

# Employment Law from a Manager's Perspective

Put yourself in the shoes of Wendy's employer. When Wendy caught her husband looking at an adult Internet site, she convinced him that it would spice up their marriage if they set up a similar site. Wendy posed for provocative photographs, which her husband took and posted to their site. To access the site, a viewer had to claim to be an adult. Professionally, Wendy worked as a counselor to troubled youths. One of the youth's parents told Wendy's manager about the Web site and demanded that Wendy be fired.

As Wendy's manager, what would you do? More important, what factors would you consider in making your decision? Would it matter if Wendy had a long history of excellent

performance appraisals? What if Wendy had done all the work for the Web site on her own time and with her own computer equipment?

Certainly, one of the factors in your thinking would need to be potential legal issues. As a manager, you don't want to cause your company or yourself unnecessary legal complications, such as lawsuits for wrongful termination. More positively, you need to know what latitude the law does and does not give you in your efforts to build and manage the best possible workforce.

All too often I have seen managers who are frustrated with the legal system. After frequent interactions with human resources professionals, management consultants, and attorneys, managers end up believing that the law requires them to hire a certain job candidate even though another candidate is far more qualified, that they cannot discipline the employee who spends more time out of work because of illness than at work, or that the law prevents them from firing an employee whose performance is lousy. All of these beliefs are fallacies. With a proper understanding of the law, managers can hire the most qualified workers. Managers can discipline employees for unreasonable absences. And managers can fire employees who cannot or will not perform the critical functions of their jobs.

As a manager, you can always get specific legal advice for some issue that confronts you, and often you should. On the other hand, you don't want to run up the cost, whether in time or money, of seeking professional counsel every time an employment question arises that might have legal implications. To manage efficiently, you need an internal compass that can guide much of your everyday decision making and let you know when you really need to get expert advice. Developing that internal compass is the purpose of this book.

This first chapter provides the basic road map for considering the legal implications of almost any employment-related de-

cision you might make. In the pages that follow, I first explain the primary concept underlying U.S. employment law, *employment-at-will*. Next I summarize some key exceptions to the basic rule. To provide some perspective, I then briefly compare the U.S. system and the approach taken by many other developed countries.

The discussion of employment-at-will shows that as a manager you have significant flexibility in dealing with workforce issues in the United States. However, the nature of our legal system has some implications that can be at least as important as the substantive legal rules when you are evaluating a potential employment decision. Therefore, I also address some unique features of the U.S. legal system.

Finally, it's important to understand that managing legal risk and opportunity in employment decisions is just a special case of what you already do as a manager. Accordingly, I end the chapter by integrating the discussion of U.S. employment law with the basic concepts of managerial risk taking.

### ■ Employment-at-Will

The underlying concept governing the legal relationship between employer and employee in the United States is known as *employment-at-will*. The concept itself is surprisingly simple to understand. It becomes complex only because of the exceptions that have developed over time. Before reading on, though, try your hand at the following Fact or Fallacy? questions.

#### ■ Fact or Fallacy? ■

1. You don't need good cause to legally fire an employee.  Fact  Fallacy
2. Unless you put a promise to an employee in writing, the promise will not be enforceable.  Fact  Fallacy

**■ Fact or Fallacy?, Cont'd ■**

3. You cannot make any decisions about an employee or potential employee based on the person's physical characteristics.  Fact  Fallacy
4. You can make decisions on who to send to training based on employees' gender because nondiscrimination laws do not apply to decisions such as training.  Fact  Fallacy
5. You would have more flexibility in firing employees if you managed a workforce in almost any developed economy other than the United States.  Fact  Fallacy

**The Basic Rule**

At its most basic, the principle of employment-at-will permits you, as a manager, to fire an employee for any reason, whether it is a good reason, a bad reason, or even no reason at all, so long as any reason that you do have is not an *illegal* reason. Historically, the logic behind this rule was that employees and employers should both enjoy roughly the same amount of freedom in establishing the terms of their relationship. Since employees generally were free to change jobs at will, employers also had the right to terminate the employment relationship at will. Individuals typically are employees at will when they are hired without a contract that specifies the duration of the employment or that imposes other obligations on the employer.

The employment-at-will standard also recognizes that companies are in the best position to determine their own employment needs. The law acknowledges that you need flexibility in determining the size of your workforce and the skills you require to get the job done. As a result, it shouldn't surprise you that courts have upheld the right of managers to fire employees for poor performance, for misrepresenting their credentials, and for insubordination. It may come as more of a surprise that courts

have permitted managers to fire employees for being suspected of having an affair with the boss's son or because the employee's spouse, a police officer, ticketed the manager's wife. Whatever the merits of these reasons, none of them is specifically prohibited by law.

The first Fact or Fallacy? item is therefore true. As a manager, you may fire an employee for any reason, even a lousy, arbitrary, or unfair reason, so long as it is not an illegal reason. Practically speaking, though, few managers choose to fire employees for lousy, arbitrary, or unfair reasons. Managers who act so arbitrarily not only sometimes fire good employees, they also contribute to poor morale and can make it difficult to attract skilled workers. In addition, it is legitimate to ask whether judges and juries look askance at managers who appear to have treated a good employee unfairly. So the advice here is not that you should start treating your employees arbitrarily or fire them for writing with blue instead of black pens. But it is useful to understand that the foundational concept of U.S. employment law recognizes your rights as a manager, within the constraints believed by our society to be appropriate, to make decisions about your employees' employment.

Consider how the employment-at-will standard would apply to Wendy. The beginning premise is that you, as Wendy's manager, have the right to fire her at will, so long as your reason is not illegal. Consequently, you can begin with the premise that you may fire her for working with her husband to establish the Web site and for permitting provocative pictures of herself to appear on the site. The only remaining question is whether any exception exists that would make your reason for firing Wendy illegal.

### **Exceptions to the Basic Rule**

If applied without limitation, the concept of employment-at-will would permit a manager to fire an employee at any time for any reason. But the courts and legislatures have developed limitations

to prevent managers from making employment decisions based on criteria that our society defines as unacceptable, such as certain types of discrimination.

These limitations, which act as exceptions to the concept of employment-at-will, sometimes frustrate managers because they are not always well defined. Still, you can get a grasp of the main limitations by understanding three basic categories of exceptions to employment-at-will: contracts, nondiscrimination statutes, and policy-based and statutory provisions.

### *Contractual Exceptions*

Some of the contractual exceptions to employment-at-will are obvious. When an employer enters into a written contract to employ an individual for a specific time period and with specific terms, that contract typically is enforceable. For example, top executives, coaches of professional sports teams, and actors in television sitcoms frequently have written contracts of this type. In contrast to those individualized contracts, a written collective bargaining agreement typically covers groups of employees in a unionized workplace. I devote little coverage in this book to the specialized issues of dealing with unionized employees because less than 10 percent of nongovernmental workers in the United States are unionized. If you do manage unionized employees, though, you should recognize that properly negotiated collective bargaining agreements are enforceable contracts. In addition, in a unionized workplace a separate and distinct set of federal laws governs employee—management relations.

More subtle issues of a contractual nature arise when a manager makes a verbal promise to an employee or to a recruit. Those promises might be enforceable if they are clear enough that the terms of the promise can be understood and a reasonable person would think the manager had the authority to make such a promise. Another factor that might affect the legal analysis is whether the employee or job candidate relied on the ver-

bal promise in taking some action, such as quitting an existing job or turning down another job offer.

Consider what happened to Philip McConkey, who went to work for Ross & Co. as an insurance broker after playing football for the New York Giants. Alexander & Alexander (A&A) made considerable efforts to recruit McConkey, even arranging a meeting between its CEO and McConkey. At the meeting the CEO addressed McConkey's worry that A&A was up for sale and "assured him there was no intention to sell."<sup>1</sup> The company's chairman allegedly gave McConkey similar assurances. McConkey eventually accepted a position with A&A, but the company was sold later the same year. Less than a year after employing him, the company stripped McConkey of all responsibilities and subsequently laid him off. When McConkey learned that A&A had been negotiating the sale of the company at the same time it was recruiting him, he sued. A jury awarded him more than \$10 million.

Fact or Fallacy? item 2 is therefore a fallacy. In practice, it can be difficult for judges and juries to evaluate who is telling the truth when employees and managers tell different stories about verbal promises allegedly made to employees or recruits. Nevertheless, verbal commitments can be enforceable. Moreover, casual written assurances can be as legally binding as a long, formal document that has been evaluated by the company's lawyers. As a manager, you should be circumspect about the commitments you make to your employees, whether or not you put them in writing.

Not all verbal representations are enforceable, however. Giles Wanamaker, in-house counsel for a company, alleged that he was told by a vice president and director that the job was a "career" job. Others reportedly told him "that there was no need for concern in that the position would be a job for the balance of [his] career."<sup>2</sup> After he was fired, Giles sued for breach of contract. He lost because New York law requires that oral promises

must be very clear in establishing a fixed period for employment; otherwise the basic rule of employment-at-will governs.

Many companies have taken steps to ensure that their employees understand that they are at-will employees. Offer letters, employment manuals, and other official company communications often explicitly explain employment-at-will. In addition, a company can take two steps to reduce the chances that its managers will make promises that undercut its employment-at-will relationships. First, the company can train its managers so they understand that careless statements might become enforceable commitments. In a column on how to retain valuable employees during times of economic retrenchment, the *Wall Street Journal* recently advised, "Bosses should 'whisper in the ears of those who keep their companies afloat that they're wanted—and will be rewarded with salary increases and bonuses.'"<sup>3</sup> That is a fine tactic—so long as the bosses and their companies understand that those whispers may be legally enforceable contracts. As a second tactic, the company can include language in its statements of at-will status explaining that only very specific agreements can change that status. In its offer letters to new hires, one major high-tech company first states that the person will be an at-will employee and explains what that means. Then it includes language similar to the following: "Your status as an at-will employee can be modified only by an explicit written agreement signed by both you and [the name of the company president]." This helps to ensure that a manager cannot undercut the company's at-will policy in recruiting a new employee or trying to retain a current one. In the long run, that protection is good for the company and its managers.

The application of the implied contract exception to employment-at-will is fairly easy in Wendy's case. Typically, in evaluating the potential existence of an implied contract, you would consider a variety of possibilities, such as an individualized writ-

ten contract with Wendy, an employee handbook that indicates the company will terminate employees only for good cause or that establishes a defined disciplinary procedure, or the existence of other verbal or written commitments. Since there is no indication in the facts that as Wendy's employer you have limited your ability to fire her, it appears that Wendy is an at-will employee and the implied contract exception will not limit your alternatives.

#### *Nondiscrimination Statutory Exceptions*

Perhaps the best known but least understood limitations on a manager's right to fire employees are those based in nondiscrimination law. Chapter Four discusses in some detail how to avoid discrimination and harassment in the workplace. Because of the importance of these concepts in the basic analysis of any workforce decision, though, I include a brief primer here.

Federal law prohibits an employer from discriminating against an employee or job candidate based on race, color, gender, national origin, religion, pregnancy, age of forty or older, and disability. State nondiscrimination laws generally are similar to the federal laws, but many protect additional characteristics of employees and job applicants. For example, several states and over a hundred cities and counties have laws that protect against discrimination on the basis of sexual orientation. Michigan protects people against differential treatment based on height and weight. Alaska forbids employers from acting on the basis of a change in marital status, and North Dakota does not permit receipt of public assistance to be a factor in employment-related decisions. Even localities sometimes impose specific prohibitions against discrimination in employment.

As stated, then, Fact or Fallacy? item 3 is mostly fact, but it is difficult to evaluate because it is so inclusive. As you will see in Chapter Five, federal nondiscrimination law makes it illegal to discriminate against someone with a disability who, with or

without reasonable accommodation, can perform the essential functions of a job. That, on its own, means that the law restricts what physical characteristics you can consider when making employment-related decisions. Similarly, some state laws, such as Michigan's protection of height and weight, further restrict your ability to make determinations based on physical characteristics. More subtle legal problems also can arise from issues associated with physical characteristics. More and more employees or former employees are filing lawsuits claiming their employer discriminated against them because of their appearance. For example, a court permitted a former employee to sue a ski resort that fired the individual for not having any upper teeth and refusing to wear her dentures, which she said caused her pain. The resort said it was concerned with its public image and had a policy that "employees will be expected to have teeth and to wear them daily to work."<sup>4</sup> In the view of the court, however, the toothless chambermaid's claim could fall within the ambit of the law against disability discrimination.

The extent to which you may consider physical characteristics depends primarily on two variables. The first is the law of the relevant state. Second, the job may require a specific physical characteristic. For example, it could be impossible for someone who is very tall to perform a job in a confined space that cannot be expanded.

The prohibition on discrimination tends to cover all phases of employment, such as salary, benefits, access to training, promotion, and all other terms, conditions, or privileges of employment. Consequently, Fact or Fallacy? item 4 is a fallacy. The federal laws against discrimination protect employees against a wide variety of discriminatory acts in the workplace, including any acts that affect the employee's "terms, conditions, and privileges" of employment. Access to training, which can qualify an employee for a promotion, raise, or even continued employment, certainly is a privilege of employment.

During recent years, one of the most quickly growing categories of employment lawsuits has been suits alleging retaliation for making a complaint of discrimination. Between 1992 and 2000 the number of retaliation lawsuits almost doubled. In addition to the raw numbers, there is some evidence that juries are particularly hostile to employers who retaliate against employees who complain of discrimination. For example, a manager in Iowa who claimed that her employer retaliated against her because she complained of gender discrimination won more than \$80 million in a jury award.<sup>5</sup>

One concern with application of the nondiscrimination laws occurs because of the "he said–she said" nature of the claims that arise. If you fire Wendy because you believe that her involvement in the Web site undermines her ability to do her job, or even because you simply disapprove of her actions, then it does not appear you have violated any federal, state, or local nondiscrimination laws. No jurisdiction that I know of specifically protects individuals who establish and appear in provocative Web sites from being discriminated against on that basis. Suppose, however, that Wendy claims that the reason you have given for her firing is a pretext and that the real reason was that she is a woman. Given the number of cases in which the employee argues that the employer had a prohibited discriminatory reason for a particular action, even while stating a different reason entirely, the law has developed a specific approach for evaluating these contradictory claims. Chapter Four discusses that approach. But for now, consider whether Wendy has a stronger case if male employees have been permitted to establish and appear on similar Web sites. Or what if the employer has a pattern of firing women, but not men, for engaging in unsavory behavior outside the workplace? In such cases, the disparity of treatment may increase the likelihood that a judge or jury will find that the employer discriminated against Wendy because of her gender. I'll return to this issue in Chapter Four.



### *Policy-Based and Statutory Exceptions in Your Jurisdiction*

The most unpredictable category of exceptions to the principle of employment-at-will is made up of policy-based exceptions established by the courts and miscellaneous statutory exceptions in various jurisdictions. Even here, however, there are some trends that are of general interest to managers.

The first trend concerns public policy exceptions to the basic at-will principle. An employer might find itself embroiled in a wrongful termination lawsuit when it fires an employee for a reason that on the surface does not violate any state law, but that in some way undercuts the policies being protected by state law. One recurring fact pattern involves employers who fire employees for refusing to do something illegal. A trucker might refuse to drive an overweight load. An inspector in a food processing plant might refuse to approve a product that does not meet minimum safety standards. A worker at a nuclear power plant might refuse to falsify operating documents. Perhaps not surprisingly, workers tend to win these types of cases. Courts reason that an employee should not be forced to choose between keeping a job and complying with the law. Furthermore, because public policy exceptions tend to be tort claims, they provide the opportunity for plaintiffs to receive high damage awards. Therefore, aside from the ethical implications, no manager should ever ask an employee to do something that is illegal.

But when the facts are different, many jurisdictions construe the public policy exception quite narrowly. In one recent case Karen Bammert worked for Don Williams, who owned Don's SuperValu. Karen's husband, a police officer, arrested Don's wife for driving under the influence of alcohol. Don fired Karen in retaliation for the arrest. Karen then sued, alleging that her firing violated Wisconsin public policy because her husband had an affirmative legal obligation to assist in the arrest of Don's wife and because state policy discouraged drunken driving. The

Wisconsin Supreme Court decided that it would be pushing public policy too far to consider the legal duties of an employee's spouse. So, the basic policy of employment-at-will applied, and Karen lost the case.<sup>6</sup>

A somewhat similar concept is known as the good faith and fair dealing exception. Courts interpret most contracts, such as a contract for the sale of goods, to require the parties to deal with one another fairly and in good faith, even if the contract does not explicitly address this point. Employees have argued that employers owe the same duty to their employees because even an at-will employment relationship is based on contract law principles. If generally accepted, this exception would substantially corrode the rule of employment-at-will. Remember, historically you could fire employees for an arbitrary reason, such as writing with a blue pen instead of a black one. But if the law requires you to deal fairly and in good faith with your employees, at minimum it seems you would have to give the blue pen users a warning before you fired them.

It makes sense, then, that only a relatively small number of employees have won cases based on an implied duty of good faith and fair dealing. If an employer takes an egregious action, such as firing a star employee the day before payment of a sales bonus in order to avoid paying the bonus, then the employee may have a reasonable chance of winning on this theory. However, one recent case decided by the California Supreme Court emphasized how infrequently this exception applies. Over twenty-two years of employment, John Guz had successfully worked his way up the ranks in Bechtel National Inc. When Bechtel eliminated a division, it fired Guz. He argued that Bechtel's restructuring decisions and his firing were arbitrary. Guz lost when the court determined that, as an at-will employee, he was only entitled to the benefit of promises made by his employer, and Bechtel had never promised him continuing employment.<sup>7</sup> Because California often sets employment law



trends, it appears that the implied duty of good faith and fair dealing will not be important in most employment law cases.

Another category of exceptions to the doctrine of employment-at-will exists because states and other jurisdictions sometimes choose to protect employees from specific actions that might be taken by employers. These are probably the most varied exceptions and tend to be limited in theory only by the imagination of state lawmakers, and in practice by the desire of most states to encourage employment in the state. A few examples provide a sense of the scope of these exceptions. Numerous states provide protection to whistle-blowers, people who serve as jurors, and even employees who engage in specified conduct on their own time. Indiana has a "Smoker's Rights Law" that precludes employers from firing employees for using tobacco outside the workplace.

New York goes further in its protection of employees outside the workplace and prohibits employers from firing someone for engaging in legal activities, including "recreational activities." That law has led to some interesting cases. For example, Wal-Mart had a nonfraternization policy that prohibited a "dating relationship" between a married employee and any employee other than the spouse. The company fired both Laurel, who was separated from her husband, and Samuel because the two were dating. The state sued to have the employees reinstated, arguing that the employees' right to date qualified for protection under the law protecting recreational activities. On appeal, a New York court decided in Wal-Mart's favor. According to the judges, "'dating' is entirely distinct from and, in fact, bears little resemblance to 'recreational activity.'"<sup>8</sup> Therefore, the basic employment-at-will standard applied, and Wal-Mart could legally fire the employees for dating. This type of interpretative question, however, is a difficult one for the courts and other courts using the same statute have held differently.

Consider now whether any of these exceptions would protect Wendy. You have not ordered her to do anything illegal. Nor does it seem likely that any state has a strong public policy in favor of titillating Web sites. So Wendy is unlikely to have a valid claim based on a generalized public policy exception. Nor is your act in firing her the egregious kind of act that tends to run afoul of the good faith and fair dealing exception. You should, though, check to see whether your state protects employees against being fired for engaging in activities outside the workplace. It is possible that a state law covering a broad range of endeavors, such as recreational activities, would affect your decision to fire Wendy. Those laws are so new, and the situation is so unique, that the legal analysis may not be entirely clear. At the end of the chapter I will return to the topic of evaluating and managing these types of risk.

### ■ International Comparisons

Employment law in the United States has developed a reputation for preventing managers from firing lousy employees, so much so that many managers, both here and abroad, subscribe to Fact or Fallacy? item 5. By now though, you know that you actually have considerable flexibility in making employment decisions. For additional perspective on this issue, it is worth comparing U.S. law to the law of other developed countries. To put this comparison in context, consider two separate situations.

First, you are a manager at a large company that has been affected by a slowing economy. You need to downsize. Would you rather be located in the United States or in Western Europe?

In the United States, the basic rules are the ones outlined so far in this chapter and the Worker Adjustment and Retraining Act (WARN). WARN requires large businesses to provide



employees and the state with sixty days' written notice when laying off groups of employees. Otherwise, you may set any criteria you choose and lay off as many employees as you choose, so long as you do not use any illegal criteria.

In many other countries with developed economies, the law is more stringent and might significantly limit your options. Other countries would still permit you to fire an employee for cause, such as for stealing from the company. But in other situations, such as downsizing, employees are entitled to notice and compensation. The amount owed to an employee usually depends on the individual's length of employment. In Germany that might mean up to seven months' notice or pay, if a layoff can be negotiated at all. And in Germany, in deciding which workers to lay off you must choose those who will be least socially affected by the layoff. That means that older workers, disabled workers, and workers with families receive the most protection.

Second, imagine you have a key employee who has become pregnant. In the United States, the Pregnancy Discrimination Act requires you to treat pregnant women equivalently to other employees. They are therefore entitled to be covered by your regular sick leave policy. If you do not provide paid sick leave for other illnesses, then federal law does not require you to pay the pregnant employee for the time she is off work due to illness associated with the pregnancy or delivery of her child. In addition, the Family and Medical Leave Act (FMLA) guarantees up to twelve weeks of unpaid leave and typically requires you return the person to her job at the end of her leave. Even then, though, the FMLA excludes from its protections certain key employees.

Compare Hong Kong and Switzerland. In each of those countries, employers must provide eight weeks of full pay for maternity leave. In France women are entitled to up to twenty-six weeks off work, with salary substitution paid by government

programs. In Australia women are entitled to a full year of maternity leave.

In short, workers in other industrialized countries often receive more protection than U.S. law provides. France has a thirty-five-hour maximum work week. Employees there receive a minimum of five weeks vacation a year and eleven paid holidays. Volkswagen in Germany has a 29.9-hour work week. Unionization rates in Western Europe are higher than in the United States, and generous government-sponsored pension programs have supported retirement at relatively early ages. The European Union (EU) is also developing directives that ban discrimination based on age and sexual orientation. The United States does not have any federal law prohibiting discrimination based on sexual orientation. And whereas U.S. federal age discrimination law applies only to people who are at least age forty, the EU directive protects both younger and older workers from discrimination based on age.

Why, then, do so many people believe that the United States has such an unfavorable climate for employers? One answer is the amount of ambiguity in U.S. employment law. Much of the lack of clarity comes about because of flexible doctrines such as the public policy exception to employment-at-will and the variation in state law. At each end of the spectrum of reasons for firing an employee, U.S. law is actually similar to that of other industrialized nations. It is legal to fire an employee for cause, such as for embezzling from the employer. It is never legal to fire an employee for reasons that the law defines as illegal discrimination. Where the laws differ is in cases where you, as a manager, are exercising significant discretion.

Return once again to the situation with Wendy. In many developed countries you either could not fire Wendy at all or you would need to give her significant notice and separation pay. In contrast, in the United States the only significant concern for you as a manager is whether the applicable state law protects Wendy's



behavior outside the workplace. The newness of those laws and the uniqueness of Wendy's situation may mean that the answer is somewhat uncertain. If you wish to fire Wendy, it will make sense for you to obtain the advice of legal counsel in your state. While this ambiguity may be troubling, once managers understand the flexibility that the U.S. concept of employment-at-will gives them, they realize the benefits of that concept as compared to the heavy strictures in the legal landscape of many other developed countries.

### ■ Unique Features of the U.S. Legal System

Another reason that some people give for believing that the United States has an unfavorable employment law climate for employers is the nature of the U.S. legal system. It is true that the structure of the legal system adds increased risk to the ambiguity already imposed by laws that are unclear in their application and that vary from state to state. This section discusses some of the unique features of the legal system that you need to take into account as you make employment-related decisions.

#### ■ Fact or Fallacy? ■

- |  |                               |                                  |
|--|-------------------------------|----------------------------------|
| 1. If an employee sues you and loses, the employee will have legal fees to pay.  | <input type="checkbox"/> Fact | <input type="checkbox"/> Fallacy |
| 2. The most you can lose in an employment lawsuit is the amount the company would have paid the employee in salary and benefits if the employee had not been illegally fired, denied promotion, or whatever. | <input type="checkbox"/> Fact | <input type="checkbox"/> Fallacy |
| 3. Juries are overly sympathetic to plaintiff claims, and appealing a jury decision is unlikely to be of much help to a company.   | <input type="checkbox"/> Fact | <input type="checkbox"/> Fallacy |
| 4. Increasingly, employers are bypassing the U.S. court system when they face employment law claims.   | <input type="checkbox"/> Fact | <input type="checkbox"/> Fallacy |

### **Contingent Fees**

The first threshold that a potential plaintiff needs to overcome is hiring a lawyer. From an economic perspective, it would make some sense if an employee who feels wronged had to weigh the strength of the claim and the size of the expected recovery against the cost of paying an attorney. Many plaintiffs' lawyers, however, accept employment law cases on what is known as a *contingent fee* basis. That means that if the lawyer is able to win a case or negotiate a settlement on behalf of the plaintiff, then the lawyer will get a percentage, typically about a third, of the award or settlement. If the lawyer is unsuccessful in representing the individual, the plaintiff has little or no obligation to pay the lawyer beyond relatively small costs such as court filing fees.

From your perspective as a manager, this system means that a disgruntled employee will not face the costs of paying a lawyer if a legal claim is unsuccessful. Monetarily then, there is little to discourage one of your employees or former employees from pursuing a weak claim. On the other hand, it is in the interest of plaintiffs' lawyers to evaluate the strength of potential cases. It would not make much sense for a lawyer to invest the significant amounts of time and resources necessary to see a case through trial, and potentially through the appeal process, only to lose the case and not receive any compensation.

Two real-world factors affect the analysis of plaintiffs' lawyers, though. First, even in a weak case, a lawyer may be able to negotiate a quick settlement. Second, lawyers who are just getting started in practice, or who are temporarily underemployed for some reason, may be willing to accept relatively weak cases because having even weak cases is better than having no cases at all.

While the availability of contingent fees increases the likelihood that you might be sued by a disgruntled employee with a tenuous legal case, public policy does support those fees. Certainly some employees are fired, discriminated against in salary,



or otherwise mistreated at work in ways that we all agree are and should be illegal. No one in this country suggests that children should be chained to machines and forced to work. Few managers would argue that the minimum wage laws should not be enforced against a competing company. However, enforcement of employment laws largely relies on claims by employees. Many employees, particularly the low-paid employees who might be most vulnerable to mistreatment, would not be able to afford the up-front costs of hiring a lawyer. In the absence of a contingent fee system, then, many clearly illegal employer actions might go unchallenged.

As a result, Fact or Fallacy? item 1 is a fallacy. The contingent fee system makes it relatively easy for a disgruntled worker or job applicant to sue without having the money in hand to pay a lawyer. Many managers object to this system because it means that individuals take very little risk in suing a company for an employment-related claim, particularly if they were not hired at that company or have been fired. On the other hand, supporters of the contingent fee system argue that it plays an important role in ensuring that people in the United States have access to the legal system.

### **Punitive Damages**

An important factor to consider in evaluating any potential legal claim is the scope of possible damages you would have to pay if you lost. In an employment law case, a court may award a whole variety of damages, including reinstatement to a job, back pay, front pay, the employee's costs of finding a substitute job, emotional damages, and punitive damages.

It is the potential availability of punitive damages that makes Fact or Fallacy? item 2 a fallacy. Indeed, the size of some well-publicized punitive damage awards, which can run into tens and sometimes even hundreds of millions of dollars, is a major reason

why this type of damages has received so much notoriety—and why it is of particular concern to corporate defendants.

While punitive damages often get bad press, it is important to realize why they exist: they are intended to punish defendants who have acted egregiously and to discourage them and others from engaging in the illegal conduct in the future. That said, many areas of the law put no caps on punitive damages and the amount of damages may be unrelated to the actual harm experienced by the plaintiff.

The law limits the availability of punitive damages to employment law plaintiffs in some circumstances. Under federal nondiscrimination law, a plaintiff can recover punitive damages only when the employer intentionally discriminates and does so either maliciously or with reckless indifference. Even when an employer's conduct is that wrongful, the law limits the punitive damages in many cases depending on the size of the employer. For small employers the cap is \$50,000. Awards against employers with more than five hundred employees can total up to \$300,000. Caps may not apply, however, in cases of race or national origin discrimination. Furthermore, some states permit either higher levels of punitive damages or uncapped damages. For example, the jury award of \$10 million in favor of Phillip McConkey, discussed earlier in the chapter, was based on state law. So was the Iowa judgment of \$80 million in the retaliation case I discussed.

### **Jury Decisions and Appellate Review**

Many people in the United States believe that juries are likely to be sympathetic with individual plaintiffs when they sue large corporations. All of us are familiar with the notion that companies are viewed as having “deep pockets” and that those pockets are like piggy banks waiting to be smashed by successful plaintiffs. So it is not unusual for managers to believe that Fact or

Fallacy? item 3 is true. But cases show that juries do not always take the plaintiff's side, even when the plaintiff is sympathetic. Furthermore, one recent study indicates that juries may be even less likely than judges are to give large punitive damage awards. Finally, the statistics about appeals in some types of employment law cases tend to surprise people.

To show that juries do not always take the side of a sympathetic plaintiff, consider another case brought against Wal-Mart. Shirley Gasper worked at a Wal-Mart store in Nebraska developing customer photographs. When Ms. Gasper noticed a picture that seemed to show a bruised infant crawling in a pile of marijuana with \$50 and \$100 bills scattered around the edges of the photograph, she turned the photograph over to the police without obtaining permission from the customer or her supervisor, who was out of town and could not view the pictures. The police praised her decision, but Wal-Mart fired her because her actions violated the company's policy of confidentiality for customer photographs. Ms. Gasper sued Wal-Mart, alleging that her firing violated public policy.

At least superficially, Ms. Gasper would seem to be a sympathetic plaintiff. After all, she did not get any personal gain from turning the photo over to the police. She believed she had a duty to report what she viewed as possible evidence of child abuse. Furthermore, Wal-Mart certainly fits the profile of a deep-pocketed defendant. Nevertheless, the Nebraska jury decided in Wal-Mart's favor, and the appellate court also found for Wal-Mart. It seems likely that Wal-Mart persuaded the jury that Ms. Gasper should have discussed the pictures with a higher level of store management rather than taking it upon herself to violate the company's confidentiality policy.

When an employer does lose an employment law case at trial, a recent study of cases of employment discrimination indicates it may be in the employer's best interest to appeal. The study determined that when employers lost at trial and ap-

pealed, they won their appeal almost 44 percent of the time. In contrast, when the employer won at trial and the employee appealed, less than 6 percent of those appeals resulted in reversals in the employee's favor. These statistics are in stark contrast to the averages for all categories of appeals in federal courts. On average, when defendants lose at trial, they succeed on appeal only about 33 percent of the time, significantly less than the rate for employers in employment discrimination cases. And, when plaintiffs lose at trial, they succeed on appeal about 12 percent of the time, or about twice the rate of plaintiffs in employment discrimination cases.<sup>9</sup>

The study did not attempt to explain why the statistics in these employment law cases are so much more favorable for employers than the overall statistics are for other categories of defendants. Still, the results should be encouraging to managers who fear that the court system may look at companies as deep pockets.

In sum, neither the jury system nor the appellate process may be as weighted against employers as many managers fear. Nevertheless, the realistic manager will consider the nature of the system when making any employment-related decision. Even if you have complied with all the technical legal requirements, do you want to risk explaining your actions to a judge or a jury where those actions might appear harsh, unfair, or arbitrary? On the other hand, would you feel more comfortable explaining your decision to fire an incompetent employee after you have counseled and warned that employee?

### **Avoiding the Court System**

Many managers view the U.S. court system's role in employment disputes as a necessary evil—something akin to an occupational hazard that cannot be avoided and must be dealt with. Thus, Fact or Fallacy? item 4 is true because employers are using arbitration

and other nonadjudicative approaches to resolve disputes. In March 2001 the U.S. Supreme Court ruled that employers can enforce arbitration agreements against their employees.

Why do managers view arbitration as being a better way than the court system to resolve employment law disputes? There are several reasons. To begin with, managers often want to get employment disputes behind them and not wait years and years for the case to work its way through the courts. Arbitration cases can be heard more quickly and less expensively than a case that goes to trial, let alone one that proceeds to appeal. Furthermore, almost all court proceedings and written decisions are available to the public. As a result, managers often fear, quite reasonably, that even an employment law claim that has no basis in fact can damage the manager's and the company's reputation. In contrast, arbitration proceedings can be kept confidential, as can any written decision rendered by the arbitrator. Finally, many arbitration policies specify that arbitration is binding. In the absence of very unusual circumstances, such as bribery of the arbitrator, a decision in a binding arbitration case is final and cannot be appealed, a fact that saves both time and money.

Because arbitration has numerous advantages, companies are showing interest in requiring employees to arbitrate employment law disputes. For example, Sears, Roebuck recently began a new method of resolving disputes for almost sixteen thousand employees at two of its businesses. That method encourages employees to start by attempting to settle their disputes at a local level. Ultimately, if nothing else is successful, the process culminates in binding arbitration. Historically Sears has spent more money on legal costs for employment-related disputes than on any other type of legal issues.<sup>10</sup> The company hopes that the use of this new process, including binding arbitration, will decrease those costs.

Some open questions on employer-mandated arbitration policies remain and some people believe that it is unfair to re-

quire employees to arbitrate their claims. For example, some employers require employees to share the costs of paying for the arbitration. Those costs can climb into the thousands of dollars. Some courts have refused to enforce those cost-sharing requirements on the grounds that they act to discourage employees from pursuing their rights. The employees would not face similar costs in courts. For example, after he had a seizure at work, Waffle House fired Eric Baker, a grill cook who made \$5.50 an hour. Rather than file for arbitration, Mr. Baker took his complaint that Waffle House had illegally discriminated against him because of a disability to the federal Equal Employment Opportunity Commission (EEOC). The EEOC has the power to seek enforcement of the federal nondiscrimination laws. The EEOC took interest in his claim and sued Waffle House on Mr. Baker's behalf. The U.S. Supreme Court decided, in 2002, that even if Mr. Baker had signed an enforceable arbitration agreement with Waffle House, that agreement could not prevent the EEOC from suing on his behalf.

Arbitration is not yet a standard with U.S. employers. Other issues remain, in addition to the question of whether employers may require employees to share the costs of arbitration. How significantly can an employer limit an employee's right to discovery? Who should choose the arbitrators? May an employer's policy limit the damages that an arbitrator can award? In spite of the gray areas, though, arbitration and other methods of alternative dispute resolution offer employers some opportunity to avoid the costs of lengthy litigation.

### ■ Recognizing Employment Law Issues as a Business Risk

As a manager, you should analyze employment-related issues as you do any other business problem: as both posing risks and offering rewards. Too often I see managers who are paralyzed

by the fear of an employment lawsuit even though the same managers recognize and accept that they cannot completely avoid the risk of other types of lawsuits. For example, any manager involved with product development, design, or manufacture knows that it is impossible to guarantee that no customer will ever file a product liability lawsuit. Some lawsuits may be brought by customers who unreasonably misused the product or who otherwise have a very weak legal case. Additionally, some of those lawsuits, even the weak ones, may damage the company's reputation. But without products the company would be out of business, so accepting some risk of a lawsuit is critical to the continuing success of the company. The best managers not only recognize this fact but bring all of their own professional expertise to bear on their jobs. They seek outside advice from lawyers and other experts on how to minimize risks within the design and manufacturing parameters they establish.

I encourage you to view employment-related issues similarly. No business can maximize its potential unless it can hire outstanding employees, motivate its workforce, and fire incompetent employees. As you pursue excellence in your workforce, though, no one can guarantee that you will not be sued by a disgruntled job candidate, employee, or ex-employee. Nor can anyone promise that a weak lawsuit will not impose costs on your company in terms of time, money, or reputation.

Avoiding all potential employment law cases, however, is as unrealistic as avoiding all product liability cases. There will be times when you decide that the risks involved in addressing problems are well worth the potential rewards of improving the quality and morale of your workforce.

In addition, I believe that legal standards very typically are consistent with good management. As you set your moral compass for interactions with your employees, using common sense, consideration, fairness, and thinking through the implications of your actions often will help ensure that you are in compliance with relevant laws. After all, laws tend to reflect societal values.

So by connecting with those values, not only will you be complying with the law, you will be actively preventing legal issues from arising. It will also help avoid situations where you may be in legal compliance with the law, but your actions appear so unreasonable or harsh that you and your company face bad publicity or lose a jury verdict because of negative perceptions.

In closing this introductory chapter, let me emphasize that this book is not intended to be a substitute for the intense training involved in a legal education. It does not give legal advice, nor does it cover the myriad of state and federal laws that can affect a final employment-related decision. Instead, it gives you a basic understanding of the fundamental concepts of U.S. employment law, which are no less important to you as a manager than a base knowledge of accounting, finance, or marketing. From there you will be better prepared to discuss with the relevant experts the specific issues you encounter with your workforce, and you'll have a better idea of when to seek expert help.

One last time, consider the opening situation with Wendy. Upon learning of Wendy's involvement in the Web site, as Wendy's manager you have three options. First, you can be so fearful of an employment lawsuit that you decide to take no action at all. Second, you can react immediately and fire Wendy. Each of these actions reflects an extreme position and poses risk for you as a manager. In the first instance, you may confront serious problems from concerned parents of other children counseled by Wendy, the possibility of negative publicity for the counseling program, and even potential harm to the children if the children's access to the Web site somehow undercuts Wendy's effectiveness as a counselor. In the second option, a hasty decision to fire Wendy may leave open the possibility of a lawsuit whose risks you have not fully evaluated. A third approach would be to consider the situation using the basic principles of employment-at-will, the exceptions to employment-at-will, and the discussion of terminating employees in Chapter Six. This analysis would raise a variety of specific questions, which you could then pose, if

needed, to the appropriate person in your human resources department or to a lawyer. This, of course, is a wiser approach, and it is the one that this book will enable you to adopt.

### **CHAPTER SUMMARY**

The most basic concept in U.S. employment law is employment-at-will, which permits you, as a manager, to fire (or not hire or not promote) someone for any reason, even a lousy or arbitrary reason, so long as it is not an illegal reason.

There are three basic categories of exceptions to employment-at-will: contractual, nondiscrimination, and public policy and local statutory exceptions. Even allowing for those exceptions, a comparison of the U.S. approach with that taken in other industrialized countries shows that managers in the United States have considerable ability to select and motivate an exceptional workforce.

The nature of the U.S. legal system poses some specific challenges for employers and managers, including the availability of contingent fees and punitive damages. Nevertheless, the U.S. legal system is less weighted against employers than many managers believe. In addition, some companies are attempting to avoid or decrease the costs associated with employment litigation by establishing alternative dispute resolution policies. Typically those policies culminate in binding arbitration, which can limit publicity, cost, time, and acrimony.

As a manager, you should approach the legal aspects of employment questions as you do other business problems, as posing both benefits and risk. The mere possibility of a lawsuit should not determine your decisions; instead, you should carefully weigh risks and rewards, just as you do when confronted with other issues. By setting your internal compass to treat employees fairly, thoughtfully, and with consideration, most of the time you will also place yourself in compliance with legal standards. My goal in this book is to provide you with a base of knowledge so that you can best use the appropriate experts, engage lawyers productively to assist in analyzing your problems when necessary, and, ultimately, protect both yourself and your company while you build the best possible workforce.