A SURVEY OF PROCEDURAL DUE PROCESS STRUCTURES IN THE GEORGIA PRIVATE SECTOR

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I. INTRODUCTION

In the state of Georgia, private businesses have no legal due process obligations toward employees that are disciplined or terminated. Any notice of disciplinary action or termination, any opportunity for an employee to air a challenge or defense to disciplinary sanctions, and any prospect for appeal of such action to higher level management is a privilege rather than a right of the at-will employee in this state. Georgia is arguably the least likely state to grant due process rights to at-will employees. This article examines empirical data to determine the nature and extent that fundamental procedural safeguards have been voluntarily granted by management in Georgia's private sector applicable to the discipline and termination of at-will workers.

At law, the controversial at-will doctrine permits managers to fire employees "for good cause, for no cause or even for a cause morally

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wrong, without being thereby guilty of legal wrong."[1] This practice has been successfully challenged in many states by employees in *wrongful discharge* litigation, but remains codified under Georgia law with few exceptions.[2] After reviewing the recent development of wrongful discharge law, this article surveys various industry practices to determine whether or not Georgia industries are voluntarily modifying their managerial prerogatives over at-will employees to grant due process rights in disciplinary decisions. The data indicates that many Georgia businesses have responded to societal and market pressures to provide procedures for due process in the termination and discipline of at-will employees.

Well-developed human resource management policies are usually in writing, covering the grounds for termination, and providing for extensive documentation when an employee must be discharged.[3] Such written policies meet numerous desirable objectives for employers, including the clear delineation of violations that result in disciplinary action, uniform and fair policies to circumvent favoritism or partiality in termination decisions, and avoidance of complaints of discrimination. Such written policies, if available to the employee, ensure advance warning of rule infringements and the consequences.[4]

Personnel polices that have responded to market demands or societal pressure for fairness in workplace discipline are typically structured around an assortment of different types of discipline procedures. Some procedures extend a pre-assessment review of the proposed disciplinary action. Others will grant a post-decision review by the employee triggering a separate grievance procedure. Each of these alternatives usually involves a review of the violation or breach of job standards, provides for an opportunity for the employee to respond or present evidence prior to a final disciplinary action, reviews the treatment of other employees in similar circumstances, documents the actions taken or recommended, and advises the employee of the outcome of the final disciplinary or termination action. Many times employees are allowed to appeal the outcome of the discipline action to higher management officials.[5] Such enlight-

[1] Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1894), *overruled on other grounds,* Hutton v. Watters, 132 Tenn. 527,179 S. W. 134 (1915).

[2] The Georgia statute provides that "[a]n indefinite hiring may be terminated at will by either party." GA. CODE ANN. § 34-7-1 (1994).

3 B. Bruce McAffee & Paul J. Champagne, Effectively Managing Troublesome Employees 1-16 (1994).

4.See D. Caruth, B. Middlebrook, & T. A. Pressley, *This Matter of Discipline,* SUPERVISORY MANAGEMENT, April 1983, at 24-31.

5 *See generally* R. B. MCAFEE & W. POFFENBERGER, PRODUCTIVE STRATEGIES: ENHANCING EMPLOYER JOB PERFORMANCE (1982).

ened processes provide a degree of due process in the private employment relation.

The seven objectives of this survey are to discover whether or not (1) Georgia employers have voluntarily granted employees the privilege or right to due process in discipline and termination decisions involving at-will employees; (2) those policies are in writing; (3) written policies, if they exist, are disseminated to at-will workers; (4) procedures to carry out the written disciplinary policies exist and are enumerated; (5) there are statistical differences between different industries within Georgia in providing such due process protection to at-will workers; (6) it can be demonstrated statistically that the at- will employee has different due process protection between privately owned or publicly traded businesses and between foreign and domestic firms; and (7) there is a demonstrable difference in the granting of procedural protection between small, medium-sized and large employers. Unless such policies exist in writing, are widely available, and are followed, the potential for denying due process would appear to be great. On the other hand, the existence of such policies in Georgia may belie the political refusal to grant exceptions to the fire- at-will rule, being proof that businesses value the efficacy of fairness in human resource management more than Georgia's legal structure indicates. A review of the growth of legal protections for at-will workers in other states is helpful in appreciating the current state of affairs in Georgia.

II. DEVELOPMENT OF LEGAL PROTECTION

In the 1980s, legal protection against wrongful discharge spread across the United States through reinterpretation of state common law precedents and revision of state statutes.[6] This well-documented movement,[7] or as some would say revolu-

[6] For a discussion of the trend see H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.12 (2d ed. 1987).

7.The wrongful discharge movement began in California with the decision in Peterman v. International Brotherhood of Teamsters Loc. 396, 174 Cal. App. 2d 184, 344 P. 2d 25 (1959) which recognized a tortious discharge for an employee's refusal to perjure himself under oath. Seminal works in the literature include Lawrence E. Blades, *Employment at Will vs. Individual Freedom: In Limiting the Abusive Exercise of Employer Power,* 67 Colum. L. REV. 1407 (1967); Clyde W. Sumner, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith,* 93 HARV. L. REV. 1816 (1980).

tion[8] in employment law, brought American workers into the ambit of protection against arbitrary or *bad faith* firings and the concept of due process in disciplinary and termination decisions already provided in most industrialized countries.[9]

The American experience with wrongful discharge reform, however, differed from the international model in several notable ways. Clearly, our country lacked any unified national legislative mandate, providing instead piecemeal protection that arose through various and narrowly focused federal statutes.[10] Most of the protection initially grew out of organized labor unions negotiating employment contracts that protected members against unjust discharges. These private agreements between management and labor typically provided elaborate grievance procedures to insure contractually basic due process protection in disciplinary actions against workers. Certainly, organized labor had rarely supported broad-based reforms altering the old at-will rule or insuring procedural due process protection for disciplined workers, preferring rather that workers seek job security and procedural protection in union membership. The vast numbers of at-will workers, being unorganized, lacked any coherent voice.[11] Thus it was not the American union movement which led in this growth of job security.

[8] *See generally* LORBER ET AL., FEAR OF FIRING (ASPA Foundation 1983) (documenting rapid changes to the established doctrine of managerial prerogative which took place in state laws in the late 1970s and early 1980s) (on file with authors).

[9] *See* Janice Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee,* 16 U MICH. J. L. Reform 323 (1983) (discussing the extent of international compliance with the International Labour Organization's Convention on Terminations which the United States declined to sign.)

10.The closest analogy in the United States is the body of equal employment opportunity rules in the Code of Federal Regulations. Uniform Guidelines on Employee Selection Procedure, 29 C.F.R. §§ 1607.1-1607.14 (1994). These regulations implement Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000 to 2000e-12 (1994). They describe how American managers should implement non-discriminatory or affirmative action plans. Otherwise, federal and state merit systems and private sector collective bargaining agreements include steps for progressive discipline, with the purpose of rehabilitating deficient workers. *See, e.g.,* 29 USC §§ 157-185 (1994) (National Labor Relations Act); 29 U.S.C. §§ 621-634 (1994) (The Age Discrimination in Employment Act'of 1967): 29 U.S.C. §§ 791-794e (1994) (The Rehabilitation Act of 1973). The majority of American workers, therefore, are left unprotected.

11.The author of one of the seminal articles urging recognition of a cause of action for wrongful discharge observed that businesses tend to lobby actively against legislative reform labor unions refuse to support such legislation because it would tend to weaken their claims of job security through collective bargaining agreements, and the unorganized workers have no lobby. Blades, *supra* note 7, at 1407.

Within most state jurisdictions the extension of protection for at- will workers in general grew through judicial construction in contract and tort theory rather than through legislative reform.[12] A few states modified their existing at-will statutes to permit an aggrieved worker to allege a claim for wrongful discharge which might then be litigated.[13] Only one state, Montana, has passed a comprehensive piece of legislation forbidding employers to fire without a "good cause," arising from "business judgment in good faith" or employee failure to perform satisfactorily the duties of the job.[14] However, a model act proposed by the Commissioners on Uniform State Laws in 1991 to establish standardized treatment of at-will employees, failed to arouse widespread support.[15] By the mid 1980s, the nation was increasingly preoccupied with threats to America's global competitiveness. Concerned calls for enhancing job security through statutory limitations on abusive terminations were overshadowed by the huge national trade deficit,[16] corporate restructuring and downsizing,[17] and

[12] See, *e.g.,* Monge v. Beebe Rubber, 114 N. H. 130, 316 A. 2d 549 (1974) and Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (breach of implied covenants of good faith and fair dealing); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (contractual commitments arising out of handbooks); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N. E. 2d 425 (1973) (tort relief granted worker fired for exercising statutory right to file a workers' compensation claim).

[13] For a discussion of statutory protection in South Carolina through mediation, Michigan's Whistleblower Protection Act, South Dakota's presumption of a hiring for a year, and Missouri's requirement that the employer provide a statement of cause for dismissals *see* Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute,* 16 U. Mich. J. of L. Reform 319, 334-5 (1983). *See also* Lex K. Larson, Unjust Dismissal (1995); Charles G. Bakaly, Jr. & Joel M. Grossman, The Modern Law of Employment Relationships (1993) (monthly updates on the at-will rule on a state by state basis).

[14] MONT. CODE ANN. §§ 39-2-901 to -913 (1987) (Wrongful Discharge From Employment Act).

[15] One commentator had urged that a statute be passed in 1976. Sumner, *supra* note 7. *See also* Note, *Reforming At-Will Employment Law: A Model Statute,* 16 U. Mich. J. OF L. REFORM 389 (1983) (proposing a model act). But it was not until 1991 that the National Conference of Commissioners on Uniform State Laws approved and recommended the Uniform Termination Act. By then, arguably, it was too late; the high tide of concern had passed as most states made some provision for aggrieved workers to state their claims. As of April 1994, the Act has been introduced in only nine state legislatures: Delaware, Hawaii, Iowa, Maine, Massachusetts, Nevada, New Hampshire, Oklahoma, and Pennsylvania. Larson, *supra* note 13, at § 5.07.

[16] Clyde Farnsworth, *Mounting Conflict Over Trade Loans for U.S. and Japan,* N.Y. TIMES, Mar. 9,1987, at A-l.

[17] Bruce Nussbaum, Kathleen Failia, Christopher S. Eklund, Alex Beam, James R. Norman, & Kathleen Deveney, *The End of Corporate Loyalty,* BUSINESS WEEK, Aug. 4, 1986, at 42.

plant relocations to cheaper foreign sites with attendant devastation to workers and communities alike.[18] Few business, industry and governmental leaders advocated reforms that arguably could raise the cost of doing business in the domestic market.[19] Enough protection had been accomplished on this issue, it seemed, and other job security needs called for attention.[20]

Nevertheless, in these last three decades of the wrongful discharge movement, many workers have come to expect fair treatment and a modicum of job security.[21] Both blue-collar and white-collar workers have come to believe that there is either a tacit agreement with management, or a fundamental right of the worker, to be treated fairly, non-arbitrarily, and not to be harmed on the basis of false accusations or the whim of abusive management.[22] Many workers have come to presume rights in the workplace that would limit arbitrary, capricious or maliciously motivated discipline or discharge. At a minimum, many would feel that the worker is entitled to advance notice of the rules they are expected to follow, notice when management feels that the rules have been violated, the opportunity to present and defend their actions, the opportunity for a fair and impartial 'review of the decision, and the consistent application of the rule to other employees. Such expectations may be rooted in the tradition of fundamental fairness Americans hold, in observing such procedural rights in labor or governmental organizations, or from management's own attempts to defuse such issues by granting the privilege of due process in many industries and large corporations. By the 1990s, legal structures in all states except Georgia had recognized the legitimacy of procedural safeguards.

Throughout the last one hundred years, Georgia perhaps more than any other state, has remained rigidly committed by statute to the old rule that "an indefinite hiring may be terminated at will by

[18] For a critique of this trend see Richard B. McKinzie, Fugitive Industry: the Economics and Politics of Deindustrialization (Pacific Institute for Public Policy Research 1984). In response, Congress passed the Worker Adjustment and Retraining Notification Act of 1988. 29 U.S.C. §§ 2101-2104 (1988).

[19] Complaints by small businesses about the high cost of doing business because of government regulations and threat of being sued were articulated frequently during the wrongful discharge movement. *See, e.g.,* Jack Steiber, *Speak Up, Get Fired,* N. Y. Times June 10, 1979, at E-19; *The Growing Cost of Firing Non-Union Workers,* BUSINESS WEEK, Apr. 6,1981, at 95.

20.David Kirkpatrick, *The New Executive Unemployed,* FORTUNE, April 8,1991, at 36.

[21] For a discussion of the arguments against the at-will rule see generally PATRICIA H. WERHANE, PERSONS, RIGHTS AND CORPORATIONS (1985); David W. Ewing, *Civil Liberties in the Corporation,* N.Y. ST. BAR J., April 1978, at 188-229.

[22]*See* Robert Ellis Smith, Workrights 209-15 (1983).

either party."[23] The rule, codified in the Georgia Code revisions of 1895, is a "statute of non-statutory origin."[24] It came from a Supreme Court decision six years earlier in *Magarahan v. Wright,*[25] a case involving the disputed claim of a clerk to his job with a grocery man. The court worried that some definite promise of employment duration had been made, and offered *dicta* that facts and circumstances should be shown on a case by case basis to the jury to reflect the intention of the parties at the time the contract was made. Only if the hiring were proved to be indefinite could it be terminated at-will. Although the court indicated that intent was a question for the jury, codifiers took this dicta from its specific set of circumstances to transform it into a statute having broad impact beyond the expressed intent of the court in its narrow holding. Codification now limits judicial ability to engage in traditional common law construction, so that until the Georgia legislature modifies the statute, no future court may reinterpret the rule in light of new facts and circumstances.[26] Thus, in Georgia, a dispute between a clerk and his employer over whether the term of hiring was of definite duration has become an intransigent rule closing the door of the court system to employee plaintiffs, denying them the most basic rights to due process and fundamental fairness in the workplace,[27] while protecting unethical behavior by business managers.[28]

[23] Ga. CODE Ann. § 34-7-1 (1994).

[24] *See* Perry Sentell, *Statutes of Nonstatutory Origin,* 14 Ga. L. Rev. 239 (1980). Codifiers were directed "to prepare for the people of Georgia a Code, which should as near as practicable, embrace in a condensed form the Laws of Georgia, whether derived from the common law, the Constitutions, the Statutes of the State, the decisions of the Supreme court, or the Statutes of England, of force in this state." Mitchell v. Ala. Ry., Ill Ga. 760, 768,36 S.E. 971,974 (1900).

[25]83 Ga. 773,10 S.E. 584 (1889).

[26] Busbin v. Ga. Power Co., 242 Ga. 612, 250 S.E. 2d 442 (1978). *See generally* Sentell, *supra* note 24. *See also* Morast v. Lance, 631 F. Supp. 474 (N.D. Ga. 1986), *affd,* 807 F. 2d 926 (11th Cir. 1987). In Morast the court refused to find an employer liable for wrongful discharge where the employee was fired for reporting an improper bank transaction to the Comptroller of the Currency, as he was legally required to do.

[27] In the last five years, sixteen cases on claims of wrongful discharge have been appealed under the Georgia Statute codifying at-will employment, and only one was granted a new trial on the issue of whether or not the term of duration was indefinite. That case involved a written contract in which the questionable term of duration of employment arose under a construction agreement to restore commercial property. The contract specified that the plaintiff would be compensated at an hourly rate and was to be paid the sum of $2,000 in three different stages of the renovation, but there was no express provision concerning the term of the construction project. Lineberger v.
Williams, 393 S.E.2d 23,195 Ga. App. 186 (1990).

28.Although good business management presumes good personnel practices, Georgia case law makes employee evidence of wrongful behavior irrelevant so that employees

In Georgia the only exceptions to the *fire at-will* rule are those specified by the legislature. For example, protection exists for employees terminated solely because of a garnishment,[29] and for those fired solely for obeying a jury duty summons or subpoena.[30] Although the state's General Assembly was asked in 1987 to grant another exception for employees who were fired in retaliation for filing workers' compensation claims,[31] the legislators refused on the grounds that Georgia's workers were better served by the perceived economic development incentives derived from fostering and maintaining pro-employer policies such as the at-will rule.[32]

The pro-business climate in Georgia has been long and carefully nurtured by both legislators and executive branch policy makers, as the cornerstone of economic development in the state.[33] The robust growth of the state, particularly around Atlanta,[34] might well be attributed to Georgia's *business friendly* climate, fostered by the state's heavy investment in industrial development, infrastructure, international port facilities, the aggressive marketing of the state as a national and international convention and sporting center, and by its comparably modest tax structure. The apparent view by Georgia's legislators to leave the antediluvian at-will rule intact as a principle

policy incentive to business attractiveness appears misplaced in the light of the state's arsenal of other economic catalysts. Other southern states, without diluting their economic development, have permitted some legal redress for discharges deemed wrongful.[36] Little economic development advantage would be lost in Georgia by permitting wrongful discharge actions for violations of public policy, especially for firings resulting from the filing of workers' compensation claims.

Furthermore, in the absence of a legal mandate, this survey data indicate that many Georgia businesses have chosen to voluntarily provide procedural due process in the discipline and discharge of at- will employees. Their actions arguably represent a panoply of concerns: a response to societal and market pressures, a recognition that good faith and fairness in personnel management is good for business, a desire to increase worker's loyalty to the company and reduce costly worker turnover and loss of valuable resources, a growing reluctance to behave unjustly, or simply a strategy to limit perceived liability exposure. If the latter is true, then they do not fully appreciate the broad protection bestowed upon them by the legislature for exercise of managerial prerogatives. They may be concerned over the large jury awards that employees have won in other states, fearing that similar damages could be awarded here. Arguably Georgia employees are the unwitting beneficiaries of employer angst in other jurisdictions, indicating again that the market can self-regulate when vulnerable to threats, real or imagined, of increased liability.

III. PROTOCOL: GEORGIA SAMPLING

Much of the methodology used for this research was adapted from a study conducted in North Carolina[36] and used with the permission of

can no longer raise jury questions. Some complaints are held insufficient to state a claim upon which relief could be granted. *See, e.g.,* Evans v. Bibb Co., 342 S. E.2d 484, 178 Ga. App. 139 (1986) (wrongful discharge for filing workers' compensation claim when plaintiff contracted byssinosis from cotton dust in Bibb textile mill); Goodroe v. Ga. Power Co., 251 S. E.2d 51, 148 Ga. App. 193 (1978) (firing for uncovering and reporting criminal activity); Taylor v. Foremost McKesson, Inc., 656 F.2d 1029 (5th Cir. 1981) (firing for refusal to cover up employer's criminal activity); Andress v. Augusta Nursing Facilities, Inc., 275 S. E.2d 368, 156 Ga. App. 775 (1980) (firing for refusal to participate in a scheme to violate state and federal nursing home regulations). *See also* Morast v. Lance, 631 F. Supp. 474 (N.D. Ga. 1986) discussed *supra* note 26.

[29]Ga. Code Ann. § 18-4-7 (1994).

30.GA CODE ANN. § 34-1-3 (1994). This section of the Code forbids employers to discipline, discharge or otherwise threaten employees who are absent from employment in answer to a summons to jury duty, a subpoena, or other court order and provides for actual damages and reasonable attorney's fees.

[31]*See* Evans v. Bibb Co., 342 S.E.2d 484,178 Ga. App. 139 (1986).

[32] Senator Harrill Dawkins, chairman of the Georgia Senate Industry and Labor Committee, argued that if employer rights were further restricted, "there is no question it would be a detriment toward economic development." For a review of Dawkins' comments and the General Assembly's refusal to hold hearings on a proposed antiretaliation bill, see *In Georgia, boss has few limits on right to fire,* THE ATLANTA JOURNAL & CONSTITUTION, Aug. 3,1987, at El, E6.

[33] Henry Grady, *The New South, in* The New South 106 (1971); H.P Henderson, A Political Biography of Ellis Arnall 116 (1991).

[34]Bill Saporito, *The World's Best Cities for Business,* FORTUNE, Nov. 14,1994, at 113.

[35]Florida has broad statutory protection and judicially recognized exceptions. *See* Larson, *supra* note 13, at §§ 6.01, 10.10[2]. South Carolina enunciated its public policy exception in Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). Alabama statutory law grants protection against retaliatory firings for filing notice of a safety rule violation or injury. Ala. CODE § 35-5-11.1 (1994). North Carolina announced its public policy exception in Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985). Tennessee provides whistleblower protection by statute. TENN. CODE ANN. § 50-1-304 (1994). The judiciary also recognized a cause of action in Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984). Mississippi recognizes a handbook exception. *See* Holland v. Kennedy, 548 So. 2d 982 (Miss. 1989). It also recognizes a duty to deal in good faith. Empiregas v. Bain, 599 So. 2d 971 (Miss. 1992).

36.Daniel J. Herron, A *Preliminary Study of Procedural Due Process Structures in the North Carolina Private Sector,* 1 SE. J. LEG. STUD. 61 (1992).

the author, Daniel J. Herron. The methodology for gathering the threshold information in our survey paralleled the Herron study and consisted of three steps: (1) determine a representative cross-section of private-sector employers within the chosen jurisdiction, in this case, Georgia; (2) survey that cross-section as to personnel policies and practices in regard to at-will employee discipline/termination; and (3) statistically analyze of that empirical data.[37]

Herron chose North Carolina because of its limited judicial recognition of wrongful discharge exceptions, and absence of statutory protections. Georgia, like North Carolina, provides fertile ground for private employer/employee relationship data collection and analysis. The state has done little modification, either judicially or legislatively, to the traditional employment-at-will doctrine.[38] It is hoped that this data will add to the Herron examination and reveal trends in the changing legal and social environment as a consequence of external pressures on business.

The results from these two surveys should provide a bank of information about two populations in the South, permitting a comparison of the two, not only with each other, but also with populations from other regions of the nation. However, other than to note that human resource management in both states shows evidence of improved procedural due process, any detailed comparison is beyond the purview of this article which addresses the Georgia data. This project applies to Georgia the question posed by Herron, that is to what degree do procedural due process structures exist in the private sector, and also attempts to extract additional data by type of industry, size and domicile of the business, and the number of at-will employees present at the survey site.

IV. SURVEY METHODOLOGY

The survey sample was chosen from databases of Georgia industries by selecting firms at random from sources such as The Georgia Directory of Manufacturing, the Georgia Banking Association membership roster, and annual reports of the Georgia Department of Industry, Trade, and Tourism and the Georgia Department of Labor. The firms that were included in the sample frame met the following

[37] *Id.* at 63.

[38] The Georgia Supreme Court upheld the statute in Busbin v. Ga. Power Co 242 Ga. 612, 250 S.E.2d 442 (1978), without any judicial exceptions for unjust dismissal. *See also* Evans v. Bibb Co., 342 S.E. 2d 484, 178 Ga. App. 139 (1986) (dismissal allegedly for filing a workers' compensation claim upheld).

criteria: annual sales of at least one million dollars, or if a financial institution, assets totaling at least one million dollars. Where annual sales amounts were unobtainable, a minimum of one hundred employees was used as the basis for inclusion in the survey. Duplicate companies, for example, holding companies and parent- subsidiaries, were not included in the survey. A random sample of four hundred firms was selected from the sampling frame.

Over the course of several months, the firms in the sample were contacted by telephone, 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 telephone contact. Contacting each firm in advance and obtaining permission to send the survey, resulted in a fifty-eight percent response rate. The responses were tested using the frequency of distributions and analyzed to determine if there were significant differences between the population sampled. Also, the survey method was tested for reliability and internal congruity and was found to be consistently dependable for the investigation.

V. EMPIRICAL DATA

The predominant question posed in this survey was, "Do procedural mechanisms exist in Georgia's private sector for administering due process in at-will employee discipline and termination?" With permission, Herron's nine substantive questions were posed. The results indicate a high percentage of procedural due process mechanisms in place, which is especially noteworthy since Georgia is arguably the strongest supporter of the at-will doctrine and continues to resist public policy exceptions to this rule.

Unlike the Herron survey, however, selection of the survey population secured only those employers clearly identified as being in one of four specific industries: service, manufacturing, banking, and retail. Also, this survey is distinguishable from Herron's inquiry in that it investigates whether or not the companies queried were domestic or foreign corporations, and whether or not they were publicly or privately owned firms. The results indicate a disturbing lack of uniformity across industries and capital structures. They also reflect the existence of greater protection within firms with larger at-will populations and show a more progressive approach to due process by foreign firms.

The survey is divided into three sections to facilitate analysis. First, demographics are measured to determine the nature of the business, the size of the surrounding community of the site surveyed,

whether or not the employer is a large U.S. corporation, a non-U.S. corporation, publicly traded or privately owned, and the number of at-will employees working at the site surveyed. The second section deals with the existence of evaluation procedures, the time intervals in which evaluations take place, and the differing use of performance appraisals for salaried and non-salaried employees. The third section probes discipline and discharge policies by the size and nature of the firm, and asks for types of notice, hearing and appeal mechanisms. The results indicate a reliable cross-section of the survey cluster, with the notable exception of the banking industry. The survey questions and responses appear in Appendix A.

A. Demographic Observations

Demographic observations arose from Survey Questions 1-4. Unlike the Herron survey, this survey attempted to obtain demographic information about the sample population of employers. Of the employers who answered the survey, 48.7 percent identified their business as being in a metropolitan community, 42.6 percent were in small towns, and 8.7 percent were located in rural communities.

Service industry respondents were further broken down to sixty- five percent from metropolitan communities, twenty-seven percent from small towns, and eight percent from rural vicinities. Of the manufacturers responding, thirty-two percent identified their firms as metropolitan, fifty-seven percent as small town and eleven percent as rural. The banking employers were equally divided into metropolitan communities and small town communities. Of the respondents from retail industries, sixty-one percent were from metropolitan communities, thirty-one percent from small towns, and eight percent were from rural communities.[39]

The survey instrument also revealed that ninety-six percent of the firms responding were domestic corporations, only four percent being foreign owned businesses. Of the firms responding, fifty-nine percent were identified as publicly traded and forty-one percent as privately owned.

B. Evaluation Policy

The existence of appraisal procedures was probed in Survey Question 5. The existence of periodic evaluations and/or appraisals

[39] *See* Appendix B, Table 1.

appears significantly high, with an average of 87.93 percent of the respondents indicating that such assessment devices are in place. The industry with the highest incidence of employee evaluation and appraisal procedures was the service industry, with 92.39 percent responding positively. The industry with the lowest proportion of evaluation procedures in place was the banking industry, with only eighty percent indicating that performance appraisals were conducted. The manufacturing and retail industries virtually tied with 84.91 percent and 84.62 percent respectively.[40]

Large U.S. corporations indicated that 94.83 percent had performance appraisal procedures, whereas only eighty percent of the non- U.S. companies revealed that they had periodic employee evaluations. Of significant note is the high percentage of privately owned firms with routine employee evaluation. The survey indicated that 78.95 percent of the companies which were privately held had in place employment appraisal procedures. The existence of established procedures for appraisal of employee work was expected to be low for the smaller firms and high for the larger firms. This proved true, because as the number of at-will employees increased, the percentage of appraisal procedures likewise increased. Interestingly enough, however, among even the smallest firms, reporting between one and fifty at-will employees, 87.71 percent of the respondents had appraisal procedures in place. Of the largest firms, those having over one thousand employees, 93.75 percent reported having appraisal procedures. Thus, there was only an eight percent point spread among all firms, regardless of size.[41]

Survey Questions 6(a) & (b) compared the frequency of appraisal by hourly and salaried classifications of employees. The survey instrument attempted to distinguish the existence of an evaluation procedure and the frequency in which the appraisal was implemented. Also, it probed whether or not hourly employees were treated differently from salaried employees. In analyzing the frequency of employee appraisal, Herron's assumptions concerning minimum due process given to employees were adopted. Herron posited that a firm with annual or more frequent appraisals meets minimal due process requirements.[42] We see no reason to embrace a different assumption, even though many firms had shorter periods of appraisal, presumably with new positions.

Of the firms responding that had annual or more frequent appraisal procedures in place, there was a marked distinction

[40] *See* Appendix B, Table 2.

[41] See Appendix B, Table 3.

42. See Herron, *supra* note 36, at 69 n.ll.

between the frequency of appraisal for hourly employees and salaried employees between service and manufacturing industries. Service industries administered annual or more frequent appraisals to eighty-three percent of their hourly employees, but increased the use of appraisals to ninety-one percent of the salaried positions. At the same time, the manufacturing industry administered annual or more frequent appraisals to seventy-one percent of their hourly employees, while they administered appraisals of salaried positions eighty-two percent of the time. A marked difference occurred in the banking and retail industries, with virtually identical percentages of annual or more frequent appraisals done regardless of whether employees were paid by the hour or were salaried. Thus, banks appraised both classifications eighty percent of the time, while retail managers used appraisals seventy-seven percent of the time.[43] It is distressing to note that at least in service and manufacturing firms, hourly wage earners are given less frequent evaluations than salaried individuals, indicating that minimum due process is less available for blue collar than white collar workers.

C. Discipline and Discharge Policy

Survey Question 7 was used to determine the existence of a written personnel policy on termination. When asked whether or not the company had a written personnel policy concerning at-will employee discipline or termination, the survey revealed that eighty-six percent had a written policy. When further inquiry was made about the availability of the policy to employees for inspection, eighty-five percent of those having written policies made them available to their employees. When analyzed by industry, service enterprises had the most frequent incidence of written policies with eighty-eight percent covering at-will employees. Manufacturing firms had written policies eighty-six percent of the time and eighty-five percent of the retail firms had written policies. Remarkably, the survey revealed that within the banking industry, known for its well-established lending and accounting policies, only sixty percent of the firms included in the study had written policies covering discipline of at-will employees. Whether this is due to the small number of banks responding to
the survey, or to bank management preference is unknown pending further study.

[43] *See* Appendix B, Table 4.

Furthermore, U.S. firms and foreign firms diverge in terms of the existence of written policies. United States corporations surveyed indicated that eighty-eight, percent had written policies, while one hundred percent of the foreign firms surveyed had reduced their policy to writing. In contrasting further organizational classifications, it was interesting to discover that ninety-two percent of the publicly traded companies reported having written policies regarding discipline of at-will employees and a unexpectedly high eighty-two percent of private firms had written policies.[44] The fact that eighty-two percent of the privately owned companies indicated that they had a written policy for discipline and termination of at-will employees was surprisingly high, although not equal to the greater level of protection of the larger U.S. industries or the foreign firms.

Regardless of the generally high level of written protection, the most revealing set of statistics came from the comparison of employers based on the number of at-will employees. The smaller the firm was in size, the less frequently it had written policies protecting disciplining of at-will employees. As the number of at-will employees increased, the ratio of firms with written policies increased.[45] Only sixty-two percent of firms with fifty employees or less had written policies, eighty-two percent of firms with between fifty-one and one hundred employees, eighty-eight percent of firms with up to two hundred fifty employees, ninety-one percent of firms with up to five hundred employees, and one hundred percent of firms with up to one thousand employees had written policies. Thus, concern that employees in the smallest firms are most in need of protection from arbitrary termination appears justified.[41]'

D. Characteristics of the Policy

Written notification of discipline was examined in Survey Question 9. When asked whether or not the employer gave written notification of discipline to at-will employees, sixty-four percent responded that notice was given all of the time, thirty-one percent answered that notice was given some of the time depending on the nature of the discipline, and no written notice was given in five percent of the companies where discipline was administered. It is interesting to note that of the larger US. companies surveyed, sixty-six percent gave written

[44] *See* Appendix B, Table 5.

45.See Appendix B, Table 6.

[46] This result is interesting given the widespread availability of evaluation and appraisal procedures. *See* Appendix B, Table 3.

notice all of the time, whereas, foreign firms gave written notice in all circumstances of discipline only fifty percent of the time. Of equal interest was the fact that small, private companies scored in between the two, with only fifty-six percent of those companies giving written notice every time discipline was administered to at-will employees.[47]

Holding a meeting relating to the discipline to be administered was raised in Question 9(b). Ninety-nine percent of employers with some kind of policy regarding at-will employee discipline had a meeting with the employee to discuss the impending action. When this high percentage was further scrutinized, the difference between large U.S. corporations and foreign companies was somewhat surprising. Fully one hundred percent of the foreign firms surveyed had such a meeting with the employee, but only ninety-one percent of large U.S. firms held a consultation with the disciplined at-will employee. Notably, a remarkably high eighty-nine percent of the privately held firms conducted such a conference. But most telling was the direct relationship between increased incidence of a conference with the disciplined employee and greater numbers of at-will employees employed. The lowest percentage of such meetings was found in firms with between one and fifty employees. The higher the number of at-will employees, the greater the probability of the employee having a formal opportunity to meet with the employer on discipline issues.[48]

Whether or not a statement of evidence was permitted was determined in Question 9(c). Within those firms that had meetings with disciplined at-will employees, a large portion allowed the opportunity for some statement or evidence to be offered by the employee. Once again, U.S. firms and privately held companies, each indicating that in only eighty-nine percent of the meetings is evidence allowed, scored lower than foreign businesses which allowed the presentment of evidence or statements to be made by the at-will employee in one hundred percent of the discipline meetings. The frequency of allowing a statement or conferring the right of giving evidence to the employee reveals another remarkable correlation between the number of at-will employees and opportunity to respond to discipline. The smaller the firm size, the less available were procedural process structures. For example, the firms with fifty or fewer employees allowed the employee the right to give evidence only sixty-two percent of the time, while those with between fifty-one to one hundred

[47] See Appendix B, Table 7.

[48] See Appendix B, Table 8. This finding is consistent with the paucity of written notification in smaller firms revealed in Appendix B, Table 6.

employees allowed evidence seventy-six percent of the time.[49] Thus, procedural due process protection increases with the size of employee populations, and decreases with smaller firms.

Other persons present at the meeting were the subject of Question 9(d). Many companies allowed additional people to attend the meeting, indicating intentional desire either for additional witnesses or for higher-level management to participate in the first meeting. The most common employer representatives at such meetings were immediate supervisors, who attended seventy-nine percent of the disciplinary meetings. Following immediate supervisors were personnel officers at thirty-nine percent, department or middle management at twenty-nine percent, upper management (plant or divisional) at twenty percent. Written comments indicate that additional persons at the meeting were always management personnel rather than employee advocates or witnesses. Based on the comments solicited, there appears to be a diminution of due process due to exclusion of spokespersons or truly independent observers for the employee's protection.

Whether or not appeals other than the meeting were allowed was addressed in Question 9(e). Of those companies which allowed appeals, the survey detected the presence of bifurcated appeal procedures. When asked, "Does the employee have an *appeal process* other than the [disciplinary] meeting?", eighteen percent indicated in written comments that a parallel procedure existed. When the comments were abstracted, it was obvious that within those companies which allowed parallel grievance procedures, aggrieved employees had the ability to petition upper management separately. Typical comments alluded to access to the president or chief executive officer, general manager, plant managers, regional officers, the company's general counsel, or a separate grievance procedure invocable by the at-will

employee.

When questioned as to the existence of an appeal process following the disciplinary meeting, fourty-six percent of the businesses surveyed indicated that further appeal was provided as a matter of right. However, the particular industries that allowed such an appeal varied markedly. The industry ranked highest in allowing such an appeal was service, indicating that in fifty-three percent of their policies, appeals were allowed as a matter of right. Of retail establishments, forty-six percent allowed appeals, while forty-one percent of manufacturers allowed appeals, and only a mere twenty

[49] See Appendix B, Table 9.

percent of bankers allowed appeals from the disciplinary meeting.[50] Only twenty-two percent of all categories of industries surveyed allowed further appeal after the initial meeting. No consistent pattern emerged showing that larger or smaller firms allowed or disallowed further appeal based on the number of at-will employees at the survey site. Firms appear to place less value on appeal procedures following the point of notice and opportunity to be heard than on the provision of that initial meeting between employee and supervisor.

Access to in-house or retained legal counsel was the issue raised in Question 9(f). Not surprisingly, eighty-seven percent of the firms surveyed had access to either in-house or retained legal counsel in making decisions and carrying out discipline procedures. Probably due to the frequency of middle management contact with legal representatives in other, non-disciplinary work, bankers indicated that they had access to an attorney in one hundred percent of the correctional action cases. In contrast, eighty-six percent of the manufacturers, eighty-five percent of the retail establishments and seventy-nine percent of the service businesses had access to counsel in at-will discipline cases. All foreign firms, notably, indicated that supervisors and management had the ability to access an attorney, in contrast to eighty-one percent of publicly traded and private U.S. corporations. It is not surprising that foreign firm managers might feel the need for constant access to legal counsel. American managers, on the other hand, may feel less necessity to lessen the risks of legal liability through costly access to attorneys. However, it should be noted that the survey did reveal that as the number of at-will employees increased, so too did the frequency of managers with ready access to legal counsel.

VI. CONCLUSIONS

Overall, most respondents indicated that they had evaluation and discharge policies in place, that these policies were in writing and available to their employees, and that some kind of notification and meeting was provided for discipline and/or discharge problems. When responses were further analyzed by industry segment, company size and capital structure, disparities appeared indicating that the smaller companies, measured by numbers of at-will employees, provided less procedural due process than larger companies. Thus, it appears that many Georgia companies have responded positively to

[50]See Appendix B, Table 10.

societal pressures to provide fair employment practices for their at- will workers and have recognized the market incentives both to retain good workers and avoid adverse publicity arising from claims of unjust dismissal. However, the private sector, in the absence of legal structures, is far from uniform in its provision of procedural due process mechanisms. State government may yet have a role to play in remedying the disparities.

APPENDIX A

(1) DEMOGRAPHICS*

Table 1
What is the **NATURE** of your business?

Service	40%
Manufacturing	46.5%
Banking	0.02%
Retail	11.3%

Table 2
What is the **SURROUNDING** Environment of your firm?

Metropolitan	48.7%
Small Town	42.6%
Rural	8.7%

Table 3
Is your company (check all that apply)?

part of a larger U.S. corporation	50.2%	117
part of a non- U.S. corporation	4.3%	10
publicly traded	15.9%	37
privately traded	40.8%	95

Table 4
What is the **NUMBER** of at- will employees (i.e., non-union, non-contractual, non-merit system) at your site which your company employs?

1-50	9%
51-100	16.3%
101-250	39.5%
251-500	19.3%
501-1000	8.2%
1001-1500	4.3%
more than 1500	2.5%
unknown	.9%

*Note that percentages do not add up to 100% because respondents were asked to check all that applied and may not have understood the difference between publicly traded and privately owned.

(2) EVALUATION POLICY

Table 5
Does your company provide a periodic employee **EVALUATION** or **APPRAISAL** procedure?

Yes	88%
No	12%

Table 6
If you answered **YES** to Question #5, what is the frequency of these evaluations for **HOURLY** and **SALARIED** employees?

HOURLY EMPLOYEES		**SALARIED EMPLOYEES**	
Monthly	2.6%	Monthly	1%
Semiannually	16.2%	Semiannually	9.3%
Quarterly	4.7%	Quarterly	4.4%
Annually	69.6%	Annually	82.4% I
Other	6.9%	Other	2.9%

(3) DISCIPLINE AND DISCHARGE POLICY

Table 7
Does your company have a **WRITTEN** personnel policy (i.e., handbook) concerning at-will employee discipline or termination?

(a) If you answered YES to Question #7, is this policy available for employee inspection and review?

Yes	84.6%
No	15.4%

(b) How much flexibility do you have in implementing your company's policy?

Great Flexibility	15.9%
Some Flexibility	57.1%
No Flexibility	27%

Table 8

(a) If you answered **NO** to Question #7, does your company have **SOME OTHER** policy for employee at-will discipline or termination which supervisory personnel may employ?

Yes	5.2%
No	94.8%

(a) How much flexibility do you have in implementing your company's policy?

Great Flexibility	2.1%
Some Flexibility	2.1%
No Flexibility	95.8%

Table 9 If your answer to **EITHER** Question #7 or #8 is **YES,** please answer the following questions:

(b) Does your company give **WRITTEN NOTIFICATION** of impending discipline to an at-will employee?

All of the time	60.1%
Some of the time depending on the nature of the discipline	28.8%
No written notice is given, but the employee is notified orally	3.4%
No notice is given at all	7.7%

(b) **If** an at-will employee is to be disciplined or terminated, does the supervisor hold a **MEETING** with the employee to discuss the impending action?

Yes	91.4%
No	8.6%

(c) If a meeting is held, does the employee have the opportunity to present a **STATEMENT** or **EVIDENCE** on his/her own behalf?

Yes	90.1%
No	9.9%

(d) If a meeting is held, WHO ELSE IN ADDITION TO THE EMPLOYEE is present? (check all who are present)

OTHERS PRESENT	YES	NO
Immediate Supervisor	79.4%	20.6%
Department or Middle Management	28.8%	71.2%
Upper Management (plant or divisional management)	20.2%	79.8%
Personnel Officer	39%	61%
Other (please describe)	5.2%	94.8%

(e) Does the employee have an (f) Do you have access to in- APPEAL PROCESS? house or retained counsel?

Yes	73.5%
No	26.5%

Yes	83.7%
No	16.3%

APPENDIX B

Table 1
Demographic Observations

Industry	**Metropolitan**	**Small Town**	**Rural**
Service	65%	27%	8%
Manufacturing	32%	57%	11%
Banking	50%	50%	0%
Retail	61%	31%	8%

Table 2
Existence of Appraisal Procedure by Industry

Firm	**Periodic Evaluation/Appraisal Procedure**
Service	92.39%
Manufacturing	84.91%
Banking	80%
Retail	84.62%

Table 3
Percentage of Evaluation by Industry Size

Number of at-will Employees	**Percentage of Evaluation Procedures**
1-50	85.71%
51-100	89.71%
101-250	85.87%
251-500	91.11%
501-1000	88.89%
1001 and over	93.75%

Table 4
Percentage of Appraisals for Hourly/Salaried Employees

Industry	**Hourly Employees**	**Salaried Employees**	**Difference r**
Service	83%	91%	8%I
Manufacturing	71%	82%	11%
Banking	80%	80%	..1 0%
Retail	77%	77%	0%

Table 5
Written Personnel Policy on Termination

Industry	**Written Policy**	**Made Available % for | Inspection >**
Service	88%	88%
Manufacturing	86%	83%
Banking	60%	60%
Retail	85%	81%
U.S. Firms	88%	84%
Foreign Firms	100%	100%
Publicly Traded	92%	89%
Privately Held	82%	82%

Table 6
Percentage of Written Policies by Industry Size

Number of at-will Employees	**Written Policies**	**Made | Available 1 for 1 Inspection €**
1-50	62%	57%
51-100	82%	79%
101-250	88%	86%
251-500	91%	91%
501-1000	100%	100%
1001-1500	90%	90%
More than 1500	100%	100%

Table 7
Written Notification of Discipline

Employers	**All The Time**
All Employers	64%
Large U.S. Companies	66%
Foreign Firms	50%
Small Private Companies	56%

Table 8
Holding of Meetings by Industry Size

Number of Employees	**Holding of Meeting**	**No Meeting**
1-50	71%	29%
51-100	84%	16%
101-250	95%	5%
251-500	96%	4%
501-1000	100%	0%
1001-1500	100%	0%
more than 1500	100%	0%

Table 9
Statement of Evidence by Industry Size

Number of Employees	**Allowed Statement or Evidence**	**Did Not Allow Statement or Evidence**
1-50	62%	38%
51-100	76%	24%
101-250	97%	3%
251-500	98%	2%
501-1000	94%	6%
1001-1500	100%	0%
More than 1500	100%	0%

Table 10
Existence of Appeals Process Following Disciplinary Meeting

Industry	**Existence of Appeal Process**
Service	53%
Retail	46%
Manufacturers	41%
Bankers	20%