

A PRELIMINARY STUDY OF PROCEDURAL DUE- PROCESS STRUCTURES IN THE NORTH CAROLINA PRIVATE SECTOR

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INTRODUCTION

The uniquely American concept of and emphasis on due process has pervaded the public-sector for years recognizing crucial individual rights concerning employment practices. It is firmly entrenched in our laws that a public-sector employee may not be terminated or even disciplined unless just cause is shown through the exercise of due process mechanisms.¹ Public employment is a Fourteenth Amendment property right terminable only upon the administration of due process.²

However, these very basic notions have not been mandated in the private-sector. Except for EEO provisions or bargained-for contractual rights, most private-sector employees have no basic due process job protection; this is clearly evident from the court cases despite the fact that 65%+ of all American employees are hired on an at-will basis.⁵ This development rises

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¹W. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. CL 1487 (1985) citing to Board of Regents v. Roth, 408 U.S. 564 (1972) *inter alia*.

²This, of course, gives rise to the distinction between substantive and procedural due process. Essentially procedural due process pertains to the mechanisms of decision-making (i.e. the process) while substantive due process pertains to the result of the decision-making (i.e. the decision itself); often, these two concepts blur and in many situations it is difficult to see a clear demarcation between the two. Moreover, as Cleveland Board of Education v. Loudermill cited above in fn.#1 notes "...where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated..." *id.* 540.

⁵U.S. Bureau of the Census, Dept. of Commerce, Statistical Abstract of the United States (1967), tables #693 and #661; figures extrapolated from these tables show the latest figures from 1985 indicating 17% of wage and salary workers in public employment; 18% belonging to unions;

from the strong concept of freedom of contract, a nineteenth century product of laissez-faire economic theory/

The at-will doctrine has historically held that employees hold their jobs solely at their employers' discretion. However, the legislative and judicial assault on this doctrine has begun. Under the rubric of fairness or realization of the fundamentally unequal employer-employee relationship, many states have and are modifying this basic doctrine, though no jurisdiction has abandoned it completely.⁵

The legal research to date in this area focuses on the etiology and development of these modifications. This emphasis is on the legal environment, with "legal environment" being defined as the cumulative rule-making processes and results of both legislative and judicial decisions. While this emphasis is the natural and desirable starting point for inquiry into the area, it only provides half of a picture. Clearly, an understanding of the status of the law is the important starting point (as the research has definitively provided) in this research field; however, this inquiry must be extended to determine the effect of that legal environment onto and within the marketplace itself ("application" as well as "theory").

In order to do this, research must first determine the status of the marketplace in regard to basic at-will employee due process rights. Once that is determined then a cause-and-effect analysis can be made concerning the legal environment and the marketplace environment. Schematically this paradigm can be described as illustrated in Figure 1 below.

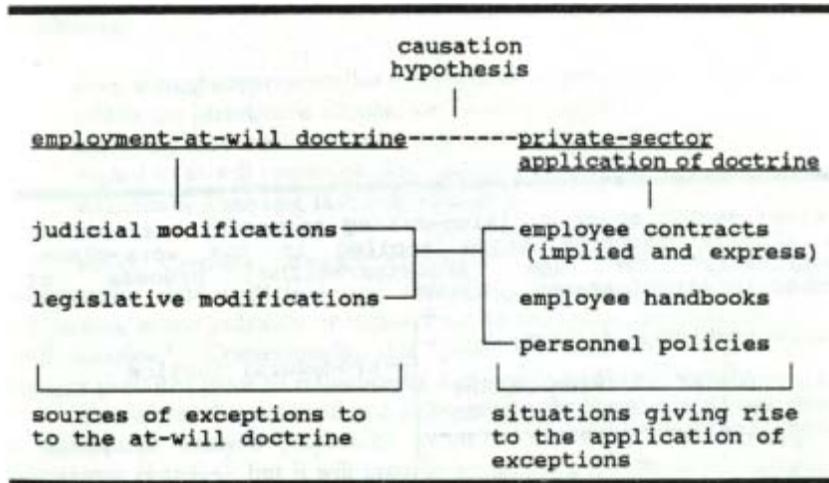
The legal literature to date focuses on the left area of the model only. Little work has been one in ascertaining the model's right-area information; this includes: how employers are conducting discipline/termination situations; what policies, if any, have the employers implemented for such situations; and, what are the constituent elements of such policies.

65% as being neither government employees nor union members.

⁵See generally, Pierce, Ellen, *et al.*, *Employee Termination At Will A Principled Approach*, 28 VILLA. L. REV. 1 pp. 3-7 (November 1982); Maulc, William *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. pp.201-207 (1985); comment, *The Employment-At-Will Doctrine: Time To Collapse Another Citadel*, 11 UNTV. OF DAYTON L. REV. pp. 399-402 (1986).

⁶For a comprehensive state-by-state review of exceptions to the at-will doctrine, see Commerce Clearing House, Inc. *Employment Relations* binder series, 'Employment-At-Will' (1987 edition pp. 551-683; paragraphs 400-499).

Figure 1



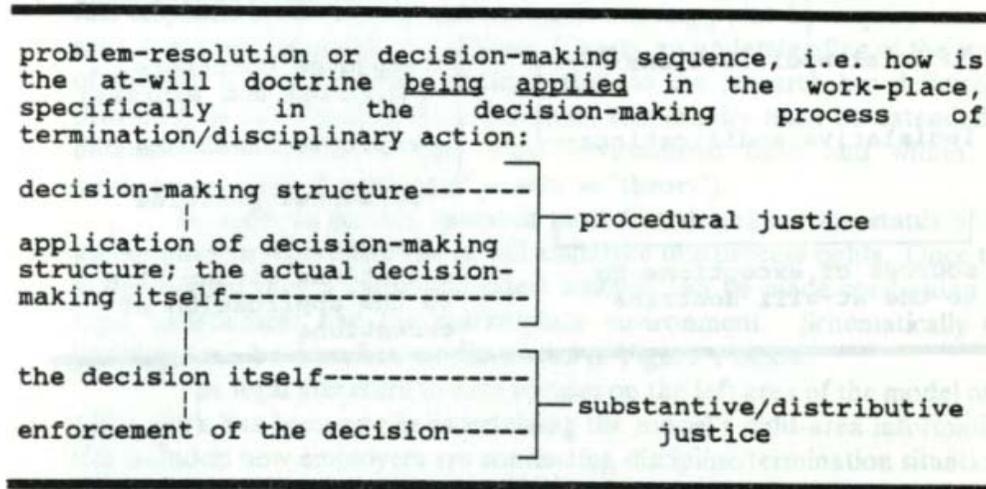
This questioning, however, delves not only into the applied area of the employment-at-will doctrine, but also into the concepts of justice, fairness, and procedure. Much work, seminal in nature, has been published exploring the notions of procedural justice and substantive justice, or more commonly known in the literature as distributive justice.⁶ The interrelation between these two concepts is schematically diagrammed in Figure 2 below.

This distinction between procedural and distributive justice is crucial in understanding this paper's data and the conclusions incumbent upon that data. Procedural justice looks to the fairness (both perceived and/or actual) of the mechanism or logistics of decision-making. The process is the focus of

⁶For a recent, comprehensive overview of the concept of "distributive justice," see Ronald L. Cohen, *Distributive Justice: Theory and Research*, 1 SOCIAL JUSTICE RESEARCH 1, pp. 19-40.

analysis.⁷ Distributive justice, on the other hand, looks to the fairness (again, both perceived and/or actual) of the decision itself, regardless of how the decision may have been reached.

Figure 2



This information is essential in determining a composite profile of a jurisdiction's private-sector employment environment and in subsequently determining the market forces at work in employer-employee relationships. Moreover, this information and subsequent analysis provides the structure for

⁷See generally Thibaut and Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978); Thibaut, Walker, LaTour, and Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); THIBAUT AND WALKER, *PROCEDURAL JUSTICE* (Lawrence Erlbaum Associates, Publishers: Hillsdale, New Jersey 1975); GREENBERG AND TYLER, *Why Procedural Justice in Organizations?* 1 SOCIAL JUSTICE RESEARCH 2, p. 127; FOLGER AND GREENBERG, *Procedural Justice: An Interpretive Analysis of Personnel Systems*, 3 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 141 (1985).

the methods in which we may measure the effect of the changing at-will doctrine in the private-sector, as diagrammed in Figure 1.

Protocol: North Carolina Sampling

The methodology for gathering this threshold information consists of the following:

1. determining a representative cross-section of private-sector employers within the jurisdiction chosen, i.e. North Carolina;
2. surveying that cross-section as to personnel policies and practices in regard to at-will employee discipline/termination;
3. statistically analyzing that empirical data.

North Carolina provides an excellent laboratory for employer policy/practice data collection and analysis. The state has done little modification, either judicially or legislatively, to the traditional employment- at-will doctrine.⁸ Consequently, this "purer" environment may uncover employer practices prior to influence by a changing legal environment.

Therefore, this data will not only provide the threshold information for subsequent analysis (especially as or if the North Carolina legal environment changes); but it will provide an accurate profile of the current North Carolina employer-employee environment in the private-sector.

Essentially then, in order to gauge or measure the effect of the changing at-will doctrine on the private-sector (i.e. the "causation hypothesis" illustrated in Figure 1), the threshold questions which need answering first are: what are the indicators of that causation hypothesis?; what are the indicators revealing?; and, how do the indicators reveal such information?

The paradigmatic model (Figure 1) identifies three primary indicators of private-sector activities regarding the at-will doctrine: employee contracts, employee handbooks, and personnel policies. This paper focuses only on the "personnel policies" indicator.

In order to analyze further this one, specific indicator of private- sector behavior regarding the at-will doctrine, this paper proposes that the indicator itself is bifurcated into its two components: procedural justice and substantive or distributive justice. As Figure 2 above proposes, procedural justice is further bifurcated into its two components: the decision-making structure itself and the use or application of the structure in the decisionmaking process. This paper focuses only on the identification and analysis of the first part of that bifurcation, the decision-making structure.

⁸See *Sides v. Duke University*, 74 N.C.App. 331,328 S.E.2d 818, *disc. rev. denied* 314 N.C 331, 333 S.E.2d 490 (1985); *Coman v. Thomas Manufacturing Co.*, 91 N.C.App. 327,371 S.E.2d 731 (1988), 325 N.C. 172, 381 S.E.2d 445 (1989).

The decision-making structure is founded upon the traditional (albeit at times ambiguous) notion of "procedural due process."⁹ The question being posed is "to what degree do procedural due process structures exist in North Carolina's private sector?" "Procedural due process" incorporates the following fundamental components:

1. availability of personnel policies for employee review;
2. "mandatoriness" of policies (rules vs. "guidelines");
3. mechanics of employee notification of impending discipline/termination;
4. availability of forum;
5. opportunity for employee to rebut or refute;
6. individuals present at meeting;
7. appellate or further review;
8. employee evaluation procedures.¹⁰

Responses pertaining to these eight components are then factored as either complying with minimal procedural due process requirements or not complying as explained by Figure 3 below which utilizes these eight due process components.

"An essential principle of due process is that a deprivation of life, liberty, or property Tx preceded by notice and opportunity for hearing appropriate to the nature of the case'...[t]he essential requirements of due process...are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Board of Education v. Loudermill, supra*. 542, 546 (citations omitted).

¹ "Granted, these "fundamental" elements are not yet mandated entirely in the public-sector, much less used as a definitive guide for private-sector comparison; moreover, the attempt to delineate precise procedures is itself contrary to the nature of due process. As Justice Brennan noted in his concurrence in *Cleveland Board of Education v. Loudermill, supra* "...[the] Very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'." *id.* 553 (citation omitted).

Yet, these elements are extrapolations and logical consequences from the Supreme Court's recognition that notice and the opportunity to be heard are, indeed, crucial to due process. Other elements, such as the existence of an appellate-type process, simply reflect due process-like practices already incorporated into our legal system.

Figure 3

minimal procedural due process	
satisfied:	not satisfied policy
1) policy available for employee review	not available
2) policies are mandatory	policies not mandatory
3) employee is notified in writing all of some of the time depending on the circumstances	employee is never notified in <u>writing</u>
4) employee is afforded a meeting to <u>discuss</u> impending action	no meeting
5) employee is permitted to present evidence or give statement to rebut impending action	no employee evidence or statement permitted
6) supervisory personnel above immediate supervisor are present	no one above employee and immediate supervisor are present
7) there is an "appeals" process for the aforementioned action	no appeals process
8) employee evaluation procedure present	no evaluation procedure
9) evaluation more frequent than yearly	evaluation yearly or at even greater intervals

SURVEY METHODOLOGY

The survey sample was chosen through a database of North Carolina companies compiled by Data-Search, a North Carolina company located in Pittsboro, North Carolina. This company has compiled a database of approximately 3600 North Carolina businesses with annual sales of at least one million dollars or, if a financial institution, with assets totaling at least one million dollars. Where annual sales amounts were unobtainable, a minimum of ten employees was used as the basis for inclusion in the database.

This project focused on businesses in the database with one hundred (100+) or more total employees. This resulted in a sample of one thousand two (1002) businesses being identified. Between November 1989 and May 1990, these businesses were then contacted by phone, notified of the survey being mailed to them, and asked to whom the survey should be directed. The survey was then sent to the attention of that person within four days of the telephone contact. Businesses with disconnected phone numbers, no answer, or who were unwilling to participate were removed from the mailing list. Moreover, duplicate companies (i.e. holding companies, parent-subsidiaries) were also eliminated from the list. There were 147 deletions lowering the sample pool to 855 businesses surveyed. The survey used is attached as [Figure 4](#). Of the 855 businesses surveyed, 391 responded for a survey response rate of 45.73%.

EMPIRICAL DATA

As Figure 3 above illustrates, the question posed in this paper is "Do procedural mechanisms exist in North Carolina's private sector for administering due process in at-will employee discipline and termination?" Nine substantive questions were posed to the sample polled and the results indicate a surprisingly high percentage of such procedural mechanisms in place; this is especially noteworthy since North Carolina is a jurisdiction which judicially and legislatively supports a strong at-will environment.

Moreover, answers indicating the existence of such mechanisms have a moderate-to-strong degree of positive association with each other. Specifically, the results were as follows:

Note: Yes answers support the hypothesis that procedural mechanisms are in place.

1992/Procedural Due-Process Structures/69

1. Question: Does your company have a mandatory personnel policy concerning at-will employee discipline and termination?
total % 66% yes 34% no

2. Question: If you answered "yes" to the above question, is this policy available for employee inspection and review?
total % 98% yes 2% no

3. Question: Does your company notify an at-will employee of impending discipline via a written statement?
total % 80.8% yes 19.2% no

4. Question: If an employee is to be disciplined or terminated, is the employee offered a meeting in order to discuss the impending action?
total % 93.9% yes 6.1% no

5. Question: If the employee is afforded a meeting, does the employee have the opportunity to present a statement or evidence on his own behalf?
total % 94.9% yes 5.1% no

6. Question: If employee is afforded a meeting, are more than just employee and immediate supervisor present?
total % 59.1% yes 40.9% no

7. Question: Does the employee have an appeal process other than the aforementioned hearing?
total % 48.3% yes 51.7% no

8. Question: Does your company provide for an employee evaluation procedure?

total % 80.3% yes 19.7% no

9. Question: Are employee evaluations administered more frequently than annually (i.e., monthly, quarterly, semiannually)?

total % 29.2% yes 70.8% no

Figure 4

Figure 4 is condensed for purposes of illustration only.

1. What is the number of at-will (i.e., non-union, non-contractual) employees which your company employs?

Comments:

2. Does your company have a mandatory personnel policy concerning at-will employee discipline or termination?

___ yes _____ no

Comments:

3. If you answered yes to Question #2, is this policy available for employee inspection and review?

___ yes _____ no

Comments:

4. If your answer to Question #2 is no, does your company have a discretionary or recommended procedural policy for employee at-will discipline or termination which supervisory personnel may employ?

___ yes _____ no

Comments:

5. If your answer to either Question #2 or #4 is yes, please answer the following questions:

A. Does your company notify an at-will employee of impending discipline via a written statement?

- all the time
- some of the time depending on the nature of the discipline
- no written notice is given, but the employee is notified orally
- no notice is given at all

Comments:

- B. If an at-will employee is to be disciplined or terminated, is the employee afforded a meeting in order to discuss the impending action? yes no

Comments:

- C. If the employee is afforded a meeting, does the employee have the opportunity to present a statement or evidence on his own behalf? yes no

Comments:

- D. If the employee is afforded a meeting, who is present?
- immediate supervisor
 - department or middle management
 - upper management (plant or divisional management)
 - personnel officer
 - other (please identify)

Comments:

- E. Does the employee have an appeal process other than the aforementioned meeting? yes no

Please briefly describe:

6. Does your company provide for an employee evaluation procedure? yes no

Comments:

7. If you answered yes to Question #6, what is the frequency of these evaluations?
- monthly quarterly
 - semiannually annually
 - other (please describe)

Comments:

General Comments:

OBSERVATIONS

With the exception of the last question concerning frequency of employee evaluations,¹¹ the responses indicate a moderately high degree of due process mechanisms in place in the private sector. Moreover, the interrelationships between questions 2,3, and 4 (as illustrated on the actual survey - see Figure #4) show a surprising degree indicating the establishment of due process types of mechanisms.

Question #2 — "Do you have a mandatory personnel policy...?" -- broke down, as indicated above, 66% answering "yes" with 34% answering "no." When breaking this down further, the data shows that 98% of those indicating a mandatory personnel policy for at-will employees had that policy available for employee inspection and review. Moreover, of those surveys indicating no mandatory personnel policy, 84.7% indicated that a discretionary policy was in place. This data broke down as follows:

Question #4 (see Figure 4)

Question: If your answer to Question #2 is no [i.e., there is no mandatory policy concerning at-will employee discipline or termination], does your company have a discretionary or recommended procedural policy for employee at-will discipline or termination which supervisory personnel may employ?

total % 84.7% yes 15.3% no

Consequently, only 5.1% of the entire survey responses did not indicate some sort of procedural guidelines, either mandatory or discretionary, regarding at-will employee termination or discipline with the clear majority of 66% indicating a mandatory one.

The number of at-will employees each of the respondents employed showed a great variance and subsequently must be considered when viewing the data. Of the 386 employees responding to this question (of the 391 total employer-respondents) 44, or 11.4%, had less than 100 at-will employees. At the other extreme, 60 respondents employed 1000+ at-will employees. The

¹¹This last question is clearly the most arbitrary of the survey. If employee evaluations are given at intervals of less than a year (monthly, quarterly, semi-annually), then the response was rated as one satisfying minimal due process requirements. If the response was that employee evaluation intervals were one year and/or more, then the response was rated as one not satisfying minimal due process requirements. There is really no basis for the one year destination here other than as an arbitrary measure. Yet, the immediately preceding question somewhat compensates for this arbitrariness in that responses indicating an employee evaluation procedure were rated as one satisfying minimal due process requirement.

mean number was 773 employees with the range being 25-20,000 employees. At the lower end were four employers with less than 40 at-will employees; at the higher end were four employers with 10,000 or more (one with 10,000; 2 with 15,000, and 1 with 20,000 at-will employees).

CONCLUSIONS

Amid the cries for the elimination of the at-will rule, one senses a great deal of urgency.¹² There is no doubt, at least from an objective viewpoint, that the at-will rule is unfair and can be used to justify employee abuse. Placing an employee's property right in his or her business over the economic necessities of at-will employees offends reasonable late-20th Century sensibilities. It conjures up notions of 19th Century laissez-faire capitalism, a reality which simply does not exist now as it did a century ago.

Yet, the cries for change, legitimate as they are, beg the question: Is legislative regulation truly needed and, if so, to what degree and extent? Despite the self-serving nature and resulting unfairness of the at-will rule itself, is the market responding to the growing outcry by implementing due process procedures?

This paper does not attempt to answer this question. But, it does provide the starting point. If the at-will doctrine is being abused in the marketplace and is in need of modification or elimination, then implementing its alternative — substituting at-will with due process, i.e., just cause — begins with the identification of structural mechanisms needed and already present within the marketplace.

In order to determine what indeed is the state of the private sector environment, then, as Figures 1 and 2 above indicate, we must look at the following factors:

procedural substantive equitable implementation due process —>
due process —> and application of mechanisms mechanisms such
mechanisms

This paper focuses on the very first step: "to what degree are procedural due process mechanisms in place?" The answer from the data presented seems to be "a moderately high degree." This conclusion can be applied in a number of ways. It can be used to note that legislatively or even judicially- mandated due process requirements in the private-sector and thus limiting or even negating the at-will rule will cause no dramatic change (and thus impact)

¹²Sa«, e.g., the articles cited in footnote #4 above.

in the private-sector. Such mandates would only codify a preexisting condition.

On the other hand, opponents to changing the at-will rule may argue that such mandates are indeed unnecessary since the market itself is responding to the fundamental unfairness and resulting unpopularity of the at-will rule.

Regardless of how these conclusions are interpreted and subsequently argued, one must be cognizant of biases evident in this survey. Despite the relatively high response rate, there is always the danger that respondents tending toward "yes" answers, the perceived "good" or sought-after answers will respond at a greater rate than "no" answer respondents. Moreover, only "large" employees were surveyed (total # of employees > 100; note: total number of AU employees, not just at-will employees). The survey tended to leave out "mom-and-pop" or smaller businesses.¹³

Moreover, this paper makes no attempt to resolve the subsequent questions: specifically, are these due process mechanisms being utilized?; do we have true justice (incorporating both procedural and distributive due process)? These questions are for another day. But, their resolution begins with the data presented here.

¹³Naturally, an argument, and a somewhat persuasive one, is that the smaller, 'more personal' business - ones with the owners working closely along side a 'few' other employees - should retain the ability to hire and fire at-will. The intimate relationship of owner-to-business demands or requires that personal flexibility. Moreover, an employee of such a business would or at least should be aware of such owner flexibility. However, as a business employ» more and more employees, the intimacy between owner and business arguably lessens and employees may expect the structural due process mechanisms which are identified in this paper.