, p < .05$.⁹⁸ However, most of that effect was due to the educating condition. Thus, Hypothesis 1 was confirmed in relationship to the education variable but was only marginally correlated in relationship to the cueing variable. In the end, the cueing variable reduced the rate of retaliation, but not by a statistically significant amount. 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

(giving a trade publication's ominous warning that "[a]ll too often, terminated employees will retaliate against their former employers by bringing frivolous discrimination lawsuits" (citing John J. Myers, *Reduce the Risk of Frivolous Lawsuits*, in *GETTING RESULTS...FOR THE HANDS-ON MANAGER*, Oct. 1997, at 7)); 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.").

⁹⁸ See *infra* figure 2 for a graphical depiction of the pattern of results.

than the participants in either the control or cueing conditions. One can surmise that the greater the amount of education, with cueing being viewed as a superficial form of education, the lower the rate of litigation.

In sum, the data confirmed two of the three hypotheses proposed.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ In the absence of such criteria, individuals form fairness judgments from whatever information is readily available.¹⁰² This is particularly true when 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.¹⁰³ Such a heuristic “frees up cognitive resources and [provides] confidence in” the decision or action reached.¹⁰⁴ Fairness heuristics can also be used as a shortcut to decide whether a particular authority can be trusted.¹⁰⁵

⁹⁹ See *infra* figure 1.

¹⁰⁰ Undergraduate students, the respondents in this survey, are not likely to have a working knowledge of the doctrine of employment at will.

¹⁰¹ Russell Cropanzano et al., *Moral Virtues, Fairness Heuristics, Social Entities, and Other Denizens of Organizational Justice*, 58 J. VOCATIONAL BEHAV. 164, 170 (2001).

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ *Id.*

¹⁰⁵ Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 39–40 (2008).

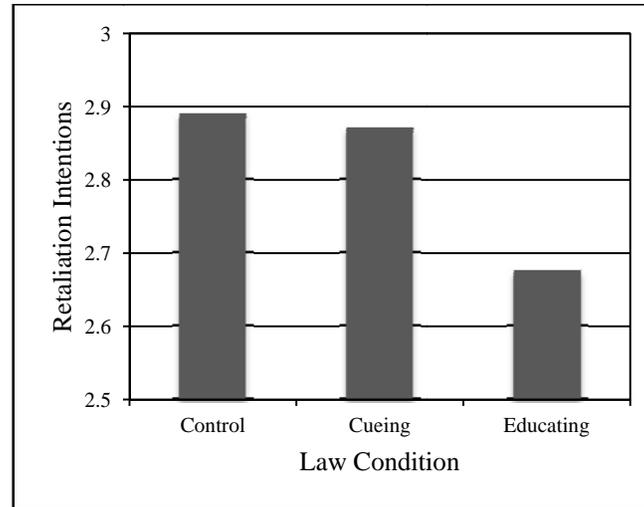


Fig. 1. Results for Knowledge Hypotheses.¹⁰⁶

This fairness heuristic may explain the high level of litigation and retaliation tendencies relative to the first control scenario. 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 greater propensity toward litigation and retaliation responses.

Hypothesis 3 was confirmed. A more thorough education 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

¹⁰⁶ Retaliation intentions are measured on the Standard Likert Scale Survey. A Likert Scale is a common survey tool that measures the strength of a respondent's beliefs or attitudes. H. Mitchell Caldwell & Thomas W. Brewer, *Death Without Due Consideration?: Overcoming Barriers to Mitigation Evidence by "Warming" Capital Jurors to the Accused*, 51 HOW. L.J. 193, 216 n.152 (2008). The numerical value of the response indicates the strength of the belief. *Id.* A value of 1 is considered "least likely," and a value of 7 is considered "most likely."

as unjust and worthy of retaliation or litigation behaviors, respondents may have perceived the discharge less negatively because it did not deviate substantially from the legal rules on which they were educated. The implication is that when the respondents were made more fully aware of the limited nature of employment protections, they demonstrated a lower propensity or desire to take action against the discharging firm.

To reemphasize, in the “educated” respondent scenario, as noted earlier, respondents are told that a disclaimer in an employee manual can override other assurances of long-term employment.¹⁰⁷ The respondents are then told that the firm has such a disclaimer.¹⁰⁸ In fact, the disclaimer is rather detailed and conspicuous, comprising a bolded ninety words, which in essence informs the reader that even though a manual with policies exists, it is not binding on the employer.¹⁰⁹ The disclaimer clause also states that the employer can amend or terminate the policies and benefits at any time.¹¹⁰ Perhaps the scenario is evidence of the power of disclaimers when properly presented to new hires. In the education scenario, the company representatives discuss the disclaimer and its legality.¹¹¹

The key factor is likely not the disclaimer itself, but how it was presented and explained. 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. An employer who emphasizes its company’s pro-employee benefits and policies, but at the same time “hides” or fails to explain the termination-at-will disclaimer, will likely be viewed by the employee as misrepresenting firm policies. Such policies provide a false but intended illusion that the firm is a fair and equitable organization.¹¹² The manual acts as a prod for

¹⁰⁷ See *infra* Appendix A § 3.3. See generally Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326 (1992); Natalie Bucciarelli Pedersen, *A Subjective Approach to Contracts?: How Courts Interpret Employee Handbook Disclaimers*, 26 HOFSTRA LAB. & EMP. L.J. 101 (2008); Cynthia Weber Scherb, Note, *The Use of Disclaimers to Avoid Employer Liability Under Employee Handbook Provisions*, 12 J. CORP. L. 105 (1986).

¹⁰⁸ See *infra* Appendix A § 3.3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Joseph Lawson, *Give your Employees a Hand (Book)*, LEGAL MGMT., Nov.–Dec. 1999, at 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

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 policies that are contrary to at-will employment, 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 done properly, the cognitive dissonance between the firm's employee-friendly policies and a subsequent strict 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.

HYPOTHESIS 5: Employees who experience substantive fairness will be less likely to pursue litigation than employees who experience substantive unfairness.

explains that employee handbooks can promote a better understanding of a firm's policies, increase consistency and credibility, and enhance recruitment. *Id.* at 26–30.

HYPOTHESIS 6: Employees who experience the combination of procedural fairness and substantive fairness will be less likely to pursue litigation than employees experiencing only procedural fairness or only substantive fairness.

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 would be followed prior to termination, including (1) a six-month review with notice if the evaluation is considered as substandard—the notice would suggest that the employee seek guidance from the human resource department or the company's informal mentoring program, (2) a second six-month review—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, (3) 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.¹¹³ 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.¹¹⁴ 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,

¹¹³ See Jill Kickul et al., *Promise Breaking During Radical Organizational Change: Do Justice Interventions Make a Difference?*, 23 J. ORGANIZATIONAL BEHAV. 469, 472 (2002) [hereinafter *Promise Breaking*]. 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 et al., *Settling the Score: The Role of Organizational Justice in the Relationship Between Psychological Contract Breach and Anticitizenship Behavior*, 13 EMP. RESPS. & RTS. J. 77 (2001) [hereinafter *Settling the Score*] (interactional injustice positively correlated to increased levels of anticitizenship behavior).

¹¹⁴ Kickul, Lester & Finkl 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.” *Promise Breaking*, *supra* note 113, at 485.

autonomy).¹¹⁵ Because termination is in the category of extrinsic values, testing for the impact of procedural fairness as a 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). Jerald Greenberg has previously shown that substantive explanations can reduce the rate of negative outcomes.¹¹⁶ He found that increases in employee theft occur when the employee feels that he or she is being treated inequitably, such as being underpaid.¹¹⁷ However, Greenberg argues that increases in employee theft “can be substantially reduced by the inexpensive tactic of explaining the basis for the inequity in clear, honest, and sensitive terms.”¹¹⁸

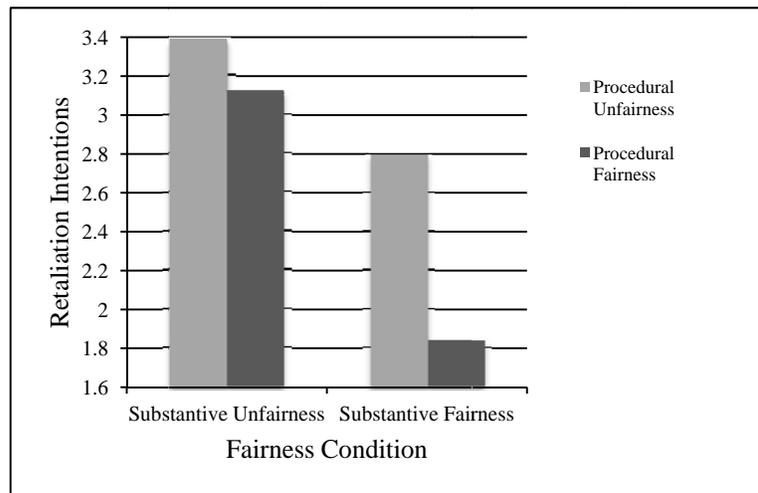


Fig. 2. Results for Fairness Hypotheses.¹¹⁹

¹¹⁵ *Id.* at 471–72.

¹¹⁶ JERALD GREENBERG, *THE QUEST FOR JUSTICE ON THE JOB* 230 (1996).

¹¹⁷ *Id.* at 215–30; see also Jerald Greenberg, *Employee Theft as a Reaction to Underpayment Inequity: The Hidden Costs of Pay Cuts*, 75 J. APPLIED PSYCHOL. 561 (1990) (concluding that when pay cuts are sensitively explained to employees, feelings of inequity and rates of theft are reduced).

¹¹⁸ GREENBERG, *supra* note 116, at 230; see also Jerald Greenberg, *Cognitive Reevaluation of Outcomes in Response to Underpayment Inequity*, 32 ACAD. MGMT. J. 174 (1989).

¹¹⁹ Retaliation intentions are measured on the Standard Likert Scale Survey. See Caldwell & Brewer, *supra* note 106 and accompanying text.

The survey also confirmed Hypothesis 6. A combination of procedural and substantive fairness produced an interaction effect in the ANOVA: $F(1, 763) = 22.31, p < .001$.¹²⁰ 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.¹²¹ However, Greenberg stresses that “the real issue is not *which* form of justice is more important but *how* they operate together.”¹²² 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 Figure 2. The lighter-shaded columns show higher rates of retaliation intentions without the amplification effect. The darker-shaded columns show that substantive fairness lowered the rate of retaliation in relation to cases of substantive unfairness. Both columns on the right show the amplified effect. The lighter column on the right shows cases of substantive fairness combined with procedural unfairness; the darker column on the right shows a drastic reduction in the rate of retaliation when there is combined substantive and procedural fairness. The rate of retaliation in the amplified scenario is nearly one-half of the rate when there is substantive and procedural unfairness. Put simply, substantive fairness without procedural fairness positively, but moderately, impacts the fairness attitudes of the firm’s employees. Substantive or 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.

¹²⁰ See figure 2 for a graphical depiction of the pattern of results.

¹²¹ See, e.g., Sheldon Alexander & Marian Ruderman, *The Role of Procedural and Distributive Justice in Organizational Behavior*, 1 SOC. JUST. RES. 177 (1987).

¹²² GREENBERG, *supra* note 116, at 403.

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' perceptions of their employers at the time of termination are 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 employees' perceptions 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 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 to the law of employment. 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 is 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, in 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 psychological contracts possess the same ingredients but in varying degrees.¹²³

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.¹²⁴ 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,¹²⁵ 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.

Even though the freedom-of-contract principle is the dominant norm, it is only one of many norms that underlie contract law.¹²⁶ 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.¹²⁷

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 metanorms of private autonomy (freedom of contract) and fairness of the exchange. Justice Cardozo

¹²³ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996) (arguing that social norms can be used to advance legal objectives).

¹²⁴ 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 the employer. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000) (arguing that employee-related protections are insufficient).

¹²⁵ Bargaining flaws primarily relate to the genuineness of consent. Contracts are legally 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 a court may later 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, and misrepresentation by one of the parties are all means to challenge the genuineness of consent and thereby determine if the contract is enforceable.

¹²⁶ See Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 435 (1995).

¹²⁷ *Id.*

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 then be balanced against the social interest served by equity and fairness.”¹²⁸ 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,¹²⁹ is the foundation upon which psychological contract theory rests.¹³⁰ Macneil’s key insight is that enforceable and unenforceable contracts are formed within a larger relational and social context. The larger relational or social 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 expect to cooperate 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 relation[al contracts], to be dealt with by cooperation and other restorational techniques.”¹³¹ 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, one study showed that employees are instrumental and not reciprocal in their perceptions of the changing obligations of the psychological contract over time.¹³² The study

¹²⁸ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921).

¹²⁹ For an understanding of Macneil’s view, see IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). See also David Campbell, *Ian Macneil and the Relational Theory of Contract*, in *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 3 (David Campbell ed., 2001).

¹³⁰ 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. J. 137, 138 (1994) (citation omitted).

¹³¹ Macneil, *supra* note 129, at 740.

¹³² Robinson, Kraatz & Rousseau, *supra* note 130, at 147.

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 Robert 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.”¹³³ 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.¹³⁴ 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.

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.¹³⁵ 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.¹³⁶ Just as conformity to norms decreases the need for

¹³³ Robert A. Hillman, Essay, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 124 (1988).

¹³⁴ See Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727 (2010).

¹³⁵ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 288 (2001).

¹³⁶ One commentator argues that a norm of no discharge without cause currently exists. Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307 (2002).

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 Contract as a Two-Way Exchange

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.¹³⁷ 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 toward another is also being unfair. This simple premise leads to a two-step process in assessing expectations. First, does a party possess certain expectations? Second, are these expectations the product of reasonable 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 be only 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.¹³⁸

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 that

¹³⁷ “[R]esearchers view the psychological contract as held by [the] employee[] alone.” Morrison & Robinson, *supra* note 57, at 229. There are studies that measure employer, as well as employee 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, e.g., Scott W. Lester et al., *Not Seeing Eye to Eye: Differences in Supervisor and Subordinate Perceptions of and Attributions for Psychological Contract Breach*, 23 J. ORGANIZATIONAL BEHAV. 39 (2002).

¹³⁸ Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 618 (1983).

relates to the psychological contract 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.”¹³⁹ 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. It is important to note that the employee can also breach the psychological contract by acting unreasonably in causing harm to the employer through litigation or retaliation. In contract law, the determination of reasonableness is made by applying the reasonable person standard.¹⁴⁰ The reasonable person standard could be used to determine whether 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 that 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 James Gordley asserts that through such an expanded analysis the reasonable person must decide whether “[t]he parties willed a certain normative relationship.”¹⁴¹ This is as close as contract law gets to the idea of the psychological contract.

The second norm from Hillman’s typology is “that a party must act reasonably to avoid harming” himself or herself.¹⁴² In the case of the psychological contract, the disgruntled employee may fail to take

¹³⁹ *Id.* at 619.

¹⁴⁰ See generally Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293 (1997) (tracing the history and the make-up of the standard).

¹⁴¹ JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 241 (1991).

¹⁴² Hillman, *supra* note 133, at 619.

positive action to limit her harm. The mitigation principle in contract law requires the non-breaching party to mitigate her damages.¹⁴³ An example of mitigation avoidance in the employment realm is when an ex-employee does not 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 bidirectional nature of the norm of reciprocity.¹⁴⁴ 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

¹⁴³ E. ALLAN FARNSWORTH, *CONTRACTS* § 8.22, at 609, § 12.8, at 786, § 12.12, at 807 (3d ed. 1999).

¹⁴⁴ See, e.g., Jacqueline A-M. Coyle-Shapiro & Ian Kessler, *Exploring Reciprocity Through the Lens of the Psychological Contract: Employee and Employer Perspectives*, 11 EUR. J. WORK & ORGANIZATIONAL PSYCHOL. 69 (2002).

and employee expectations is inevitable.¹⁴⁵ 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 where only one party (the employer) makes a promise, a cause of action for promissory estoppel is available when the promisee (the employee) reasonably relies upon the promise.¹⁴⁶ Contract law's theory of promissory estoppel or detrimental reliance encompasses another element found in the psychological contract and justice literatures. 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 a resulting injustice in the event that the court fails to provide a remedy.¹⁴⁷ 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 and detrimentally relying on the promise. An example would be when an employer makes a promise to discourage an employee from taking a job with a competitor. After retaining the employee, the employer then fails to honor its promise. If the employee can prove damages—for example, that the other job was higher paying or provided additional benefits—then a cause of action in promissory estoppel is supported.

Promissory estoppel and the recognition of a violation of a psychological contract both seek to address the feeling of injustice produced by a breach of express or implied promises. The essence of psychological contract theory is that even if there is no breach of a

¹⁴⁵ See John Paul Kotter, *The Psychological Contract: Managing the Joining-Up Process*, 15 CAL. MGMT. REV. 91, 92 (1973).

¹⁴⁶ RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

¹⁴⁷ *Id.* See generally Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981) (analyzing the Restatement's embrace of detrimental reliance or promissory estoppel).

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.¹⁴⁸ 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 the interests of both the employee and 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 on which to base psychological contract theory. However, there is a major difference between the two. Promissory estoppel requires the reliance to be reasonable. The psychological contract literature generally does not distinguish between reasonable and unreasonable employee perceptions and expectations.

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 toward retaliatory behavior, such as beliefs that others are malevolent, an inclination toward anger, and general personal anxiety.¹⁴⁹ 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 of the company's employment policies at the time of entry and during employment, provide an "adequate" explanation for the discharge—one grounded in the notion of substantive fairness—, and use due process mechanisms leading up to the termination.¹⁵⁰

Our 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

¹⁴⁸ See Morrison & Robinson, *supra* note 57, at 250 (distinguishing between perceived breach and violation).

¹⁴⁹ See Eisenberger et al., *supra* note 11, at 788.

¹⁵⁰ Benjamin B. Dunford & Dennis J. Devine, *Employment At-Will and Employee Discharge: A Justice Perspective on Legal Action Following Termination*, 51 PERSONNEL PSYCHOL. 903, 922 (1998).

predictors of employees' actions at termination relating to intent to sue or retaliate. 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."¹⁵¹ 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."¹⁵² 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, are affected throughout the course of the employment. If an employee perceives her employer as being unfair, for example, by 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 throughout the duration of the employment. 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 sham 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.

¹⁵¹ GREENBERG, *supra* note 116, at 132–33.

¹⁵² *Id.*

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. It first 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 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 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.¹⁵³ The key finding is that employees perceive that the law provides protection against arbitrary or unfair discharge.¹⁵⁴ Implied in these perceptions is the belief that an employer may only discharge an employee for just cause.¹⁵⁵ 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.¹⁵⁶

Pauline Kim showed that employees' perception of employment law is deeply flawed.¹⁵⁷ Kim's study measured the beliefs that

¹⁵³ *E.g.*, Kim, *supra* note 69.

¹⁵⁴ *Id.* at 106.

¹⁵⁵ *Id.* at 136.

¹⁵⁶ See generally Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS 1, 3–9 (Cass R. Sunstein ed., 2000) (reviewing list of biases and heuristics); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13 (Cass R. Sunstein ed., 2000).

¹⁵⁷ Kim, *supra* note 69, at 137.

former employees have about the protections provided by employment law.¹⁵⁸ Kim challenged the assumption that the simple concept of employment at will was easily understood and acknowledged by employees.¹⁵⁹ Kim found that most employees believed that the law granted far greater protection from discharge than was actually provided.¹⁶⁰

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 of the respondents—89%—erroneously believe that the law forbids such a discharge. . . . [T]his study raises serious doubts about whether workers have the most basic information necessary for understanding the terms on which they have contracted.¹⁶¹

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.¹⁶² Another found that “[o]nly 15 percent of the under 35 age group; 22 percent of the 35–49 age group; eight percent of the 50–65 age group, and 20 percent of the over 65 age group knew that employers hold the right to terminate [employment] at any time even without cause.”¹⁶³ As one author concludes, “Survey results confirm the presence of a Pollyannish denial factor in which most respondents believe employees can be legally discharged only for cause.”¹⁶⁴ These beliefs persist out of employees’ desire to construct a coherent and secure reality.¹⁶⁵ Employees’ misconceptions are likely anchored by a fairness norm that equates unfairness with illegality. An employee’s beliefs are shaped by the understanding of employees in

¹⁵⁸ *Id.* at 133–40.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 140.

¹⁶¹ *Id.* at 110–11.

¹⁶² Robert F. Wayland et al., *Employment-at-Will Statements: Perceptions of Job Applicants*, 14 INT’L J. MANPOWER 22, 28 (1993).

¹⁶³ 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.*

¹⁶⁴ James Wallihan, *The Politics of Employee Discharge: Triggering, Representation, and Venue*, 31 POL’Y STUD. J. 625, 630 (2003).

¹⁶⁵ Mark V. Roehling & Wendy R. Boswell, “Good Cause Beliefs” in an “At-Will World”? A Focused Investigation of Psychological Versus Legal Contracts, 16 EMP. RESPS. & RTS. J. 211, 215 (2004).

general. For example, the notion that an employer must give a minimum of two weeks' notice before discharge is widely held among workers.¹⁶⁶ The implication of these results is that discharged employees often believe they are victims of an unfair and illegal act.

Other predispositions that inflate employees' perceptions of job security and just-cause employment include "optimism bias"¹⁶⁷ and the "availability heuristic."¹⁶⁸ 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 outsourcing is generally discounted. People tend to believe that divorce or termination of employment is likely to happen to others but is unlikely to happen to them.

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 individual 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 who possesses a very positive view of her first employer's commitment to long-term relationships and who knows 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

¹⁶⁶ Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 63 (2010).

¹⁶⁷ See Russell Korobkin, A "Traditional" and "Behavioral" Law-and-Economics Analysis of *Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 461 (2004) ("Evidence of the overconfidence (or optimism) bias demonstrates that, on average, decision makers underestimate the likelihood of a bad event happening to them.").

¹⁶⁸ See *id.* at 462 ("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.").

litigation and retaliation. We hypothesized that the more information relating to the lack of protections under at-will employment relationships the employer provided to the employee upon commencement of employment, the lesser the rate of litigation and retaliation at discharge. The overall hypothesis that such education lowers rates of litigation and retaliation was confirmed.

The educating scenario provided the same information as the cueing scenario but provided additional information stressing the employment-at-will nature of the employment. In the educating variation, the company's lawyer referred the new employee to an express disclaimer clause on the cover of the employee handbook. The disclaimer clause explicitly stated 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."¹⁶⁹

As was expected, the participants that were provided with no information showed the highest rate of willingness to litigate and retaliate. Once again, as expected, those who were educated showed a lesser rate of litigation and retaliation propensities than those who were provided no information. Therefore, additional information on employment at will deflated the employee's presumption or expectation that the law provides 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

¹⁶⁹ See *infra* Appendix A § 3.3.

information.¹⁷⁰ Bounded rationality recognizes the limits of individual cognitive processes.¹⁷¹ 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.”¹⁷² Oftentimes individuals use shortcuts or are biased in some way.¹⁷³

The educating scenario in the current study failed to reach the limits of bounded rationality. The survey showed that many of the new employees were able to process a definitive explanation of at-will disclaimers. This diminished 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 dominant predictor than education and cognitive shortcuts like optimism bias, availability heuristics, and bounded rationality. This is what Christine Jolls has called the “fairness dynamic.”¹⁷⁴ 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 even when” it is at a cost to themselves.¹⁷⁵ She notes “the significant role . . . this aspect of fairness behavior [plays] in the employment relationship.”¹⁷⁶ Fairness considerations are particularly important in employment because of its relational aspects. That 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

¹⁷⁰ The inability to process information is part of what is referred to as “bounded rationality.” Jolls et al., *supra* note 156, at 14–15.

¹⁷¹ *Id.*

¹⁷² Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 7 (2002).

¹⁷³ See Jolls et al., *supra* note 156, at 14–15.

¹⁷⁴ Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. REV. 47, 48 (2002).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

promote the goals of informed consent¹⁷⁷ and fairness is found throughout the legal literature.¹⁷⁸ 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 was referred 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, the nature of the relationship, and fairness factors are powerful predictors of employee reaction at the time of termination. All of those 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 and practices of procedural and substantive fairness.

B. Employer Perceptions: Internal-External Employment Contracts

Given the longstanding position of the termination-at-will employment regime, a common perception is that employers 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 employers 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, during the course of employment, the

¹⁷⁷ Craig A. McEwen & Richard J. Maiman, *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 based on whether the mediation was undertaken by consent of the parties).

¹⁷⁸ See, e.g., Michael K. Molitor, *Eat Your Vegetables (Or at Least Understand Why You Should): Can Better Warning and Education of Prospective Minority Owners Reduce Oppression in Closely Held Businesses?*, 14 FORDHAM J. CORP. & FIN. L. 491 (2009) (proposing a method to inform prospective owners of closely held businesses of the dangers of oppression for minority owners in such businesses).

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 feel 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.

If the employer's perception of employment is one of a totally at-will relationship, then why does the employer 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. Employee perceptions of dismissal rights were more likely pro-employer. In short-term employment, workers have no illusion of job security. In long-term employment, the expectations of job security generally matched the reality of the mid-twentieth-century workplace.

Toward 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.¹⁷⁹ What we are currently witnessing, with the creation of employment-at-will exceptions, 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."¹⁸⁰ 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 shifts 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 produce the same type of employee response.¹⁸¹ They distinguish two types of employee perceptions: perceived breach and violation.¹⁸² This distinction is based on the view that perceived breach is cognitive in nature and the sense of violation is emotive in nature.¹⁸³ It is the second type of breach that produces the strongest response—higher rates of litigation and retaliation.¹⁸⁴ Morrison and Robinson assert that perceived breach is a precursor to feelings of violation.¹⁸⁵ But not all perceived breaches

¹⁷⁹ Professor Estreicher notes, "For employers, there are a 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).

¹⁸⁰ Moss, *supra* note 4, at 343–44.

¹⁸¹ Morrison & Robinson, *supra* note 57, at 247–48.

¹⁸² *Id.* at 230.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 230–31.

¹⁸⁵ *Id.* at 230.

produce the affective state that a sense of violation produces.¹⁸⁶ They elaborate, “[V]iolation is a combination of disappointment emotions and anger emotions.”¹⁸⁷ A combination of these emotions leads to a feeling of betrayal, which in turn results in “a mental state of readiness for action.”¹⁸⁸ Another explanation of this phenomenon is the concept of bounded willpower taken from behavioral decision theory.¹⁸⁹ 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 into how occurrences of perceived violations can be minimized. It distinguishes between obligations that the employer is unable to keep versus those that the employer is unwilling to keep. If the reason for the breach is the former, then one could 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.¹⁹⁰ 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. That results in different interpretations of the psychological contract, which is significant 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, the law generally recognizes disclosure as a defense to perceived breaches of contract or claims of misrepresentation.¹⁹¹

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 231.

¹⁸⁸ *Id.*

¹⁸⁹ Jolls et al., *supra* note 156, at 15–16.

¹⁹⁰ Morrison and Robinson tie the development of incongruence to a number of factors: (1) “divergent schemata” (the employer and employee may have different cognitive frameworks for interpreting or processing information), (2) “complexity” (the employee is provided a large number of stimuli that he or she has difficulty in processing, storing, and recalling), (3) “ambiguity” (ambiguous stimuli require the employee to construe and to fill in gaps using contextual factors and prior information). Morrison & Robinson, *supra* note 57, at 235–36.

¹⁹¹ FARNSWORTH, *supra* note 143, § 4.11, at 247. “Courts have departed from or relaxed the ‘no duty to disclose’ rule by carving out exceptions to the rule and by refusing

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.¹⁹² David Guest and Neil 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.¹⁹³

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 benefit of a good company reputation, especially in a mobile workforce, is the primary reason for the divergence of the internal and external employment contracts. Alternatively stated, the bad company will need to compensate through 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.

This 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 including the time of termination. Educating employees,

to adhere to the rule when it works an injustice.” *Id.* (citing *Ollerman v. O’Rourke Co.*, 288 N.W.2d 95, 102 (Wis. 1980)).

¹⁹² David E. Guest & Neil Conway, *Communicating the Psychological Contract: An Employer Perspective*, 12 HUM. RESOURCE MGMT. J. 22, 25–26 (2002).

¹⁹³ *Id.* at 35.

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. The fairness norm undergirds the practices employed during the employment engagement to emphasize that an 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 most useful when it guides employer actions leading up to and including the time of termination. The goal here is to manage the employee's perceptions 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 legal contract with the 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.¹⁹⁴ The employer should take steps to minimize the effect of discharge on others in the organization.¹⁹⁵ Failure to pursue substantive and procedural fairness or to disclose relevant information during the process of termination is likely to affect remaining employees and their view of the psychological contract. There is 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 remaining employees and the employer. One study showed that trust can mediate the perceptions of

¹⁹⁴ Jean M. Hiltrop, *Managing the Changing Psychological Contract*, 18 EMP. REL. 36, 44 (1996).

¹⁹⁵ *Id.*

psychological contract breach and the negative outcomes of perceived breaches.¹⁹⁶ Just as the perception of fairness during the course of an employment relationship can reduce negative outcomes, trust building early in the relationship can minimize negative effects stemming from subsequent breaches. The feedback loop noted above can weaken the strength of prior trust.

VI

FUTURE OF THE PSYCHOLOGICAL CONTRACT AND EMPLOYMENT LAW

The common law is in a constant state of development. The major force behind its development is the correcting of injustices that occur within its domain. The common law of contract focuses upon the intent of a promising party and the expectations of a promise-receiving party. In the classic contract-law paradigm, there are reciprocal intents, promises, and expectations. Promissory estoppel is an example in which contract law responds to injustices when 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. Just as contract law fabricated promissory estoppel to prevent injustice, 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, the role of education, the role of fairness, and the role of *a priori* expectations. It also suggests avenues for future research in those four areas. Finally, it examines the evolution of employment-at-will exceptions and the role of the psychological contract in that evolution, looking 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 rationales for such a change are the broader recognition and protection of reasonable expectations.

¹⁹⁶ See Sandra L. Robinson, *Trust and Breach of the Psychological Contract*, 41 ADMIN. SCI. Q. 574 (1996).

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.¹⁹⁷ 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 phenomena 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 for 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 part of the internal context of the psychological contract. One study confirmed the cyclical nature of psychological contract breach and organizational cynicism.¹⁹⁸ Specifically, employees who believed that the firm's promises were broken held more cynical attitudes toward their employer.¹⁹⁹

The external or legal context is generally outside the control of the employer. However, the employer can influence how the employee interfaces with or perceives the external contract. Employers face three challenging conditions concerning their 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 and secure employment environment. Second, employees' beliefs that the law protects them from unfair or arbitrary discharge are likely to persist at some level. Third, employees now have a larger menu of legal remedies with which to punish employers for unfair decisions than they had in the past. The result is a situation where employers perceive themselves to be under constant threat of litigation or retaliation from discharged employees.²⁰⁰ More research needs to be done to determine the ways

¹⁹⁷ GREENBERG, *supra* note 116, at 401. Morrison and Robinson also note that there is "considerable variance across occupations, organizations, industries, and countries with respect to the number and types of obligations that exist between employees and organizations." Morrison & Robinson, *supra* note 57, at 249.

¹⁹⁸ Johnson & O'Leary-Kelly, *supra* note 42, at 641-42.

¹⁹⁹ *Id.*

²⁰⁰ *Cf.* Rita Murphy, *OSHA, AIR21 and Whistleblower Protection for Aviation Workers*, 56 ADMIN. L. REV. 901, 914-15 (2004) (discussing whistleblower protection and noting

an employer can frame the internal context of a relationship to combat the larger societal and legal context that encourages employee litigation and retaliation.²⁰¹

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.”²⁰² 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. Optimism bias supports the employees’ positive opinion of their employment relationship and their ability to obtain job security. More study is needed to measure the persistence of employee expectations despite a change in context at the macro level.

Previously, it was noted that the psychological contract is a bundle of many matched and unmatched expectations. Due to that 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.²⁰³ The increase in the incongruence of expectations necessarily increases the rate at which employees perceive employers’ violations of the psychological contract.²⁰⁴ 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 feed back to its employees. The feedback should reduce employees’ expectations and thereby diminish the scope and strength of the psychological contract.

that because of 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”).

²⁰¹ Rousseau notes, “Firms foster different psychological contracts by the way they reward their employees and the HRM strategies that underly [sic] personnel practices.” Denise M. Rousseau, *New Hire Perceptions of Their Own and Their Employer’s Obligations: A Study of Psychological Contracts*, 11 J. ORGANIZATIONAL BEHAV. 389, 399 (1990).

²⁰² Morrison & Robinson, *supra* note 57, at 226.

²⁰³ One study showed “that among a sample of recent MBA graduates, 55% believed that some aspect of their psychological contracts had been broken by their employers during the previous two years.” *Id.* (citing Robinson & Rousseau, *supra* note 67).

²⁰⁴ See Robinson & Rousseau, *supra* note 67.

B. *The Role of Education*

Our survey showed that providing employees with information about the nature of employment law and their particular relationship relates to their perceptions of fairness. As noted earlier, more finely grained research should further explore the relationship between employee knowledge of employment at will and the 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 reducing the rates of litigation and retaliation? Would other practices in framing those rights, such as annual re-education, produce better results? Would too much information overwhelm employees' cognitive abilities, leading them back to the use of heuristics (availability, fairness) and biases (optimism)?

C. *The Role of Fairness*

The fairness norm is the most robust predictor of an employee's reaction at the time of termination.²⁰⁵ If there is a perception of unfairness, there is more likely a perception that the termination was unjust. A feeling of injustice is the strongest rationale for an employee's perception of a 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. Because 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 how that history frames the perceptions of fairness at discharge. If the

²⁰⁵ The perception of fairness or unfairness has been acknowledged as a prime motivator of human behavior. See, e.g., E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* 59 (1989) ("Litigants were more satisfied with the outcome . . . and perceived the procedures to be fairer when the outcome exceeded their expectations . . ."); Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 753–54 (2004) (asserting the fairness perceptions are the key factors to understanding negotiating behaviors).

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? Are 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 must be researched. Additionally, a survey should test how employees' perceptions of the goodness or badness of their relationships with the reviewers or evaluators impact employees' intentions to litigate or retaliate at the time of discharge. Other factors that should be measured include the role of mentoring, the role of providing ample notice regarding changes in the terms and conditions of employment, the perceptions of equality or inequality in the application of company policies,²⁰⁶ 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 marketable skills sets.²⁰⁷ It has generally been conjectured that such factors go to the core of employee expectations and influence an employee's feelings of injustice at the time of termination. From the perspective of law, this leads to a host of

²⁰⁶ In an examination of the effect of corporate mission statements on organizational decision making, one study asked in relationship to employees, "Do firms practice what they preach in their mission?" The answer 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 ed., 2d ed. 2010). The authors did indicate that despite the failure to practice what they preach, the incorporation of the employee as a stakeholder in the mission statement 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.*

²⁰⁷ Sherry E. Sullivan & Lisa Mainiero, *Women's Kaleidoscope Careers: A New Framework for Examining Women's Stress Across the Lifespan*, in *EXPLORING THE WORK AND NON-WORK INTERFACE* 205, 214 (Pamela L. Perrewé & Daniel C. Ganster eds., 2007).

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 for employees, 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 led to a school of ethics called the "ethics of care."²⁰⁸ Under such an approach, an employer does owe a greater duty of care toward 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 "concrete relationships."²⁰⁹

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 that are 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, on the employee's feelings at termination?

²⁰⁸ 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 (2009) ("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). See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

²⁰⁹ Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 624 (1990). The author explains that one "feminist strategy is to claim that women's distinctive attributes promote a distinctive form of understanding. . . . This 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.*

E. Employment Law: Past and Future

This Subpart 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 basis to reform employment law in the future. The merging of the legal and psychological employment contracts advances contract 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.

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 employee mobility—psychological contract theory is useful in assessing 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.²¹⁰ Contract law adjusts to novel developments in business transactions and to changes in societal norms. As the model of lifetime employment began to disintegrate, 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 questions the justice of the rule when it is applied to specific fact patterns. Judges move to prevent systemic injustices by fabricating exceptions to the general rule. In

²¹⁰ See generally LARRY A. DIMATTEO, *EQUITABLE LAW OF CONTRACTS: STANDARDS AND PRINCIPLES* (2001) (reviewing the equitable reformation of contracts in the twentieth century and the immutability of equitable contract principles); DiMatteo, *supra* note 126, 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).

utilitarian terms, the benefits of a general rule applied to a general area of law or society may be justified. Over time, however, it becomes clear that there are groups of similarly situated cases or fact patterns where the general rule produces unjust results. Rule utilitarianism justifies adopting an exception to the rule that yields greater benefits than merely applying the general rule across all cases. The key element in the rule-utilitarian approach is the importance of a category or group. The law should respond only when there is a well-defined and sizeable group that justifies an exception or a rule adjustment. 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 metaprinciples that cover potentially all contractual relationships. Their application is done on an *ad hoc* basis because each case is different in some way. Even though a workable definition of good faith may be out of reach, Professor Summers's excluder analysis can assist in determining types of bad faith.²¹¹ The court in *Busam Motor Sales v. Ford Motor Co.* described the essence of an excluder analysis: "It is possible that it would have shown certain acts or course of conduct . . . from which the required bad faith could be properly inferred."²¹² If such patterns of conduct reoccur in a significant number of cases, then those patterns lay 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 base 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. It is unlikely that the courts were familiar with the human resource management literature, and it is equally unlikely that the good-faith or implied-in-fact exceptions were the impetus for psychological contract theory. But both the development of the exceptions and of psychological contract theory respond to the same sense of injustice caused by the intentional breach of employee expectations whether the breach is recognized as a legal breach or

²¹¹ Summers, *The General Duty of Good Faith*, *supra* note 28, at 818–24.

²¹² 203 F.2d 469, 472 (6th Cir. 1953) (dealing with a termination of an automobile franchise).

not.²¹³ The exceptions close the gap between the psychological contract and the legal contract.

2. *The Future of Employment Law: Using the Psychological Contract 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 is 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 contracting 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 in employment termination law 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.²¹⁴ 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 and productivity) without incurring additional costs or providing additional remuneration. As the present study shows, unilateral actions taken by the employer (procedural fairness, substantive fairness, and education) influence

²¹³ Professor Estlund notes that because of the gap between the psychological contract and a legal contract the employer has it both ways in that it "enjoy[s] the benefits of employee expectations of legally enforceable job security without legal accountability." Estlund, *supra* note 172, at 7.

²¹⁴ Professor Estlund suggests closing the gap between psychological contracts and legal employment contracts by adopting a waivable default in favor of job security. *Id.* at 8. This forces the employer to obtain a waiver of job security from her employees. *Id.* This way, the employer cannot obtain the benefits of employee expectations of job security and the legal reality of employment at will. *Id.*

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 reduce employee and employer harm. The law uses descriptive understandings to convert a “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 psychological contract being recognized as a breach of a legal contract. The “must” version is best left to 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 or absolute requirements. However, courts can more adeptly adopt the “should” version. 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 employment law 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, the courts could perform 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.²¹⁵

²¹⁵ The practice of procedural fairness is likely to support the employee’s expectations of just-cause termination. 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 an outcome is positive or negative).

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 existing law. The sections below provide ways in which current law can be changed to 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. Elements of the psychological contract should be utilized in determining if an implied-in-fact contract has been formed.²¹⁶ 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 had been formed. Not every employee expectation should establish a contractual obligation because not every employee expectation is reasonable.²¹⁷ However, inquiry into the psychological contract can help illuminate otherwise opaque implied promises.

Second, the same rationale for making the implied-in-fact exception more universal supports the claim for expanding the good-faith exception. Implied-in-fact contracts capture the moment that reasonable employee expectations were created by the employer. The malicious creation of such expectations with the intent to procure employee-generated benefits can be captured by application of the good-faith exception. Because 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 good faith when terminating employees. Psychological contract theory can illuminate employee expectations; it can also help understand attitudes. To understand good faith, one must look to, among other sources, the attitudes and communications of the parties in their interactions with one another.²¹⁸ Psychological contract

²¹⁶ See DiMatteo, *supra* note 134, 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."); Stone, *supra* note 56, at 551–52 & n.110.

²¹⁷ See Bird, *supra* note 38, at 208–15.

²¹⁸ 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

theory can be used to trace employees' expectations to employer-employee or manager-employee interactions to support or refute 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.²¹⁹ 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 employee reliance on employer-generated expectations is reasonable, then a claim of promissory estoppel should be allowed to prevent an injustice to the discharged employee.²²⁰

All the requirements of a promissory estoppel claim—promise (express or implied), reasonable reliance, and injustice—are present in the breach of many psychological contracts at the time of termination. 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

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.'").

²¹⁹ See Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1 (1999).

²²⁰ 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.

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, Inc. v. Standard Oil Co. of California*.²²¹ Even though the courts have generally not elected to expand the tort of bad faith outside the realm of insurance law,²²² there is no reason why the tort theoretically cannot be applied to any type of contract. Nonetheless, it has been used primarily against insurance companies who fail to pay out legitimate claims in a timely fashion.²²³ The concept of bad-faith breach as enunciated in *Seaman's* could be applied to bad-faith termination in the employment setting. The *Seaman's* court based the claim of bad faith on the "special relationship" between the insured and the insurer.²²⁴ The employment relationship should be designated as such a special relationship. The *Seaman's* court described the special relationship of insured-insurer as "characterized by elements of public interest, adhesion, and fiduciary responsibility."²²⁵ 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.

Just as the tort of bad faith is based on a breach of an implied duty in an insurance contract, a tort of bad-faith termination can be fabricated based upon an implied duty in the employment context. An implied duty requiring good-faith termination would allow a claim for bad-faith termination despite the absence of an express

²²¹ 686 P.2d 1158, 1170 (Cal. 1984), *overruled by* *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 670 (Cal. 1995).

²²² The California Supreme Court subsequently rejected the application of the tort of bad faith to the employment relationship. *See* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988) (failing 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, 444 (Del. 1996) (confining the tort of bad faith to insurance cases).

²²³ *See* Arnold R. Levinson & Terrence J. Coleman, *Insurance Bad Faith Claims Are Not Preempted*, TRIAL, June 2001, at 30, 31 (noting that "many states' bad faith laws are limited exclusively to insurance claims."). *See generally* 16 RICHARD A. LORD, WILLISTON ON CONTRACTS: A TREATISE ON THE LAW OF CONTRACTS § 49:104 (4th ed. 2000).

²²⁴ *Seaman's Direct Buying Service Inc.*, 686 P.2d at 1666–67.

²²⁵ *Id.* at 1666.

employment contract.²²⁶ 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.

3. Summary

Because 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.²²⁷ 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. This is because not all psychological contract breaches are the same. This was alluded to in the literature distinguishing between perceived breaches that do, and perceived breaches that do not, rise to the level of a violation. Thus, like contract interpretation,²²⁸ whether a breach of the psychological 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;²²⁹ reasonableness of employee expectations; longevity of employment;²³⁰ teaching of firm-specific versus marketable skills;

²²⁶ Another analogy is the claim of tortious interference with business relations, which is not based upon an actual contract breach.

²²⁷ 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." Bird, *supra* note 38, at 195–215.

²²⁸ Classical contract law was more 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 formed. Relational contract law broadens the contextual factors that should be considered in interpreting and enforcing contracts.

²²⁹ "Corporate culture has been defined as an internal consistency within an organization that influences the behavior and values of its employees." Bird, *supra* note 38, at 180.

²³⁰ See Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH L. REV. 8 (1993). Furthermore, "employers, particularly leaders of a company, have a profound impact upon the development, nature, and characteristics of employees' cultural norms." Bird, *supra* note 38, at 183.

and so on. If the implied-in-fact or good-faith exceptions were fully recognized, then 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 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 minimal 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 of 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 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 employee views the employment termination 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, creation of negative reputational effects for the employer, or 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 discharge of employees is not only ethically correct, but is cost-effective from the perspective of the employer.

This Article presented 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 involving procedural or substantive unfairness were positively correlated with increased propensities to retaliate and litigate. In scenarios involving both procedural and substantive unfairness, the effect on the propensity to retaliate or to litigate was amplified. 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 about 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 unfairness or injustice at the time of discharge. The reason for being terminated, as well as the process by which an employee is discharged, influence the employee's reactions to being discharged. Termination for a fair reason is helpful, as is implementing a fair process for termination. When both are present, the rates 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, thus reducing rates of retaliation and litigation.

Psychological contract theory can be used to explain the creation of the existing exceptions to the employment-at-will doctrine. Psychological contract theory also can be used as a guide to reforming employment law. This reformation can be done by a wholesale change from the employment-at-will to a just-cause-termination legal regime. This, however, is unlikely to happen, and 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 may achieve the same goal. Such reform is not solely for the benefit 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, which will produce benefits for employers and 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 substandard 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 two-week notice of discharge.

True to the process outlined in the Manual, you received your first review at the six-month mark. That review did indeed include a "Notice of Substandard 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 six-month review again included a "Notice of Substandard Evaluation" along with a notice that you would be given a three-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 from 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 three-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 substandard 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 two-week notice of discharge.

Your first six-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 Substandard 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 a new manager for a full year.

Unfortunately, you have been advised that your job performance is substandard. You find the work especially difficult and fall behind the performance numbers of most of your coworkers. 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. Another company

hired the manager who hired you soon after your arrival, and you have worked under a 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 is 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, AND EDUCATING

3.1 *No Law Cueing*

The new employee 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-à-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, courts may imply a duty on the employer to “act in good faith” in the discharge of an employee. Therefore, giving an insincere reason for firing any employee may lead to a claim 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. 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 states that: THIS MANUAL AND THE POLICIES CONTAINED WITHIN ARE GIVEN TO YOU FOR INFORMATIONAL 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	Disagree	Not sure	Agree	Strongly 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	Disagree	Not sure	Agree	Strongly 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 the 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 is 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.

1	2	3	4	5
Very Unlikely	Unlikely	Neither Unlikely nor Likely	Likely	Very Likely

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 my time to help others who have work-related problems.
35. Adjust my 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 non-work 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 coworkers about non-work topics on work time.
51. Leave my workstation 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 my 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 coworkers.
64. Deliberately bend or break a rule or rules.
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.

1	2	3	4	5
Very Unlikely	Unlikely	Neither Unlikely nor Likely	Likely	Very Likely

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-art 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.