IS AT-WILL EMPLOYMENT OBSOLETE?

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Abstract

Employers may fire you for any reason, except for cases of discrimination. This is called the at-will employment doctrine. So, what is at-will employment? Well, its origins can be traced back to a treatise written by Horace C. Wood titled Master and Servant, which outlined the at will employment doctrine, basically stating that employees and employers should be able to mutually terminate their relationship for any reason. Unfortunately, this doctrine has not aged very well. Its evolution seems to reinforce a modern-day Master/Servant relationship. Not only that, but because it has been combined with non-compete agreements, there is no longer parity in the relationship, the employer appears to have all the power and that has a negative on the overall employee morale as well. Some would say that this doctrine results in no significant changes, but the facts indicate otherwise.

Introduction

Employers have always been able to fire you for any reason, except for cases of discrimination. This is called the "At-Will Employment Doctrine." At-Will Employment can trace its origins back to a treatise written by Horace C. Wood titled *Master and Servant,*[1] which outlined the At-Will Employment Doctrine,

[1] Ronald Standler, *History of At-Will Employment Law in the USA*, Rbs2.com, 2000, http://www.rbs2.com/atwill.htm, (last visited Mar 26, 2021.)

stating that employees and employers should be able to mutually terminate their relationship for any reason.[2] Wood cited four cases in the *Master and Servant Treatise* as supporting his at-will theory. but others have found no support for the at-will doctrine in those cases.[3] Many have described the emergence of the at-will theory as a mistake made by Wood. The court wrote in Footnote 8 of its opinion in *Magnan v. Anaconda Industries, Inc*, "Scholars and jurists unanimously agree that Wood's pronouncement in his treatise, Master and Servant § 134 (1877), was responsible for nationwide acceptance of the rule. They also agree that his statement of the rule was not supported by the authority upon which he relied, and that he did not accurately depict the law as it then existed."[4] So even as this doctrine emerged, it was based upon flawed logic and reporting.

For people in the working-class, this doctrine has not aged very well either, since it propagates a modern-day "Master/Servant" relationship. Beyond that, it is also plausible that the doctrine influences overall employee morale as well. But some would say that this doctrine changes nothing and is still fair. This research will argue that a law that has no legal support since its inception should not be a part of our law in the first place.

Examining At-Will Employment

Master and Servant[5] is a peculiar name for a document that serves as a basis for employee contract law. Considering that without employees, businesses cannot exist. When employees are initially chosen for a job or position, they

[2] Id.
[3] Id.
[4] *Magnan v. Anaconda Industries, Inc*, 193 Conn. 558, Footnote 8, 1984, https://casetext.com/case/magnan-v-anaconda-industries-inc-1, (last visited April 8, 2021.)
[5] Id.

are presented with what is usually an adhesion contract,[6] which includes two specific characteristics, (1) the unequal bargaining power between employee and employer and (2) the choice to either accept all terms of the contract or none of them at all.[7] This robs the worker of any autonomy in deciding who they want to work for, and as such, there is a certain unfairness created when one is not able to negotiate their own terms. The employee is the most vital aspect of any business, so why does the law now reflect this notion that the employer gets everything their way and the employee has no rights?

Public Policy & At-Will Employment

Sometimes systems that are put into place to protect us, fail in their purpose. Take the courts, for example. When Horace first introduced the treaty,[8] there was no opposition or examination, there were no efforts to check or debate Horace's sources, nor was there debate concerning implementing the doctrine when it came to making decisions about employment contracts.[9] One of the first challenges to this theory was the occurrence of workplace discrimination.[10] It was only after several adaptations, changes, and amendments, that the legal theory was amended to include a limitation on the employer's right to fire anyone for any reason, and that limitation was if the firing conflicted with "public policy" it was not allowed. One can surmise, however, that the courts have a very narrow view of public policy, since the courts appear to have chosen to leave the development of the relevant laws to the legislature.

[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

According to John Orth, this is not true. In his article, *The Role of the Judiciary in Making Public Policy,*[11] Orth explains that judges are tasked with interpreting statutes and developing them into common law, and are tasked with restating this common law and applying it, which is why judges often base their decisions on precedents.[12] Common-Law refers to non-statutory law made by previous judicial decisions (precedent) to keep public policy consistent, so as society develops so does public policy along with it.[13] If judges fail to update common law then the legislature steps in, but in the case of at-will employment, the interests of large, wealthy, and powerful companies have a substantial stake in the development of the legal theory. And since the legislature will not want to annoy or turn against large, wealthy companies, they are not motivated to do away with at-will employment.[14] In this particular case, the evolution of the at-will doctrine, judges have really chosen not to influence public policy as society has changed. The ideas introduced in *Master and Servant* are outdated, including the idea that employees and employers are on equal footing. This growing power imbalance in the relationship between employee and employer as a direct effect of adhesion contracts is something the judges are failing to consider. Beyond that, judges are also failing to apply the fact that most contracts that employees are under are adhesions contracts. These contracts do not give the working-class employee any other option than to accept the terms of the contract out of financial necessity.

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[11] John Orth, *The Role of the Judiciary in Making Public Policy*, North Carolina Periodicals Index, April 1, 1981, Digital.lib.ecu.edu, https://digital.lib.ecu.edu/ncpi/view/388 (last visited Mar 26, 2021.)

[12] Id.

[13] *Common Law*, LII / Legal Information Institute (2021), https://www.law.cornell.edu/wex/common_law, (last visited Mar 25, 2021.)

[14] John Orth, *The Role of the Judiciary in Making Public Policy*, North Carolina Periodicals Index, Digital.lib.ecu.edu (2021), https://digital.lib.ecu.edu/ncpi/view/388, (last visited Mar 26, 2021.)

Drawing a Connection: Public Policy & At-Will Employment

Adhesion contacts do influence employee morale. It also changes how employees view upper management. Liz Ryan, author of the Forbes article *Ten Ways Employment-At-Will is Bad for Business,*[15] did not explicitly mention *Master and Slave*, but she does allude to a one-sided relationship between management and employer, stating that the idea of employment At-Will "keeps lousy management in place at every level of the organization chart."[16] She also suggests that this is proof of an inherent power imbalance between employee and employer. Employees are the backbone of any organization, especially the ones at the very bottom of the corporate ladder. She also adds that this policy creates a "good little worker" effect that prohibits employees from bringing their creativity to their work.[17] Simply stated, not giving employees a voice in the matter of their terms of employment does not lead to good business practices.

Conclusion

At-Will employment reflects a doctrine introduced in an era where the employer/employee had a different relationship, but as societies and businesses change, the doctrine has not, and that is why we must strike it completely from legal theories applied to modern day situations. Beyond its detrimental effect on work morale, it also propagates the notion that employees are lesser contributors to the company's systems, and to the overall economic system in America. Society can change this by knocking on doors and communicating with and educating judicial authorities, society must demand to know why this has not been at the forefront of our attention and why this policy has not been removed from appropriate legal theories. A doctrine based on falsehood should be obsolete.

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[15] Liz Ryan, *Ten Ways Employment-At-Will Is Bad for Business,* Forbes, https://www.forbes.com/sites/lizryan/2016/10/03/ten-ways-employment-at-will-is-bad-for-business/, (last visited Mar 20, 2021.)
[16] Id.
[17] Id.