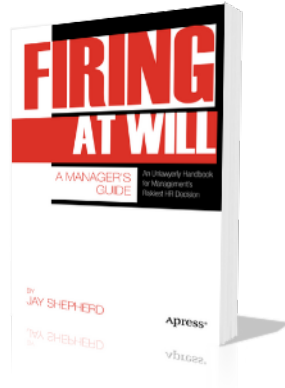


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## CHAPTER

# 1

# “At Will” Is Alive and Well

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I love baseball. I'm from Boston, so being a member of Red Sox Nation is a birthright. I don't get to Fenway Park as often as I'd like, so I watch a lot of games on TV and listen to many on the radio. Because baseball has a distinct rhythm to it, it's easy to have the game on and still work on something else (like writing this book). I can bang out a sentence or two between pitches, and then look up at about the right time to see the next offering to the plate.

When you listen to a lot of games on the radio, you pick up a lot of the sayings and automatic jokes that the announcers use. For example, if a player gets injured and comes out of the game, the team will often make an announcement that the player is listed as “day-to-day.” In other words, he's not expected to go onto the disabled list, but it's uncertain whether he'll play in tomorrow's game. Almost inevitably, after telling the radio audience that so-and-so is day-to-day, one of the announcers will add the following quip: “As are we all.”

That might get a knowing chuckle, but in many ways it's true. In the American workplace, nearly all workers are listed as “day-to-day.” And it's true in a sense. Unlike baseball players, who sign contracts for one or more seasons, most American employees do not work under contract. Instead, they work day-to-day, with their next day's employment at least metaphysically uncertain.

This is because most US workers are employees *at will*.

## Employed at Will

Being an at-will employee means that you are subject to the ancient, common-law, at-will doctrine. In other words, you are employed as long as both of you—the employer and the employee—wish you to be employed. Neither one of you owes the other any commitment about the future. The employer can fire the employee for almost any reason or for no reason at all, with or without warning. The employee can likewise quit for any reason or for no reason at all, with or without warning. It might sound a bit harsh and unfeeling, but it actually is a very fair arrangement. Both the employer and the employee have equal discretion to end the employment relationship.

The opposite of an at-will employee is a contractual employee. Most American workers operate without an actual contract for a specific term of service. Exceptions include professional baseball players and other sports figures, movie stars, and senior corporate executives. Also, employees in a unionized workshop who are subject to a collective-bargaining agreement are also considered contractual employees. But the overwhelming majority of US employees are employed at will.

## A Dying Doctrine?

Many commentators think that the at-will doctrine is an antiquated concept, that it is under attack from courts and legislatures, and that it will soon be extinct. A Google search for the phrase “employment at will” with the word “death” made at the time of this writing (September 2011) yields more than 100,000 hits, many of them law-review articles and blog posts that are either advocating for its demise or bemoaning it. Over the years, I’ve had many employer clients tell me that they thought the at-will doctrine was dead or dying. It’s understandable why they’d come to that conclusion. But it’s also wrong.

The at-will doctrine is alive and well and living in the United States (almost exclusively; unlike Coca-Cola and rock ’n’ roll, it has not been one of our more successful exports). But the scope of the doctrine has narrowed over the past few decades. Or to be more precise, the exceptions to the at-will doctrine have grown. This has led many people (especially frustrated employers) to wrongly conclude that the concept has weakened or failed altogether.

Understanding the exceptions to the at-will doctrine will help employers lower their risks of employee lawsuits. There are three major exceptions, and employers need to consider them before firing an employee. They

are the public-policy exception, implied-contract exception, and statutory exception.

## Blowing the Whistle

The public-policy exception is a pretty narrow one. Think “whistleblower.” If an employee drops a dime on your company, telling the government that you’re hiring illegal immigrants, or selling arms to terrorists, or filling your hamburgers with sawdust, you’re not free to fire the employee for that. The thinking behind this is that society wants people to report bad things happening, and it figures that people would be less likely to do so if they thought that their employers would legally be able to fire them for it. In this case, the public-policy concerns for preventing lawbreaking outweigh the freedom to fire at will.

It doesn’t have to be something particularly serious, either. Let me give you an example from one of my past cases. I once had a small engineering company as a client. They had a guy—let’s call him Calvin—who worked as a fairly low-level clerk.

## A Royal Pain

Calvin wasn’t a great employee; in fact, he was a royal pain. We’ve all known a Calvin or two in our day. He was always moping around, complaining about pretty much everything, and dragging down workplace morale. His life, according to him, was an endless series of minidramas in which everyone else played the roles of the bad guys. He was always the victim. Calvin was competent enough at his job; his performance always hovered above the level of “barely acceptable.” It was his attitude that was the big problem.

Unfortunately, the owners of the company were nice guys, and a little too timid as managers. Like so many people, they preferred to avoid conflict and just focus on the work they were doing. If Calvin’s performance had been worse, they might have fired him a long time before. But he coasted along, complaining all the way.

Finally, after years of putting up with this, Calvin’s attitude started to decline. He didn’t like his assignments. He didn’t like his pay raises (they were minimal). He didn’t like his coworkers (that feeling was surely mutual). The owners’ patience also declined. They finally made the decision that it was time to let Calvin go because of his declining performance. Unfortunately, they procrastinated and delayed having the meeting with him to discuss it. In fact, it took more than a month for them to actually do it.

But in the meantime, there was a foul stench in the workplace. Not figuratively. Literally.

## The Rotten-Egg Smell

One of the particular bees in Calvin’s bonnet was that on certain days, an unpleasant odor like that of rotten eggs would waft up from the building’s basement. The building was over a hundred years old in a crowded neighborhood just outside Boston. There seemed to be no rhyme or reason as to when the smell would worsen; sometimes on hot days, sometimes on cold days. It didn’t smell bad every day. It was actually a rare occurrence. Everyone noticed it from time to time, but it only became a *cause célèbre* for Calvin.

The company’s management had taken it seriously. They’d hired a contractor specializing in molds and whatnot to come in and check it out. Then they had hired a special kind of plumber who specialized in sewer stuff (now there’s a career for you). They put in fans and humidifiers and dehumidifiers. Nothing seemed to work. And nothing would stop Calvin from complaining about it.

Finally, during the month in between the decision to fire him and the actual termination, Calvin decided to take matters into his own hands. Without his bosses’ knowledge, he placed a phone call to the city’s board of health. They sent an inspector to come check it out. The company owners weren’t thrilled at the surprise visit, but they granted the inspector access to the basement and openly answered all his questions. The inspector came to the same conclusion that the other experts had: that it was a weird phenomenon, certainly unpleasant, but not dangerous. He then departed, satisfied that the company had done everything it could have.

Calvin’s boss made it clear that he was angry at Calvin’s decision to call the health board without consultation. It had created an embarrassing situation, and it had been disrespectful. But he didn’t punish Calvin in any way, and that was the last time they discussed the call.

A short while later, the previously scheduled performance-review meeting took place and Calvin was fired.

## A Situation That Stinks

You can see where this is headed. Calvin, of course, lawyered up, and his story was that the company fired him because he “blew the whistle” about the rotten-egg smell. The case was litigated in federal court for two years.

Legally, we had a pretty good argument in defense. Complaining about a rotten-egg aroma isn't what the law usually contemplates for the public-policy exception to the at-will doctrine. Public policy protects an employee who is fired for asserting a legal right, doing what the law requires, or refusing to do what the law forbids. Merely complaining about a smelly basement that was not a health hazard didn't cut it.

What is more, Calvin had to prove that the real reason he was fired was because of his dime-dropping; not because of his lousy performance and attitude. This was going to be hard for Calvin and his lawyers to do, because the employer had documented his shortcomings and because the termination meeting had been scheduled before Calvin called the health department.

But even with the law on our side, the federal judge was unwilling to dismiss the case. He concluded that a jury could possibly find that the real reason the company fired Calvin was because of his so-called whistleblowing. So the judge allowed the case to head toward trial, but warned Calvin's lawyer that a jury would probably rule against him. At the judge's urging, we went to mediation, and ended up settling the case. Between legal fees and the settlement, the employer spent a ton of money. Bottom line: defending a lawsuit relating to the public-policy exception can be very expensive.

## Unintended Consequences

The second major exception to at-will employment is the implied-contract exception. This is where the employer has effectively created a contract with its employees, even though it didn't mean to. In a word: oops.

You'd be amazed how often this happens. And it's usually a situation where a well-meaning employer (or its human-resources team) thought that it was merely laying down some rules to improve the workplace. Maybe you've spent time in a workplace like that. Maybe your company is like that now.

These are the workplaces where the employers try to legislate behavior with complicated, detailed rules and codes of conduct. Typically, they have felt burned in the past by problem employees who have taken advantage of their good nature or largesse. *Never again*, they say, as they set about crafting the personnel manual to end all personnel manuals.

## Manual Overdrive

I can generally tell that this has been the case as soon as I start reading a company’s manual. For example, they’ll have an overly detailed bereavement-leave policy, explaining exactly what degree of relatedness is required for an employee to get time off to go to a family funeral. One of the most amazing examples I ever encountered was the bereavement policy at Alabama Agricultural and Mechanical University back in 2007 (the language dates back to 1993). Here it is verbatim in all its glory:

Staff members shall, upon request, be granted up to three (3) days annually of bereavement leave for the death of a parent, spouse, child, brother or sister, grand parents [sic], grand parents-in-law, grandchild, son or daughter-in-law, mother-in law, father-in-law, brother-in-law, sister-in-law, step children, children-in-law, aunts, uncles, nieces, nephews, and first and second cousins. Other relationships are excluded unless there is a guardian relationship. Such leave is non-accumulative, and the total amount of bereavement leave will not exceed three days within any fiscal year. If additional days of absences are necessary, employees may request sick or annual leave, after providing an explanation of extenuating circumstances.

The AAMU bereavement policy is robotically impersonal. Imagine being a valued member of the faculty or staff, losing a family member, and then having to parse that gobbledygook. Imagine an employer docking an employee’s pay after she lost her father because the travel involved pushed her over the “nonaccumulative” three-day limit? Absurd.

Another area where this sort of ridiculousness crops up is in dress codes. It happens when bad HR directors or clueless managers become flummoxed by the revealing or otherwise inappropriate outfits of their employees. *Uh-oh, we can’t have that.* And then they start typing up a dress code, trying to regulate against every possible fashion faux pas. I once read the dress code of a banking association that actually specified what kinds of underwear could and could not be worn (thongs: no; granny panties and tighty-whiteys: yes; boy shorts: not yet invented). The Swiss banking giant UBS famously banned employees from having garlic at lunch or wearing “socks with cartoon motifs.”

## Progressively Worse

The worst type of personnel policy is the progressive-discipline policy, where the HR folks have legislated what type of bad behavior will get you in trouble at work, and what that trouble will look like. It's called "progressive" because the level of punishment tends to increase with the number and seriousness of the offenses. A first offense might merit a "verbal warning." ("Verbal" in this sense means "spoken," as opposed to "having to do with words." Otherwise, all warnings would be verbal, unless they were spelled out in handy pictograms as on an airplane's flight-safety card.) A second offense might lead to the so-called "written verbal warning," a fine piece of redundancy if there ever was. Subsequent offenses might merit probation, suspension, or termination.

Doesn't sound like a problem at first, does it? I mean, you can't have employees running around helter-skelter, willy-nilly, and pell-mell. (And why do we like these rhyming words to describe chaotic behavior? Never mind.) This is a place of work; we need to enforce certain codes of conduct so that people act professional. Right?

I get the underlying sentiment; I really do. But HR folks, well-meaning as they are, sometimes go too far with the legislating. This usually happens at places that have been burned by bad employees. Managers and human-resources people will long remember when a bad employee has taken advantage of the company's permissive atmosphere. And they'll vow to prevent it from happening again.

One of the problems with this is that you end up throwing out the baby with the bathwater. You're playing defense instead of offense. You're worrying more about the bad employees (who I trust make up only a small part of your workforce) than about the good employees (who make up the bulk of your team). Worse, you end up restricting or even effectively punishing the good employees in your quest to stop the behavior of the bad employees. You end up making it a less-fun place to work, which then makes it a bad place to work, which then drives away the good employees. Oops.

But the biggest problem with progressive-discipline policies is that they have the tendency to create semicontractual relationships between the company and the employees. Many courts around the United States have concluded that the presence of a progressive-discipline policy alters the at-will status by changing the terms and conditions of employment. In essence, the employer is setting forth the disciplinary policy and the employee is (at least implicitly) agreeing to be bound by it. Presto! You have a contract. Ish.

By creating this paradigm of discipline, you’ve now lessened your ability to fire employees at will. Ironic, isn’t it?

## A Customer-Service Breakdown

This scenario came back to haunt a coffee stand that had created a progressive-discipline policy for its workers. Host Marriott Corp. held the Dunkin’ Donuts franchise in Terminal B at Boston’s Logan Airport. This was a small, busy location serving harried air travelers before they headed through security.

One of their employees, a guy named Ferguson, apparently had a poor attitude and deficient customer-service abilities. One customer, unfamiliar with the Dunkin’ offerings and out of step with the rush-hour bustle, asked a few too many questions of Ferguson. “What is the special coffee today?” he asked. Ferguson replied, “Nothing much.” The customer stormed off, and a supervisor went after him to apologize. Afterward, the company fired Ferguson, understandably deciding that this was not the proper way to treat customers. Naturally, he sued.

Unfortunately for Host Marriott, its discipline policy was too specific, listing 11 specific acts that would lead to an employee being summarily dismissed. This list included things like fighting, drunkenness, gambling, and weapons possession. Strangely, it did not include mistreating customers. For this reason, a Massachusetts court allowed the lawsuit to proceed, concluding that the company should have first given Ferguson a warning under the policy. While the case eventually settled, it ended up taking years and costing hundreds of thousands of dollars to litigate. All because of a progressive-discipline policy.

In this case, a well-meaning HR department came up with a list of what it wanted to prevent—namely, drinking, fighting, gun-toting gamblers (apparently, they thought they were in the Wild West instead of a major metropolitan airport). But in drawing up their list of cardinal sins, they overlooked the basic concepts of being a good employee and treating customers right. They could successfully fire an employee for something as obscure as gambling (not a lot of room for a craps game in the tiny airport coffee stand) but not for interfering with the company’s sole mission of serving customers well. This is a problem with progressive-discipline policies and many personnel policies in general. Better to treat your employees like grown-ups and focus on the company’s purpose.

## The Letter of the Law

The third and final major exception to the at-will doctrine is the statutory exception, where state or federal laws have explicitly limited an employer's ability to fire workers. These statutes generally prevent employers from firing people because of what type of person they are, or because they've done certain things.

The most common type of statutory exception comes from state and federal antidiscrimination laws, which make it illegal for an employer to fire a worker because of the employee's membership in a certain protected category. These categories vary among the states and the federal government, but they generally include race, color, national origin, religion, gender, age, disability, pregnancy, and sexual orientation. Firing someone for any of these reasons is illegal, and these laws give rise to many lawsuits. I discuss these categories in greater detail in Chapter 4.

Then there are the statutes that give employees freedom to do certain things without fear of termination. For example, the federal and state governments feel so strongly that employers must properly pay wages that employees are free to question and complain about wage issues without any risk of retaliation. Often, an employee who has a weak wage claim will have a successful retaliation case because the company mishandled the complaint. Employees who complained about discrimination enjoy the same protection.

Similarly, there are various whistleblower statutes that guarantee employees freedom from retribution if they report certain things to the authorities. (This is similar to the public-policy exception discussed above.)

Employers need to be aware of these statutory exceptions before deciding whether to fire an employee. I'll discuss many of them in the chapters to come. But your employment counsel will be able to explain all the different exceptions that apply to your company under the laws of your jurisdiction.

## Conclusion

Most US workers are employees at will. And contrary to what you may have heard, the at-will employment doctrine is still alive and well. Of course, the freedom to fire at-will employees is not unfettered. Managers need to be aware of the public-policy exception, implied-contract exception, and statutory exception to doctrine. But as long as they keep them in mind, employers remain largely free to shape and refine their teams as they see fit.

## Well? What'd you think?

If you liked this chapter, you're in luck. It was probably the worst chapter of the book. The rest of the chapters won't even talk to this chapter, they're so much better. In fact, after reading those chapters, your mind will probably blot out your memory of this one.

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Thanks!