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## Annual Survey of Virginia Law: Employment Law

Patricia K. Epps

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## EMPLOYMENT LAW

*Patricia K. Epps\**

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,<sup>1</sup> 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.<sup>2</sup>

### 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.<sup>3</sup>

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\* Associate, Hunton & Williams, Richmond, Virginia; B.A., 1974, University of Virginia; M.A., 1979, University of Virginia; J.D., 1983, University of Virginia.

1. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000-e (1982); National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982 & Supp. II 1984); Labor-Management & Relations Act, 1947, ch. 120, 61 Stat. 135 (codified as amended in scattered sections of 29 U.S.C.); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-218 (1928 & Supp. III 1985), as amended by Act of Oct. 16, 1986, Pub. L. No. 99-486, 29 U.S.C.A. § 214 (Cum. Supp. 1987); Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5, 18, 26, 29, 31, 42, U.S.C.).

2. VA. CODE ANN. §§ 2.1-714 to -725 (Repl. Vol. 1987).

3. For an excellent discussion on the status of the employment-at-will rule in Virginia, see Marshall & Wicker, *The Status of the At-Will Employment Doctrine in Virginia after Bowman v. State Bank of Keyesville*, 20 U. RICH. L. REV. 267 (1986).

Two circuit court decisions handed down in October 1986 illustrate the diverse views in this area. In *Seitz v. Philip Morris, Inc.*,<sup>4</sup> 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.<sup>5</sup> Accordingly, the plaintiff could proceed to trial and attempt to prove that the employment manual constitutes a contract.<sup>6</sup>

In *Moore v. Sadler Materials*,<sup>7</sup> 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.<sup>8</sup> 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.*,<sup>9</sup> 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).

7. No. L-3076 (Virginia Beach, Oct. 21, 1986).

8. For a discussion of the major federal court decisions in this area, see Marshall & Wicker, *supra* note 3, at 284-88.

9. 653 F. Supp. 871 (E.D. Va. 1987).

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 employment. The court adopted the suggestion in an earlier handbook decision from the Western District of Virginia, *Thompson v. American Motor Inns, Inc.*,<sup>10</sup> 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 conditions.<sup>11</sup> 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.<sup>12</sup> The court dismissed Kings' argument that the 1985 handbook converted 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 general contract principles.<sup>13</sup>

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*,<sup>14</sup> the Fourth Circuit merely noted that the trial court correctly had refused to admit in evidence an employment manual which specified only cause and reduction in force as bases for termination 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.<sup>15</sup> Thus the question of whether the handbook was evidence sufficient to rebut the at-will presumption was not before the court.

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10. 623 F. Supp. 409 (W.D. Va. 1985).

11. *Kings Entertainment Co.*, 653 F. Supp. at 874.

12. *Id.* at 874-75.

13. *Id.* at 875-76.

14. No. 86-2559 (4th Cir. April 14, 1987).

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.<sup>16</sup>

## 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.<sup>17</sup> Prior to enactment of the Human Rights Act, Virginia law only addressed private sector employment discrimination on the basis of disability.<sup>18</sup>

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.<sup>19</sup> An unlawful discriminatory practice is defined as conduct which violates Virginia antidiscrimination statutes or regulations, title VII of the Civil Rights Act of 1964,<sup>20</sup> or the Fair Labor Standards Act.<sup>21</sup>

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16. *Id.* slip op. at 6 (citation omitted).

17. VA. CODE ANN. §§ 2.1-714 to -725 (Repl. Vol. 1987).

18. See Rights of Persons with Disabilities Act, VA. CODE ANN. §§ 51.01-40 to -46 (Cum. Supp. 1986) (amended 1987). The Virginia Fair Employment Contracting Act of 1980 requires that state contracts of over ten thousand dollars shall contain provisions requiring the contractor to agree not to discriminate on the basis of race, religion, color, sex, or national origin during the performance of the contract. *Id.* § 2.1-376 (Repl. Vol. 1987). No penalties or enforcement procedures are provided, however.

19. *Id.* §§ 2.1-718 to -720 (Repl. Vol. 1987).

20. 42 U.S.C. §§ 2000e - 2000h-6 (1982).

21. 29 U.S.C. §§ 201 - 262 (1982 & Supp. III 1985). Specifically, the Equal Pay Act provisions of the Fair Labor Standards Act prohibiting sex-based discrimination in payment of

The Council's investigatory role is triggered by the filing of a written complaint within 180 days of the alleged discriminatory event.<sup>22</sup> 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 tecum after it has made a good faith effort to obtain information necessary to determine whether a violation has occurred.<sup>23</sup>

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.<sup>24</sup> The Council does not have jurisdiction over complaints filed under local ordinances prohibiting discrimination.<sup>25</sup>

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 unsolved complaint must be referred to the federal agency with jurisdiction over the complaint.<sup>26</sup>

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.<sup>27</sup> 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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wages for equal work are incorporated in the definition of an unlawful discriminatory practice. *See* 29 U.S.C. § 206(d) (1982).

22. The General Assembly adopted the title VII limitations period for filing a charge of discrimination. *See* 42 U.S.C. § 2000e-5(e) (1982).

23. VA. CODE ANN. § 2.1-721 (Repl. Vol. 1987).

24. *Id.* § 2.1-717.

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.

26. *Id.* § 2.1-717 (Repl. Vol. 1987).

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*.<sup>28</sup>

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28. 229 Va. 534, 331 S.E.2d 797 (1985).