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THE FOUNDATION OF EMPLOYMENT LAW IN VIRGINIA

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As the body of law governing the employment relationship has expanded and matured, it has incorporated and drawn from disparate areas of legal thought. Because this process has not always been orderly or logical, arbitrary rules developed for other types of contracts and unlikely hypothetical scenarios about the length of performance may determine whether an employment agreement is enforceable. Ancient common-law principles of agency and tort have intermingled freely with cutting-edge technological principles related to creating, storing, and retrieving electronic information. Most Americans understand that it is unlawful to discriminate against employees based on factors such as race or sex, but it is similarly unlawful to discriminate against an employee who reports the use of unsafe containers in international shipping.

If there is an overarching principle, it is without question the presumption, sometimes elevated to the status of a "doctrine," of employment at will.[1] Therefore, any discussion of employment law must begin with the presumption of employment at will.

The History of Employment at Will in Virginia

Virginia, like most states, strongly adheres to the doctrine of employment at will. Although the concept of at-will employment is straightforward, the process of determining legal exceptions to the doctrine is complicated and occupies much of an employment lawyer's time.

The employment-at-will doctrine is not a substantive rule of law. Rather, it is a common-law presumption. In the absence of evidence that an employment arrangement is to run for a particular term or be terminated only upon certain events (for example, for just cause), an employment contract may be terminated by either party at any time and for any reason. The usual formulation of the doctrine provides that the termination must be upon reasonable notice to the other party, although little law exists on this aspect of the rule.

The employment-at-will presumption most often is implicated where the employee has no express oral or written agreement with his or her employer. This situation is often referred to as one in which the employee has "no employment contract," but that is not technically accurate, because even if there is no express written agreement, there could be an express oral

[1] In addition to being an at-will jurisdiction, Virginia is also a "right-to-work" state. Sections §§ 40.1-58 through40.1-69 of the Virginia Code prohibit mandatory union membership and have nothing to do with the employment at will doctrine.

agreement. More commonly, the absence of any express oral or written agreement usually results in a contract implied in law: the employee works, and the employer is bound to pay wages(usually at an agreed rate) for the work done.

The typical employment relationship is therefore a "unilateral contract" in which the employer offers consideration in return for performance, and the employee performs by showing up at work each day and being paid in arrears. There are few Virginia employees outside the employment-at-will presumption (for example, employees belonging to a union, enjoying tenured public employment, or entering into written employment contracts for a fixed term or until there is "cause" for termination).

The employment-at-will presumption is in fact a marked departure from the common law of England, where hiring an employee was presumed to be for a period of one year. The concept of employment at will as we know it today was first expounded upon at length in the 1877 treatise "Master and Servant" by Professor Horace Wood. Wood's strident proclamation that "with us, the rule is inflexible, that a general or indefinite hiring is prima facie at will" should have been somewhat suspect from the start. Wood cited only four United States cases in support of his theory, and none of them really seemed to say what he read into them. It is not an exaggeration to say that Wood crafted the doctrine largely out of whole cloth. Nevertheless, the concept flourished in the economic climate prevalent in the United States and was rapidly incorporated into the common law of almost every state in the Union.

The seminal and often cited case importing the at-will presumption into the common law of Virginia had nothing to do with employment. Rather, *Stonega Coal v. L&N Railway,* 106 Va. 223, 55 S.E. 551 (1906) concerned the rights of one

railroad company to terminate a coal supply contract with another company, at will and without just cause. Quite reasonably, the court held that a supply contract without a definite term and without express conditions for termination could be terminated at the will of one of the parties—it was not, in effect, a perpetual contract. This factually inapposite scenario has become the fount of Virginia employment law for the last century.

Three early important cases interpreted and reinforced the at-will presumption in Virginia employment law. All three cases concerned express contracts, and the Supreme Court of Virginia sided with the employee in all three cases.

In *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949) the employer promised to pay a bonus to all employees who remained on the job until the plant closed. When the plant closed, the employer refused to pay the bonus, and an employee sued. In upholding the trial court's award of the bonus, the Supreme Court of Virginia noted that the employee had the right to leave the employment of Hercules at any time; therefore, his continued performance of the contract, and his concomitant decision not to exercise his right to quit his employment at any time for any reason, was sufficient consideration to bind the employer to pay the bonus.

In *Norfolk Southern Railway v. Harris*, 190 Va. 966, 59 S.E.2d 110 (1950) the employee had a "just cause" termination provision in his employment contract. Notwithstanding this provision and the absence of "cause" as defined, the employer terminated his employment. The employee successfully sued in the Norfolk Circuit Court for breach of contract. The employer appealed, arguing that despite the just cause language of Harris' contract, the contract did not state a specific term of years such that it could overcome the statute of frauds. The Supreme Court upheld the trial court, stating that the promise to terminate Harris only for just cause was a valuable part of the contract for which Harris had bargained and for which Norfolk Southern had received consideration.

The third and final early case is *Twohy v. Harris*, 194 Va. 69, 72 S.E.2d 329 (1952). Twohy, who worked for Harris in a number of different capacities and under a number of different companies, threatened to quit his job due to the poor wages. Harris offered him ten percent of the stock in each corporation Harris owned to prevent Twohy from seeking other employment, and Twohy accepted. Twohy later brought suit to enforce the agreement, and the court ruled that his continued employment for Harris constituted sufficient consideration for the bonus. Again, the critical issue was the employee's right to leave employment at any time, with or

without a reason—and the forbearance of the exercise of that right as a species of consideration sufficient to bind the employer to his promise of stock.

CONCLUSION

Simply stated, any effort to understand the complex body of law surrounding the employment relationship in Virginia must begin with these early cases.