Annual Survey of Virginia Law: Employment Law

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EMPLOYMENT LAW

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This survey covers legislative and judicial developments in Virginia employment law between June 1986 and June 1987. It does not address the workers' compensation and unemployment compensation statutes but focuses on state labor and fair employment laws and the employment-at-will doctrine.

Although federal law is the primary source of labor and fair employment law, remedies available under Virginia common law for employment-related disputes have expanded, most notably as a result of the federal courts’ recognition of a state contract claim based on an employer's representations and handbooks. Legislative developments were relatively sparse in 1987. The only significant bill enacted affecting the relationship between employers and employees was the Virginia Human Rights Act.2

I. EMPLOYMENT AT WILL

The Virginia Supreme Court has not considered the issue of whether policies contained in an employment handbook or an employer's representations can become enforceable terms of an employment contract. In the absence of any pronouncement from the court on this exception to the employment-at-will rule, decisions from the state circuit courts and the federal courts interpreting Virginia law varied as to whether an employer's handbooks or representations provide the basis for a contract claim.3

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Two circuit court decisions handed down in October 1986 illustrate the diverse views in this area. In *Seitz v. Philip Morris, Inc.*, the plaintiff alleged that his discharge violated the defendant employer’s Policy and Procedure Manual provisions setting “just cause” as the standard for terminating employment. The circuit court overruled the employer’s demurrer to the breach of contract claim, holding that the lack of a specific time limit does not mean that an at-will arrangement exists when an employment contract is alleged. Accordingly, the plaintiff could proceed to trial and attempt to prove that the employment manual constitutes a contract.

In *Moore v. Sadler Materials*, the plaintiff claimed that his discharge was in breach of an employment contract, based upon the defendant’s employment manual stating that employees would be fired only for stated reasons constituting good cause. The circuit court sustained the defendant’s motion to dismiss, holding that the language in the manual could not be used for purposes of creating the terms of a contract where the contract provides no definite period of time for its duration.

Virginia federal district courts have shown a greater inclination to allow wrongful discharge claims based on express contracts derived from employer’s representations, handbooks and personnel policies. These courts have not only accepted the proposition that an enforceable contract may result from an employer’s expression of personnel policies and procedures, they have applied general contract principles to modification of these “agreements” as well.

In *Thompson v. Kings Entertainment Co.*, the plaintiff, who was employed at a theme park, received an employee’s manual in 1980 defining dismissal as a separation initiated by the park “for cause.” The park was subsequently sold and the plaintiff’s new employer, Kings Entertainment, gave him an employee’s handbook in

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4. 6 Va. Cir. 428 (Richmond 1986).
5. *Id.* at 429-30.
6. At trial, the defendant moved the court to strike the evidence upon conclusion of the plaintiff’s case as to liability. The defendant argued that there was no evidence to go to the jury and it was entitled to judgment as a matter of law. The court granted defendant’s motion to strike. *See Seitz v. Philip Morris, Inc.*, At Law No. Lk-848-1 (Richmond, July 21, 1987).
8. For a discussion of the major federal court decisions in this area, see Marshall & Wicker, *supra* note 3, at 284-88.
1985 which stated that employment was terminable at will. After
the plaintiff was discharged, he sued Kings for breach of contract,
claiming that the 1980 manual served to rebut the at-will
presumption.

Ruling on Kings’ motion for summary judgment, the district
court rejected the contention that the provisions contained in the
1980 manual were not enforceable terms of the plaintiff’s employ-
ment. The court adopted the suggestion in an earlier handbook de-
cision from the Western District of Virginia, Thompson v. Ameri-
can Motor Inns, Inc.,\textsuperscript{10} that an employee could demonstrate that a
handbook constitutes an offer of benefits in exchange for continued
labor and that acceptance is demonstrated by reading and signifying
that he understands the handbook’s terms and conditions of
employment, and working according to those terms and condi-
tions.\textsuperscript{11} Applying this analysis, the court found that the plaintiff
had produced evidence sufficient for a finding of offer and assent
to the 1980 manual’s provision for termination for cause.\textsuperscript{12} The
court dismissed Kings’ argument that the 1985 handbook con-
verted plaintiff to an at-will employee, finding that Kings had not
produced sufficient evidence to conclusively establish that the
plaintiff assented to the 1985 handbook’s terms. It rejected Kings’
view that the plaintiff’s acceptance should be inferred from his
continuing to work with knowledge of the 1985 handbook’s terms,
concluding that inaction cannot be construed as assent under gen-
eral contract principles.\textsuperscript{13}

The Fourth Circuit Court of Appeals has not had occasion to
review the federal district court decisions on the enforceability of
terms contained in an employment handbook. In Costantino v. Jaycor,\textsuperscript{14} the Fourth Circuit merely noted that the trial court cor-
rectly had refused to admit in evidence an employment manual
which specified only cause and reduction in force as bases for ter-
mination of employment. The plaintiff had claimed his discharge
breached this term of employment but failed to establish that the
handbook was applicable to him as an executive employee.\textsuperscript{15} Thus
the question of whether the handbook was evidence sufficient to
rebut the at-will presumption was not before the court.

\textsuperscript{11} Kings Entertainment Co., 653 F. Supp. at 874.
\textsuperscript{12} Id. at 874-75.
\textsuperscript{13} Id. at 875-76.
\textsuperscript{14} No. 86-2559 (4th Cir. April 14, 1987).
\textsuperscript{15} Id. slip op. at 4.
Costantino, however, did address another exception to the at-will employment rule which has been accepted in several other jurisdictions: the implied covenant of good faith and fair dealing. The Fourth Circuit affirmed the district court's rejection of a contract claim based on an implied covenant, stating:

In light of the Supreme Court of Virginia's characterization of an employment contract of unlimited duration as 'a contract of hazard,' *Edwards Co. v. Deihl*, we are not satisfied that Virginia would recognize a covenant of good faith and fair dealing if the court were squarely presented with the issue today.16

II. FAIR EMPLOYMENT LAWS

The General Assembly passed Virginia's first comprehensive anti-discrimination bill in the 1987 session. The Human Rights Act makes unlawful any discrimination on the basis of race, color, religion, national origin, sex, age, marital status or disability, in employment as well as in public accommodations, including educational institutions, and in real estate transactions.17 Prior to enactment of the Human Rights Act, Virginia law only addressed private sector employment discrimination on the basis of disability.18

A major feature of the legislation is the creation of the Council on Human Rights, which is authorized to receive, investigate, seek to conciliate, hold hearings and make findings and recommendations upon complaints alleging unlawful discriminatory practices.19 An unlawful discriminatory practice is defined as conduct which violates Virginia antidiscrimination statutes or regulations, title VII of the Civil Rights Act of 1964,20 or the Fair Labor Standards Act.21

16. *Id.* slip op. at 6 (citation omitted).
The Council's investigatory role is triggered by the filing of a written complaint within 180 days of the alleged discriminatory event.\textsuperscript{22} In carrying out its investigation, the Council must rely upon the cooperation of the parties to obtain information; the Council itself does not have power to issue subpoenas. It may, however, request the Attorney General to apply to a circuit judge for a subpoena duces tectum after it has made a good faith effort to obtain information necessary to determine whether a violation has occurred.\textsuperscript{23}

If the alleged discriminatory practice is unlawful under a Virginia statute which is enforced by a state agency, the Council must refer the complaint to the agency.\textsuperscript{24} The Council does not have jurisdiction over complaints filed under local ordinances prohibiting discrimination.\textsuperscript{25}

The Council's authority does not extend to awarding damages or granting injunctive relief; it is limited to resolving complaints through conciliation. If conciliation efforts are unsuccessful, an unresolved complaint must be referred to the federal agency with jurisdiction over the complaint.\textsuperscript{26}

The Act explicitly provides that the Human Rights Act does not create an independent or private cause of action, nor should it be construed to allow tort actions for unlawful discrimination.\textsuperscript{27} Lacking such an explicit pronouncement by the legislature, it might have been argued that a cause of action in tort existed for discharging an employee in violation of the public policy embodied in the Act. This provision, therefore, was inserted to discourage a new

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\textsuperscript{24} Id. § 2.1-717.

\textsuperscript{25} Id. The 1987 General Assembly gave Virginia cities, towns, and counties the authority to enact human rights ordinances prohibiting discrimination in employment, as well as housing, public accommodations, credit, and education. The ordinances cannot be inconsistent with nor more stringent than applicable state laws. The new law also permits localities to establish a local commission on human rights with powers and duties granted by the Human Rights Act. See id. § 15.1-37:3:8 (Cum. Supp. 1987). Local human rights agencies which were established before July 1, 1987, may continue to exercise additional powers which previously had been granted them. See id. § 2.1-724 (Repl. Vol. 1987). Thus, the City of Alexandria and County of Fairfax human relations commissions may continue to operate as deferral agencies as certified by the Equal Employment Opportunity Commission.

\textsuperscript{26} Id. § 2.1-717 (Repl. Vol. 1987).

\textsuperscript{27} Id. § 2.1-725.
exception to the employment-at-will rule under the Virginia Supreme Court's holding in *Bowman v. State Bank of Keysville*.28