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Authors

Frank D. Ferris is national executive vice president of the National Treasury Employees Union (NTEU), the nation's largest independent federal sector union. He has been associated with NTEU for more than 25 years supervising the union's negotiations, training, and cooperative efforts programs. He holds a Masters degree in labor studies from the University of Massachusetts and a Doctorate from the University of Southern California. He has published widely in the field of labor relations and teaches courses in conflict management and human resources at Johns Hopkins University.

E-Mail: frank.ferris@nteu.org

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Frank D. Ferris

National Executive Vice President
National Treasury Employees Union

A Return to Spoils? Revisiting Radical Civil Service Reform in the United States

Stephen E. Condrey and R. Paul Battaglio, Jr.

Don Rumsfeld is the finest Secretary of Defense this nation has ever had.

—Vice President Richard Cheney,
December 15, 2006 (Tyson 2006)

I think that Donald Rumsfeld will go down in history as one of the worst secretaries of defense in history.

—Senator John McCain, February
19, 2007 (Fletcher 2007)

These two appraisals frame a near-perfect picture of the public sector at-will dilemma. While Secretary Rumsfeld might soon be christening an aircraft carrier named in his honor if the Vice President were his assessor, he would be lucky to avoid being keel-hauled to that carrier by Senator McCain. But, as attention-grabbing as it is that these

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two are judging the same performance, one can't help but also notice that:

- curiously missing from the scene is any hint of a more objective perspective of the Secretary's performance, and
- the public's interests are nowhere in the picture.

One may be tempted to dismiss this picture as unrepresentative of the typical workplace because of the national politics involved, but that would assume—wrongly—that local electoral and office politics are not worthy substitutes.

Condrey and Battaglio have given us very useful measures to assess the technical aspects of the at-will picture. Like any

picture, however, its true value is in the eye of the beholder and best measured from several angles. Four such perspectives are those of the politicians, the employees, the managers, and the public. Future research should focus on what they see, fear, and desire when faced with radical civil service change ideas.

The Politicians

As Condrey and Battaglio suggest, an "at-will employment" campaign platform plank has undeniable voting-booth appeal. It can be explained in the average six-second media sound bite; it suggests a certain frontier toughness by the candidate; it taps into the stereotypical image of civil service employees who have been regularly trashed in presidential campaigns since Jimmy Carter; it enables one to demagogue about the "out-of-touch, pointy-headed, elite, liberal, activist judges" who reinstate employees; and it permits the candidate to say he or she is just doing what good business leaders would do. These leaders are never named, however, lest they suddenly become the next Jeff Skilling, Bernie Ebbers, or Dennis Kozlowski.

Of course, little thought is given in the heat of campaigns to the immortal words of H. L. Mencken: "There is always an easy solution to every human problem—neat, plausible, and wrong." At-will campaigners would be wise to review the plight of Attorney General Alberto R. Gonzalez who, as I write this, is dealing with intense congressional fire for his at-will termination of eight U.S. attorneys. Future research might report on, if just anecdotally, how often and successfully opposition parties have used an executive's at-will power to drag a vulnerable termination decision before the public for political gain.

The Employees

While the popular understanding of at-will employment is that an employee can be fired for any reason at all, that is not what the law provides. Courts have recognized numerous exceptions to an executive's right to fire at will. For example, they have reversed termination decisions when they find any of the following:

- a written, oral, or otherwise implied contract of something other than an "at-will" relationship;
- an implied promise of good faith and fair dealing in the employment relationship;
- a termination that violates public policy;
- a fraudulent representation in hiring the employee;
- an intentional failure to disclose a material fact about the job that harms the employee;
- a infliction of emotional distress on the employee;
- the tortious interference with the employee-employer relationship by a third party; or
- defamation of the employee. (White 1998, 13-26)

An employee also can charge that the termination violates any of more than a dozen statutes that prohibit discrimination based on race, color, gender, age, religion, national origin, disability, pregnancy, sexual orientation, sexual harassment, union activity, whistle-blowing activity, political affiliation, veterans' status, and several other grounds written into state or local jurisdiction codes. In other words, modern at-will employment rights are those that are left over after cutting through the many legal exceptions which, it could be argued, have overtaken the rule.

Generally, once an employee has established the possibility of discrimination and the employer responds with his or her business-related reason for the termination, the employee can often prevail in court by showing that the employer's alleged reason was "pretext." Hardly giving any employer comfort, one court has described the evidence needed to prove pre-text and prevail in a suit against the employer as follows:

Without direct evidence of pretext (e.g., an admission), a plaintiff may show pretext by presenting evidence "tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge." (*Nawrot v. CPC International Corp.*, No. 00-2849 [7th Cir. 2002])

Even Justice John Roberts's Supreme Court has added to the at-will employer's uncertainty. It has endorsed an employee's right to sue an employer for a termination based solely on retaliation for some protected conduct engaged in by the employee. For example, if an employer terminated a female employee for regularly complaining that she was not paid on par with men in the office who did the same work, the employee can win reinstatement, back pay, and damages, even where she was completely wrong about the underlying equal pay allegation (see *Burlington Northern & Santa Fe Railroad v. White*, Supreme Court, No. 05-259 [2006]).

The media is fond of noting that employees are becoming more vulnerable because their overly protective unions have severely declined in strength. Yet that seems akin to noting that modern America is more vulnerable because the horse-mounted cavalry no longer exists. It is not as if our nation lost a mobile military; it was replaced with the

mechanized and later airborne mobile forces. One could similarly argue that unions have largely been overtaken by the employment attorneys of the country to the point that the house of labor should be re-titled the AFL-ABA-CIO (American Federation of Labor-American Bar Association-Council of Industrial Organizations) in deference to the bar association members who are so active on behalf of employees. One need only enter the search terms "lawsuit" and "discrimination" into www.google.com to see over 1.2 million stories about how active an area of litigation employment decisions have become.

Future research into the public value of an at-will employment policy should not overlook what has happened in the legal arena. Specifically, let's find out: (1) whether or not lawsuits have increased, (2) whether or not reinstatement costs have increased due to awards of attorney fees and damages, and (3) whether or not managers and employee witnesses have been taken away from their jobs for significant periods to prepare and give their testimony, give depositions, or answer interrogatories. In short, future research should assess if an at-will approach merely replaces an internal civil service or negotiated arbitration appeals process with a far more formal and costly litigation process.

The Managers

Perhaps the most intriguing gift Condrey and Battaglio provide us is their finding of substantial opposition to the at-will concept among the more experienced human resource managers. Some will agree with these researchers that this shows that resistance to at-will reforms will retire with this senior generation. However, it strikes me more as a testament to the wisdom of the experienced long-time leaders of our civil service. I can almost hear the endless profes-

sional conference debates over the meaning of this finding now.

However, there likely is even better data to be found on this issue among the first and second-line managers in public agencies, regardless of age. Federal sector researchers, for example, have found that managers shy away from terminations for many reasons other than the lack of an at-will option:

- they rarely get to replace the terminated employee in a timely fashion due to budget constraints, which means the employee's workload must now be shared among the good performers who remain;
- even when replacements are brought in, they are often inexperienced, which requires a great deal of the manager's time to train the substitute;
- terminations often upset those employees in the work group who remain because they are perceived as being unfair, threatening to them, or denying the employee a long-time friend;
- managers get little support or training to help them through a termination. (MSPB 1999; OPM 1999)

When you add in the increasing awareness of workplace violence incidents (most recently reported by the federal Bureau of Justice Statistics [2001] as 1.7 million incidents a year), and that courts have not yet settled whether terminated employees can sue their supervisors personally for financial damages in certain termination situations, it becomes clear that an at-will termination policy may have little practical effect.

Future research should compare the percentage of employees terminated under at-will policies in Georgia, Florida, and Texas to those of other states to see if the policy results in more frequent action against poorly performing employees or even voluntary

resignations among poor performers. A related inquiry might look at the sophistication of the performance evaluation systems in place in the at-will jurisdictions versus the others. Whose systems best measure employees' performance regularly and objectively so the public is not burned as the Cheneys and McCains fiddle endlessly around the issue on campaign trails?

If Abraham Maslow (1943) and his progeny are to be believed, managers (as most of us do) focus first on their own needs. Often, this results in them being more concerned with meeting their own goals by devoting their time to staff members who can help them the most, to getting promoted, and to leading a satisfying work life. Much lower is their concern with terminating a marginal employee. After all, if the manager gets promoted, the employee is someone else's problem.

The Public

Many voters will be attracted to the at-will platform. Yet ask those same voters how happy they would be with giving government managers the unchecked right to throw away a functioning computer solely because the manager no longer liked it. Or, rate their approval of a manager whose government car broke down and responded "at will" by taking the plates off and leaving it by the side of the road as junk. Is there any doubt about the level of public outrage that would occur over the unchecked disposal of property?

When the public views the employee as its employee (or, crassly, its property) in whom much has been invested—not to mention the cost of replacement—it is easy to see the interest in ensuring that public resources are used wisely, not just at the whim of some other public employee. Many will argue (although perhaps not Attorney General Gon-

zalez) that at-will policies help elected officials force changes quickly. But those same policies take away the public's civil service check-and-balance mechanism on the executive's right to be wrong, wasteful, and even unethical. Permitting employees to earn rights to a job and the protection of appeal processes also benefits the public. Those appeals are employees' opportunities to open the executive's termination decision to community scrutiny. They reveal who was at fault, how long the fault was tolerated, the cost of the fault, and whether the investment should be declared a total loss. In short, they better educate the electorate.

Radical Civil Service Change

I had the opportunity awhile ago to be the chief spokesperson for all the unions that were negotiating with management officials over the proposed radical changes to personnel policies in the federal Department of Homeland Security (DHS). As Professor Riccucci discusses in her commentary, management demanded at-will policies throughout the personnel process. Among others, these included policies for terminations, for pay increases, for assignments, and for benefits. Officials from DHS and the Office of Personnel Management (OPM) repeatedly bellowed the classic at-will campaign themes at the bargaining table. These included: management needs to modernize old-school thinking among employees, management needs the freedom to make changes instantly, management shouldn't be overruled by arbitrators or judges who know nothing about homeland security, and management needs to run the government like a business. Put simply, it was all about giving management unchecked authority.

In response, the union offered dozens of changes to improve the fundamentals of government, including faster resolution of

negotiation disputes and employee appeals, fewer steps to common personnel processes, more decentralized flexibility in various personnel systems, and better measures of pay equity. We repeatedly argued for a performance reward system driven by the "expectancy theory" of motivation. More precisely, we argued that employees perform at their best when:

- they are offered a reward that they value;
- they perceive that the extra effort they put in will truly yield extra results;
- they perceive that extra results will be rewarded; and
- they perceive few negatives associated with being a high performer. (Patten 1997, 134-139)

Yet we were never taken seriously. We were dealing with "at-will" management negotiators from OPM and DHS who had already decided that their pre-determined approach was not open to challenge. Sadly, they had locked in on a single approach to improving operations—at-will decision-making—rather than on the many ways to achieve the more fundamental goals of what can be done to improve operations while maintaining neutral competency, the rule of law, and objective merit analyses.

As a result, the unions' offer to support radical civil service changes was left on the table by management, along with the unions' offer not to challenge the proposed revisions in court. Management moved forward on its own, and history has shown it got very little change. It was rebuffed by the courts, Congress is in the process of withdrawing some of the flexibility it had to make changes, and it should not be long before we see Government Accountability Office audits announcing that millions and millions of dollars

were wasted on private contractors to design personnel systems without ever seeking rigorous public employee input or support.

Speaking as a negotiator, which I have spent 30 years of my life doing, radical change is always available to one party at a bargaining table if it is willing to offer other involved parties similar radical improvements. It need not even be a one-for-one exchange. If civil service change advocates continue to design these radical changes in their faculty offices, on their consultant's conference table, at campaign headquarters, or even in the halls of the National Academy of Public Administration and similar organizations of no-longer-active-in-government stakeholders, they will accomplish little. These change advocates will have to overcome the vagaries of Congress, the probing of the media, the scrutiny of the courts, and the anxieties of employees who are excluded from the deliberations. It certainly is possible to overcome all that, but the easiest path to change, even radical change, is to enlist the impacted employees so that the Congress, the media, and the courts are not forced to take sides.

Radical civil service change efforts in DHS fell victim not to unions, but to politicians more interested in campaign sound-bites, images, and platforms than government effectiveness; more trustful of million-dollar consultants than the cost-free insights of their own employees; and more comfortable with the motto of every at-will advocate: "I am the decider" (Henry and Starr 2006).

References

- Bureau of Justice Statistics. 2001. Law Enforcement Officers Most at Risk for Workplace Violence. Press Release, December 20.
- Fletcher, Michael A. 2007. Cheney Argues Rumsfeld Served Well: McCain Called Him "One of the Worst" Defense Secretaries. *Washington Post*, February 22, A04.

- Henry, Ed, and Starr, Barbara. 2006. Bush: "I'm the Decider" on Rumsfeld. April 18. <http://www.cnn.com/2006/politics/04/18/rumsfeld>.
- Maslow, Abraham. 1943. A Theory of Human Motivation. *Psychological Review* 50: 370-96.
- Patten, Thomas. 1977. *Pay: Employee Compensation and Incentive Plans*. New York: Free Press.
- Tyson, Ann Scott. 2006. The Curtain is Drawn on the Rumsfeld Era. *Washington Post*, December 16, A08.
- U.S. Merit Systems Protection Board (MSPB). 1999. *Federal Supervisors and Poor Performers*. Washington, DC, July.
- U.S. Office of Personnel Management (OPM). 1999. *Poor Performers in Government: A Quest for the True Story*. Washington, DC: Office of Merit Systems Oversight and Effectiveness, Report of a Special Study, January.
- White, Rebecca Hanner. 1998. *Employment Law and Employment Discrimination: Essential Terms and Concepts*. New York: Aspen Law and Business.