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TERMINATING EMPLOYEES IN VIRGINIA: A ROADMAP FOR THE EMPLOYER, THE EMPLOYEE, AND THEIR COUNSEL

*Keith D. Boyette**

I. INTRODUCTION

In Virginia, as elsewhere, employees are increasingly challenging the employer's decision to terminate the employment relationship. Consequently, the employer's time and resources are diverted from the operation of business to the defense of employee lawsuits. The probability and risk of such litigation can be minimized if the employer, advised by his counsel, structures his employment contracts and relationships with an awareness of the legal consequences of his actions.

This article addresses what may be characterized as the current common law of Virginia on the termination of employees. This article will not address federal statutory limitations on the employer's ability to terminate,¹ although obviously, these limitations must be reviewed and considered whenever an employee is discharged.

The relationship between an employer and employee is contractual in nature.² While the relationship is sometimes embodied in a written contract, the contract is more often oral. The parties to the relationship may not even have discussed the terms of the employment; however, an implied employment contract exists wherever one person performs labor or services of value for another under circumstances which indicate "that the parties intended and un-

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1. Federal statutes prohibit termination of an employee when the termination occurs because of the employee's race, 42 U.S.C. § 2000e-2(a) (1976 & Supp. V 1981); sex, *id.*; age, 29 U.S.C. § 623(a) (1976 & Supp. V 1981); physical handicap, *id.* § 794 (1976 & Supp. V 1981); or union activity, *id.* § 151 (1976). In addition, the Occupational Safety and Health Act (29 U.S.C. § 660(c)(1) (1976)), the Clean Air Act (42 U.S.C. § 7622(a) (Supp. V 1981)), and the Employee Retirement Income Security Act (29 U.S.C. § 1140 (1976)) prohibit the dismissal of an employee because he reports employer activity which violates the statute in question.

2. In *Humphrees v. Boxley Bros.*, 146 Va. 91, 97, 135 S.E. 890, 891 (1926), the Supreme Court of Virginia observed that "[t]he relation of employer and employee can only exist by virtue of contract, express or implied"

derstood that the person performing the services was to be paid for them."³

The ability of the parties to terminate the contract depends on the express or implied terms of the contract. Where the contract addresses the right of the parties to terminate the relationship, the terminating party must adhere to those requirements or expose himself to liability for breach. For example, where the contract requires a specified period of written notice in advance of termination, failure to comply with the terms of the notice requirement will result in liability for damages incurred by the other party during the notice period. Thus, where the employee is dismissed without the required notice, he is entitled to recover compensation for that notice period.⁴

3. *Charlottesville Music Center, Inc. v. McCray*, 215 Va. 31, 35, 205 S.E.2d 674, 678 (1974).

4. *Raynor v. Burroughs Corp.*, 294 F. Supp. 238, 242 (E.D. Va. 1968) (applying Michigan law; majority rule). Professor Corbin, however, disagrees with this analysis, asserting:

If a party who has a power of termination by notice fails to give the notice in the form and at the time required by his reservation, it is ineffective as a termination. Its terms and the circumstances under which it is given may be such as to justify the other party in regarding it as a repudiation of the contract, with all the effects of repudiation.

6 A. CORBIN, CORBIN ON CONTRACTS § 1266 (1962) (footnote omitted). See also *Stockmen's Supply Co. v. Jenne*, 72 Idaho 57, 237 P.2d 613 (1951) (failure to give the specified notice left both parties bound by the contract).

Generally, courts considering this issue have agreed with the *Raynor* holding (294 F. Supp. 238) that termination upon inadequate notice or upon failure to give notice terminates the contractual relationship at the end of the specified notice period and entitles the employee to recover compensation for the notice period only and not for the entire balance of the contract period. *E.g.*, *Old Dominion Copper Mining & Smelting Co. v. Andrews*, 6 Ariz. 205, 56 P. 969 (1899); *Johnson v. Pacific Bank & Store Fixture Co.*, 59 Wash. 58, 109 P. 205 (1910); see also Annot., 96 A.L.R.2d 272, 274-79 (1964).

The Supreme Court of Virginia has aligned itself to some extent with the general rule holding that a notice which did not accord with the contract termination provision was sufficient to terminate the contract upon the expiration of the period specified in the contract. *Hepner v. American Fidelity Life Ins. Co.*, 220 Va. 422, 428, 258 S.E.2d 508, 512 (1979). The Virginia court would probably hold also that the damages for failure to comply with a contractual notice of termination provision are limited to those incurred during the contractual notice period.

However, the courts have recognized two exceptions to this general rule. Where the employee will forfeit vested rights beyond normal compensation if the contract is permitted to be terminated, the inadequate or nonexistent notice is ignored, and the contract continues in force. *E.g.*, *Hubert v. Luder's, Inc.*, 92 Ga. App. 427, 88 S.E.2d 481 (1955); *Oldfield v. Chevrolet Motor Co.*, 198 Iowa 20, 199 N.W. 161 (1924). Furthermore, where the contractual provision requires notice before termination and permits the noticed party to obviate the termination by taking specified action, the inadequate or nonexistent notice is likewise ignored, and the contract continues. *E.g.*, *Carleno Coal Sales, Inc. v. Ramsay Coal Co.*, 129

II. TERMINATION FOR CAUSE

If the employment contract is for a specified term, a party desiring to terminate the contract before its expiration must have cause.⁵ Additionally, the contract itself may expressly require cause before termination can occur.⁶ Where cause is required, termination of the relationship without cause can result in the imposition of damages for breach of the contract.⁷ The damages recoverable under such circumstances include the amount due under the contract for the remainder of the contract term less any amounts the employee earned or might have earned by reasonable effort in other employment.⁸ Furthermore, if cause is required and the employer discharges the employee without cause, the Virginia courts will not enforce contract covenants proscribing activity after the end of the employment relationship, such as those prohibiting competition with the employer, solicitation of the employer's customers, or disclosure of information concerning the employer's customers.⁹

Where the employer decides to discharge an employee under circumstances requiring cause, the employer should carefully review his reasons for termination. The grounds for dismissing the employee should be as specific as possible. In the majority of suits, the determination of whether the employer had cause to discharge will be a question of fact to be submitted to the jury.¹⁰

An all-inclusive listing of the circumstances which might constitute cause for termination is impossible. If the employer's action is questioned in litigation, the ultimate outcome will obviously turn upon the facts and circumstances of the employment contract, the performance of that contract, and the events leading up to its termination. However, the Supreme Court of Virginia has discussed what constitutes sufficient cause for termination in several cases where cause for discharge was held to be required.

Colo. 393, 270 P.2d 755 (1954).

5. *E.g.*, *Twohy v. Harris*, 194 Va. 69, 80, 72 S.E.2d 329, 335-36 (1952); *Standard Laundry Serv., Inc. v. Pastelnick*, 166 Va. 125, 130, 184 S.E. 193, 195 (1936).

6. *E.g.*, *Norfolk S. Ry. v. Harris*, 190 Va. 966, 59 S.E.2d 110 (1950).

7. *Standard Laundry Serv., Inc. v. Pastelnick*, 166 Va. at 129, 184 S.E. at 195.

8. *Id.*; *Virginia Talc & Soapstone Co. v. Hurkamp*, 124 Va. 721, 728-29, 98 S.E. 681, 683 (1919). The employer has the burden of proving the employee's failure to mitigate damages by securing other employment. *Paddock v. Mason*, 187 Va. 809, 818, 48 S.E.2d 199, 203 (1948).

9. *Standard Laundry Serv., Inc. v. Pastelnick*, 166 Va. at 130, 184 S.E. at 195.

10. *Citizen Home Ins. Co. v. Glisson*, 191 Va. 582, 589, 61 S.E.2d 859, 862 (1950).

First, if an employee violates the terms of his employment contract or the employer's reasonable policies, rules, or regulations, the employer may have adequate cause to terminate.

In *Spotswood Arms Corp. v. Este*,¹¹ the employee had served as manager of the employer's hotel. Although both the employer and the employee had prepared written contracts, neither contract had been executed.¹² Nevertheless, the court found that the employment was for a specific term and that cause was required for the employer to discharge the employee without liability.¹³ In *Este*, the employer became dissatisfied upon learning, shortly after the employment began, that the employee was violating orders concerning how he should conduct the financial affairs of the corporation.¹⁴ The employer brought the violations to the employee's attention to no avail.¹⁵ Both the employer's orders and the employee's failure to comply were documented.¹⁶ The employee was dismissed after refusing to follow his employer's order to discharge a subordinate employee.¹⁷

The Supreme Court of Virginia held that the employer had adequate cause to terminate his manager in *Este*.¹⁸ The court found that all employment contracts contain an implied covenant that the employee will comply with the "lawful and reasonable" orders of the employer relating to employment performance.¹⁹ Where the employee disobeys the express provisions of the employment contract or the general rules, instructions, or particular commands of the employer, the court noted that such disobedience justified peremptory dismissal.²⁰

Thus, where cause is required, the fact that the employee has violated the express terms of the contract or a "lawful and reasonable" company policy or order may constitute cause for discharging the employee, enabling the employer to avoid liability. Whether disobedience of a particular company policy or order is deemed

11. 147 Va. 1047, 133 S.E. 570 (1926).

12. *Id.* at 1049, 133 S.E. at 571.

13. *Id.* at 1049, 1055, 133 S.E. at 571, 573.

14. *Id.* at 1050, 133 S.E. at 571-72.

15. *Id.* at 1050-53, 133 S.E. at 571-73.

16. *Id.*

17. *Id.* at 1053-55, 133 S.E. at 572-74.

18. *Id.* at 1061-64, 133 S.E. at 574-76.

19. *Id.* at 1061, 133 S.E. at 574 (quoting 1 C. LABATT, MASTER & SERVANT § 273 (2d ed. 1913)).

20. 147 Va. at 1061, 1064, 133 S.E. at 574, 575.

sufficient to justify termination will probably depend on the relative importance of the policy or order to the successful operation of the employer's business.²¹ Disobedience of minor rules or orders, standing alone, will probably be insufficient to justify termination if cause is required. Additionally, the likelihood that disobedience of an employer's policies, rules, or orders will constitute cause is enhanced where the employer can show repeated violations by the employee.²² Nevertheless, the courts are likely to defer to the employer's judgment on what is reasonable and necessary for the operation of his business and are unlikely to second-guess the wisdom of a particular policy, rule, or order.

If the reason for the discharge is failure to follow company policy or a specific order, the fact that the policy exists and was communicated to the employee or that the order was actually given to the employee should be established and documented. Evidence of the employee's failure to follow the policy or his disobedience of an order should likewise be documented. Evidence that the policy was a reasonable one applied uniformly and that the employee was dismissed only after a careful investigation and review of his actions will enhance the likelihood that the discharge will be found to have been justified if it is later questioned.

Disability or incapacity may be cause for termination. In *Citizen Home Insurance Co. v. Glisson*,²³ the employee was hired as a salesman under a written employment contract which provided that termination could result if either party violated its terms, covenants, or conditions.²⁴ After fulfilling his duties under the contract for a number of years, the employee became disabled and was unable to perform his duties. When the disability had continued for a year, the employer discharged him.²⁵

The Virginia Supreme Court in *Glisson* held that the employer had adequate cause to terminate the employee.²⁶ The court stated that, where the parties have not allocated the risk of incapacity in the contract, "temporary disability of short duration as compared with the term of service contemplated" will not constitute suffi-

21. *Id.* at 1062, 133 S.E. at 575.

22. *Id.*

23. 191 Va. 582, 61 S.E.2d 859 (1950).

24. *Id.* at 585, 61 S.E.2d at 860.

25. *Id.* at 585-86, 61 S.E.2d at 860-61.

26. *Id.* at 590, 61 S.E.2d at 863.

cient cause for discharging the employee.²⁷ However, the court ruled that, where the employer has not assumed the risk of incapacity, a long illness which renders the employee "unable to substantially perform his duties permits the employer to treat the agreement as terminated."²⁸

While *Glisson* does not provide a fixed formula for determining whether a disability constitutes sufficient cause for termination, the Supreme Court of Virginia noted that the following factors are relevant to the determination:

[t]he nature of the business and duties required by the contract, the character and possible duration of the illness, the necessities of the employer, the effect upon . . . [the employer's] interest of the cessation for a time of the employee's services, [and] whether the duties may be reasonably and substantially performed for a time by another²⁹

A central issue in disability cases, when the employer has not assumed the risk of disability, is whether there has been a failure of the consideration which supported the contract.³⁰

A third line of cases in Virginia addresses the question of whether unsatisfactory performance by the employee can constitute cause for termination. In *Crescent Horseshoe & Iron Co. v. Eynon*,³¹ the employer discharged the employee for unsatisfactory performance. The Supreme Court of Virginia stated that unless the employee professes to have a greater than ordinary degree of skill and has contracted to perform his services at that higher level, the employer is entitled to have his employ e perform only in a reasonably skillful manner.³² Thus, where cause for termination is required, the employer may terminate an employee only for failing to perform in this reasonably skillful manner unless a contractual provision requires a higher degree of skill.³³

The trier of fact determines whether the employee failed to render the contracted level of services.³⁴ In *Forsberg v. Zehm*,³⁵ the

27. *Id.* at 587, 61 S.E.2d at 861.

28. *Id.*

29. *Id.* at 589, 61 S.E.2d at 862.

30. *Id.* at 590, 61 S.E.2d at 862.

31. 95 Va. 151, 27 S.E. 935 (1897).

32. *Id.* at 159, 27 S.E. at 937.

33. *Id.*

34. *Forsberg v. Zehm*, 150 Va. 756, 770, 143 S.E. 284, 288 (1928).

employee contracted to perform his duties to the best of his ability and to promote a high degree of excellence and efficiency in the product produced.³⁶ The Virginia Supreme Court observed that the determination of whether the employee had rendered the contracted level of services must take into account the nature of the employment and the reasonableness of the employer's expectations.³⁷ At a minimum, the jury may properly consider the relation of the contracting parties to each other, the real object of the contract, and the character of the services to be rendered.³⁸

In a termination case based on the employee's unsatisfactory performance, the employer's likelihood of prevailing in a court challenge is increased where he has established objective criteria for judging the employee's performance. The criteria should relate to the nature and object of the employment and should be uniformly applied. Furthermore, the employee should have been informed of his unsatisfactory performance and have been given an opportunity to correct his performance prior to dismissal.

A fourth line of cases deals with the issue of whether criminal conduct by an employee in the course of his employment constitutes cause for dismissal. In *Rudlin v. Parker*,³⁹ the employee was dismissed for making indecent advances to a female customer.⁴⁰ The Virginia court noted that such conduct, if proven, constituted commission of a crime⁴¹ and that the commission of a crime by an employee in the course of his employment would constitute cause for termination.⁴²

Where the employment contract is for a specified duration or expressly requires cause for termination, the employer has the burden of proving cause justifying the dismissal.⁴³ Where the cause assigned by the employer is the violation of the express terms of the contract or a company policy or order, the disability of the employee, or his unsatisfactory performance, the employer must establish that cause by a preponderance of the evidence.⁴⁴ However,

35. 150 Va. 756, 143 S.E. 284.

36. *Id.* at 761, 143 S.E. at 285.

37. *Id.* at 770-71, 143 S.E. at 288.

38. *Id.* at 772, 143 S.E. at 289.

39. 186 Va. 647, 43 S.E.2d 918 (1947).

40. *Id.* at 651, 43 S.E.2d at 920.

41. *Id.* at 653, 43 S.E.2d at 920.

42. *Id.* at 654, 43 S.E.2d at 921.

43. *Norfolk S. Ry. v. Harris*, 190 Va. 966, 977-78, 59 S.E.2d 110, 115 (1950).

44. *Id.* at 977-78, 59 S.E.2d at 115.

where the employee is discharged for conduct of a "character as to import a crime," the burden of proof is "clear and satisfactory" evidence.⁴⁵

If the employee challenges his dismissal under circumstances requiring cause, the sole issue in the ensuing litigation is whether a *legal* cause existed for the discharge. The employer's underlying motive for terminating the employee is irrelevant and immaterial and therefore not admissible.⁴⁶ Additionally, evidence that the employer continued the employment after learning of the conduct which ultimately resulted in the employee's dismissal does not preclude the employer from later terminating the employee because of that conduct.⁴⁷ As the Supreme Court of Virginia has stated, "The master may overlook breaches of duty in the servant, hoping for a reformation; but, if he is disappointed and the servant continues his course of unfaithfulness, he may act, in view of his whole course of conduct, in determining whether the contract of employment should be terminated."⁴⁸ Nevertheless, evidence that the employer knowingly overlooked the employee's conduct or similar conduct by other employees may discredit the alleged existence of policies prohibiting the conduct and the importance of those policies to the successful operation of the employer's business.

Finally, where the discharge of an employee occurs under circumstances requiring cause and the employee challenges the discharge, the employer may rely either upon grounds for the dismissal different from those stated at the time of the termination or upon grounds discovered after the dismissal.⁴⁹ The cause relied upon by the employer in any litigation over the discharge need not have been the inducing motive for the dismissal nor even known to the employer at the time of termination.⁵⁰

⁴⁵ Rudlin v. Parker, 186 Va. at 653, 43 S.E.2d at 921. This higher burden of proof is also required where the employee is charged with fraud. *Id.* The greater burden is imposed because "one charged with wrong doing or other unlawful act is presumed innocent of the charge." *Id.*

46. Crescent Horseshoe & Iron Co. v. Eynon, 95 Va. 151, 159, 27 S.E. 935, 937 (1897).

47. Spotswood Arms Corp. v. Este, 147 Va. 1047, 1064, 133 S.E. 570, 575 (1926).

48. *Id.* (quoting Gray v. Shepard, 147 N.Y. 177, —, 41 N.E. 500, 502 (1895)).

49. Crescent Horseshoe & Iron Co. v. Eynon, 95 Va. at 158, 27 S.E. at 936.

50. *Id.*

III. AT-WILL EMPLOYMENT

Where a written employment contract is ambiguous regarding its duration or the need for cause to terminate or the contract is oral and both of the parties do not concede that the employment relationship is for a specified duration or terminable only for cause, the ability to terminate the employment relationship and the consequences of the termination are more uncertain.

In Virginia, where the employment contract, whether written or oral, does not specify that it will last for a specified period of time, the courts recognize a rebuttable presumption that the employment is at will and therefore terminable at any time by either party for any reason or even for no reason.⁵¹ The courts also recognize a rebuttable presumption of at-will employment in situations where the contract does not specify either that the employment relationship will last as long as the employee performs satisfactorily or that the contract is terminable only for cause.⁵² Of course, if the written contract expressly provides that it is terminable at any time by either party for any reason or even for no reason, or if both parties concede as much, the contract itself creates an employment at will, and no presumption is necessary.

Where the contract is terminable at will, the dismissed employee has "no basis for recovery of damages against his erstwhile employer."⁵³ The Supreme Court of Virginia has quite properly characterized an at-will contract as a contract of hazard.⁵⁴

Because in most employment relationships the parties have contracted orally and either did not discuss, or have differing recollections of, the duration of the relationship or the circumstances under which the relationship will terminate, the rebuttable presumption of at-will employment is frequently employed in litigation challenging the employee's dismissal. However, use of the presumption does not necessarily end the case.

The employee can successfully rebut the presumption of a termi-

51. *Sea-Land Serv., Inc. v. O'Neal*, 224 Va. 343, 349, 297 S.E.2d 647, 650 (1982); *Norfolk S. Ry. v. Harris*, 190 Va. 966, 976, 59 S.E.2d 110, 114 (1950); *Edwards Co. v. Deihl*, 160 Va. 587, 590, 169 S.E. 907, 908 (1933); *Title Ins. Co. v. Howell*, 158 Va. 713, 718, 164 S.E. 387, 389 (1932); *Hoffman Specialty Co. v. Pelouze*, 158 Va. 586, 594, 164 S.E. 397, 399 (1932).

52. *Sea-Land Serv., Inc. v. O'Neal*, 224 Va. at 348-49, 297 S.E.2d at 650; *Norfolk S. Ry. v. Harris*, 190 Va. at 976, 59 S.E.2d at 114.

53. *Sea-Land Serv., Inc. v. O'Neal*, 224 Va. at 349, 297 S.E.2d at 650.

54. *Edwards Co. v. Deihl*, 160 Va. at 590, 169 S.E. at 908.

nable-at-will contract by proving by a preponderance of the evidence that his contract was terminable only for cause.⁵⁵ In determining whether the presumption that the contract was at will has been rebutted, the Virginia courts consider the understanding and intent of the parties, as ascertained from their written and oral negotiations, the practices in the business, the situations of the parties, and the nature of the employment.⁵⁶

For example, in *Title Insurance Co. v. Howell*,⁵⁷ a suit challenging a discharge after two-and-a-half months of employment, the employee failed to rebut the presumption of an at-will relationship. The employee, a lawyer, was hired pursuant to a resolution of the executive committee of the company's board of directors stating that he was employed "at the rate of \$708.34 per month, payable on the 1st and 15th of each month."⁵⁸ The employee and a representative of the employer initialed a copy of the resolution.⁵⁹ The negotiations preceding the initialing had included the employee's request for an annual salary and the employer's response that officers of the company were employed by the month with the right to a month's notice of termination.⁶⁰

In holding that the contract was at will rather than from month to month, the Virginia Supreme Court placed primary emphasis on the language of the resolution.⁶¹ The court ignored the negotiations between the parties and stressed that the resolution itself stated merely the *rate* of compensation.⁶² The court found that the resolution constituted the entire contract and thus could not be altered by parol evidence and that, because the employer's representative had maintained throughout negotiations that he had no authority to make the contract, his representations did not become part of the contract.⁶³

In *Hoffman Specialty Co. v. Pelouze*,⁶⁴ the employee sued his employer, maintaining that he had a one-year oral contract which

55. *Id.*

56. *Hoffman Specialty Co. v. Pelouze*, 158 Va. at 595, 164 S.E. at 398-99.

57. 158 Va. 713, 164 S.E. 387 (1932).

58. *Id.* at 716, 164 S.E. at 388.

59. *Id.* at 717, 164 S.E. at 388.

60. *Id.* at 716-17, 164 S.E. at 388.

61. *Id.* at 717, 164 S.E. at 389-90.

62. *Id.* at 717, 164 S.E. at 389.

63. *Id.* at 718-19, 164 S.E. at 389-90.

64. 158 Va. 586, 164 S.E. 397 (1932).

was later renewed from year to year.⁶⁵ The court initially applied the presumption of an at-will relationship.⁶⁶ While the plaintiff maintained that his employer had said that he would be paid \$2,400 a year, the employer claimed to have told the employee that he would be paid \$200 a month.⁶⁷ The employer presented evidence that all of its employees were employed by the month and that monthly employment was the custom in the trade.⁶⁸ Furthermore, when the employer terminated the employee, it offered him more than a month's salary as severance pay.⁶⁹ In light of the conflicting testimony, the Virginia Supreme Court found that the case had properly been submitted to the jury and upheld the verdict that this was not an at-will contract. In so holding, the court emphasized the fact that the employer offered more than a month's salary as severance pay, an act inconsistent with the rights of the parties under an at-will employment contract.⁷⁰

On the other hand, in *Edwards Co. v. Deihl*,⁷¹ the Supreme Court of Virginia held that the presumption that the employment contract is terminable at will was not rebutted. In reaching this conclusion, the court considered the nature of the business, the uncertainty that the business would continue, and the fact that this uncertainty was discussed by the parties at the time the employment relationship was created.⁷²

The presumption that employment of an unspecified duration is terminable at will has been the rule in most American jurisdictions at least since 1877.⁷³ While the application of the presumption has come under increasing attack and while exceptions to the presumption's application have been recognized in jurisdictions other than Virginia,⁷⁴ the presumption is still applicable in most American jurisdictions in the absence of an applicable exception. There-

65. *Id.* at 588-89, 164 S.E. at 397.

66. *Id.* at 594, 164 S.E. at 399.

67. *Id.* at 591-92, 164 S.E. at 398-99.

68. *Id.* at 592, 164 S.E. at 398-99.

69. *Id.* at 594, 164 S.E. at 399.

70. *Id.* at 594-95, 164 S.E. at 400.

71. 160 Va. 587, 169 S.E. 907 (1933).

72. *Id.* at 591, 169 S.E. at 908.

73. The presumption that employment for an unspecified duration is terminable at will was identified as the American rule in 1877. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). This presumption was contrary to the English common law, which presumed that employment was for a year unless otherwise specified. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-20 (1976).

74. See *infra* text accompanying notes 85-102.

fore, cases from other jurisdictions provide examples of what evidence may be persuasive in rebutting the presumption.

As noted above, the Virginia court has looked to the written and oral negotiations between the parties as a guide to ascertaining their intent with respect to the duration of the employment.⁷⁵ Similarly, in determining whether negotiations occurred and whether agreement was reached on the conditions under which either party could terminate the employment relationship, other courts have examined the employment application⁷⁶ and statements made during the interviewing process.⁷⁷

The Supreme Court of Virginia and other courts have examined the customs of the industry or trade as a guide to ascertaining intent.⁷⁸ However, limited weight should be given to such evidence unless the employee concedes knowledge of those customs at the time the employment relationship commenced or unless the industry practice was discussed by the parties at some point and acknowledged to be applicable. Without such knowledge by the employee or discussion and acknowledgment of applicability, evidence of custom is not probative of the parties' mutual understanding and intent.

The courts have also examined the parties' statements and conduct during the employment as evidence of the practical construction of the parties' understanding and intent in entering into or modifying the employment contract. Thus, the employer's offer of severance pay as an inducement to procure the employee's resignation has been deemed inconsistent with employment at will.⁷⁹ Sim-

75. *Hoffman Specialty Co. v. Pelouze*, 158 Va. at 595, 164 S.E. at 398-99.

76. *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980) (application acknowledged that employment could be terminated with or without cause and with or without notice, at any time, and that only the president or vice-president had authority to enter into a contrary employment contract); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 465-66, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982) (application specified that employment was subject to provisions of personnel handbook).

77. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, _____, 292 N.W.2d 880, 890 (1980) (employees assured of job security "as long as . . . [they] did . . . [their] job"); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 460, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982) (employee relied on assurance of policy of not terminating employees without cause).

78. *Hoffman Specialty Co. v. Pelouze*, 158 Va. at 592, 164 S.E. at 398-99; *accord Maloney v. E.I. DuPont de Nemours & Co.*, 352 F.2d 936 (D.C. Cir. 1965) (applying Delaware law; contracts of other employers in industry examined).

79. *Hoffman Specialty Co. v. Pelouze*, 158 Va. at 594, 164 S.E. at 399. *But see Maloney v. E.I. DuPont de Nemours & Co.*, 352 F.2d at 939 (under Delaware law, severance pay policy expected where termination can occur without cause).

ilarly, assurance of job security or employment for as long as performance is satisfactory has negated the presumption that the employment is at will.⁸⁰

Literature setting forth company policies or procedures relating to termination has been considered in determining whether the employment contract contained any limitation on the employer's ability to terminate. The courts are divided on the effect of the issuance of a personnel manual or policy statement on disciplinary procedure and job security. In *Johnson v. National Beef Packing Co.*,⁸¹ the Supreme Court of Kansas held that a personnel manual published after employment began did not modify the employee's at-will contract because the terms in the manual had not been bargained for, any benefits conferred were mere gratuities, and the manual was only a unilateral expression of company policy and procedures.⁸²

In contrast, the Michigan Supreme Court held in *Toussaint v. Blue Cross & Blue Shield*⁸³ that statements of policy issued after the employee's employment created contractual rights. The court found that contract rights were created upon the statement's issuance even though the employer and employee had never agreed that the statements were contractual; the statements were not signed by the employer and employee; the policy could be unilaterally amended without notice; and the statements contained no reference to the employee, his job, or his compensation.⁸⁴

Thus, in any litigation challenging the employer's ability to dismiss the employee with or without cause, at any time, counsel for the employee must review all the dealings between parties, from

80. *Maloney v. E.I. DuPont de Nemours & Co.*, 352 F.2d at 938 (Delaware law; employment to continue as long as performance satisfactory and economic conditions permit).

81. 220 Kan. 52, 551 P.2d 779 (1976).

82. *Id.* at _____, 551 P.2d at 782. *Accord* *Mau v. Omaha Nat'l Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980).

83. 408 Mich. 579, 292 N.W.2d 880 (1980).

84. *Id.* at _____, 292 N.W.2d at 892. *Accord* *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626-30 (Minn. 1983) (handbook, if given to employee, modifies existing contract while employee continues in employ); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 466-67, 443 N.E.2d 441, 445, 457 N.Y.S.2d 193, 197 (1982) (limitations on employer's right to terminate might be inferred from personnel policies and procedures handbook).

In *Maloney v. E.I. DuPont de Nemours & Co.*, 352 F.2d at 939, the District of Columbia court was asked to apply Delaware law to the presumption of at-will employment. Among the factors found to rebut the presumption was the distribution of an employee benefit summary which addressed potential causes for discharge but which did not include the arbitrary whim of the employer.

the inception of negotiations prior to employment through the date of discharge, in order to develop all facts possible to rebut the presumption of at-will employment. On the other hand, even when no litigation is threatened, the employer and his counsel should constantly review the operation of the employer's business to ensure that no facts exist which may limit the employer's ability to terminate employees if that is the type of flexibility the employer desires.⁸⁵

IV. LIMITATIONS ON THE ABILITY TO TERMINATE

Aside from limitations imposed by the facts in a given case, several legal theories have emerged to avoid raising at-will presumption altogether. Virginia, which recognizes and applies this presumption, has not yet addressed these theories, although at least one federal district court has held that they are not recognized in Virginia.⁸⁶ Other jurisdictions, however, have been receptive to these arguments.

A. *Implied Contractual Terms*

Some courts recognize an implied covenant of good faith in all employment contracts, including those of unspecified duration.⁸⁷ The courts which have found such a covenant have relied upon such facts as the payment of commissions as part of the employee's compensation,⁸⁸ the length of the employee's association with the employer,⁸⁹ and the employee's adoption of grievance and discipli-

85. See *infra* text accompanying notes 105-10.

86. In *Fisher v. Southern Oxygen & Supply Co.*, Civil Action No. 82-0912-R (E.D. Va. Sept. 26, 1983), the court held that Virginia has not yet recognized an implied good-faith obligation in at-will employment contracts. *Id.* at 2. The court further expressed its belief that the Supreme Court of Virginia would not recognize such an implied obligation because it had previously characterized such contracts as contracts of hazard. *Id.* Finally, the court stated that the recognition of a cause of action in tort for abusive discharge or for bad-faith discharge was incompatible with the presumption that an employment contract of unspecified duration is terminable at will by either party. *Id.* at 3.

87. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Gram v. Liberty Mut. Ins. Co.*, _____ Mass. _____, 429 N.E.2d 21 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

88. *Fortune v. National Cash Register Co.*, 373 Mass. at _____, 364 N.E.2d at 1256.

89. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d at 328, 171 Cal. Rptr. at 927; *Fortune v. National Cash Register Co.*, 373 Mass. at _____, 364 N.E.2d at 1258.

nary procedures⁹⁰ as bases for implying such an obligation.

Most of the courts that infer such a covenant have held that the covenant is not breached simply because the employer lacked good cause to terminate.⁹¹ Rather, the absence of good cause is a factor to be considered, along with such other factors as whether the employer made a bona fide investigation to support the termination and whether the employer received some benefit as a result of the dismissal.⁹² The *presence* of good cause, however, negates a charge of bad faith.⁹³ Some courts have refused to find a breach of the implied covenant solely because the employer used a false reason or a pretext to justify the discharge to the employee.⁹⁴

On the other hand, many courts have refused to find an implied covenant of good faith in an at-will employment contract,⁹⁵ basically for two reasons. First, these courts perceive an implied obligation of good faith as inconsistent with other terms of the contractual relationship. If the employment is at will, the employer enjoys an unfettered right to discharge the employee at any time, and "it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."⁹⁶ Second, these courts have been concerned with unnecessarily limiting the employer's discretion in managing the work force.⁹⁷

Rather than imply a covenant of good faith in an at-will contract, those courts which do imply such a covenant should examine both the basis for the at-will presumption and the advisability of using such a good-faith covenant. The implication of the

90. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927; *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729.

91. *E.g.*, *Gram v. Liberty Mut. Ins. Co.*, _____ Mass. at _____, 429 N.E.2d at 27.

92. *Id.* at _____, 429 N.E.2d at 27.

93. *Id.* at _____, 429 N.E.2d at 27.

94. *Cort v. Bristol-Meyers Co.*, 358 Mass. 300, _____, 431 N.E.2d 908, 911 (1982) (at-will employer has no duty to offer the employee a reason; concealment of real reason therefore not actionable).

95. *Daniel v. Magma Copper Co.*, 127 Ariz. 320, _____, 620 P.2d 699, 703 (Ariz. Ct. App. 1980); *Parner v. Americana Hotels, Inc.*, _____ Hawaii _____, _____, 652 P.2d 625, 629 (1982); *Criscione v. Sears, Roebuck & Co.*, 66 Ill. App. 3d 664, _____, 384 N.E.2d 91, 95 (1978); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, _____, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983); *Watson v. Zep Mfg. Co.*, 582 S.W.2d 178 (Tex. Civ. App. 1979); *Jones v. Keogh*, 137 Vt. 562, _____, 409 A.2d 581, 582 (1979); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, _____, 335 N.W.2d 834, 838 (1983).

96. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d at _____, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.

97. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d at _____, 335 N.W.2d at 838.

covenant results in uncertainty because the court must then struggle to define the scope of the covenant. The parties are capable of addressing the issue of termination directly in their contract and are free to provide for whatever procedural steps they desire before termination. If the parties choose not to address the duration of the contract expressly, the courts should handle the relationship according to rules that are easy to apply.

The beauty of the at-will presumption is that it is easy and straightforward. The employee always has the opportunity to rebut the presumption by facts and circumstances demonstrating a different employment relationship. If the courts believe the employee deserves or is entitled to more protection than the at-will presumption provides, the courts should adopt a rebuttable presumption providing that protection. To hold that the relationship is presumed to be at will while simultaneously implying a covenant of good faith is inconsistent and negates the certainty which the law should strive to provide. Such inconsistency also fails to protect the employee because he is least able to afford a lengthy court fight to establish his rights.

B. *Limitations Based on Public Policy*

Some courts recognize a cause of action where the dismissal violates some public policy⁹⁸ and allow the terminated employee to recover damages if the policy violated is well-established and important.⁹⁹ The scope of the cause of action differs depending on the source of the public policy. For example, some courts will permit such a cause of action only when the public policy is evidenced by an existing law.¹⁰⁰ Other courts recognize judicially conceived and defined policies, such as that of encouraging employees to inform law enforcement authorities of the illegal activities of fellow employees.¹⁰¹

98. *E.g.*, *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 287 N.E.2d 902 (1973); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

99. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d at _____, 335 N.W.2d at 838.

100. *Id.* at _____, 335 N.W.2d at 840. In *Brockmeyer*, the Wisconsin Supreme Court held that "existing law" consisted of constitutional and statutory provisions. *Id.* at _____, 335 N.W.2d at 840.

101. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, _____, 421 N.E.2d 876, 880 (1981).

On the other hand, some courts have refused to permit at-will employees to sue and recover for a discharge which violates public policy.¹⁰² These courts have rejected the cause of action because of its inconsistency with the at-will presumption and because of a conviction that such a significant change in the law is best left to the legislature so that a "principled statutory scheme [can be] . . . adopted after opportunity for public ventilation."¹⁰³

As noted above, the state courts have not addressed the issue of whether a cause of action for termination in violation of public policy exists in Virginia. However, the Virginia General Assembly has declared the termination of an employee to be unlawful under certain circumstances, regardless of whether an at-will relationship exists. For example, section 34-29(f) of the Virginia Code declares that "[n]o employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness."¹⁰⁴ Section 40.1-51.2:1 provides that "[n]o person shall discharge . . . an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others."¹⁰⁵ Section 40.1-51.2:2 permits an employee who has exhausted certain administrative remedies to sue an employer for a discharge in violation of the safety and health laws.¹⁰⁶ Thus, the Virginia legislature has permitted at-will employees to sue their employers where the reason for their dismissal violates a specific statute.

V. PRESERVING THE AT-WILL RELATIONSHIP

Under current Virginia law, if the employer wishes to be free to terminate his employees at any time for any reason or even for no reason, he can take certain measures to minimize the risk of a successful challenge to discharge. Of course, there is no way that he can eliminate all possibility of litigation arising out of an employee termination because the dismissed employee can institute suit and

102. *Hirrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130 (Ala. 1977); *DeMarco v. Publix Super Mkts. Inc.*, 384 So. 2d 1253 (Fla. 1980); *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979).

103. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d at _____, 448 N.E.2d at 90, 461 N.Y.S.2d at 236.

104. VA. CODE ANN. § 34-29(f) (Cum. Supp. 1983).

105. *Id.* § 40.1-51.2:1 (Repl. Vol. 1981).

106. *Id.* § 40.1-51.2:2.

put the employer to expense simply by paying the filing and process fees at the courthouse. However, by adopting certain personnel procedures and by controlling communications with his employees, the employer can minimize the possibility that a discharged at-will employee will sue and can enhance the likelihood that the employer will prevail if litigation does occur.

A. *The Employment Application*

The first contact between a prospective employer and employee is usually the job application, which is designed to provide the employer with information on the prospective employee's background and experience. The application therefore presents the first opportunity for the employer to make explicit his policies on the duration of employment and his ability to end the relationship. The employer should consider including language similar to the following in bold print immediately above the line for the applicant's signature:

IF I AM EMPLOYED, IN CONSIDERATION OF MY EMPLOYMENT, I AGREE TO CONFORM TO THE POLICIES, RULES, AND REGULATIONS OF [EMPLOYER] AND I UNDERSTAND AND AGREE THAT MY EMPLOYMENT AND COMPENSATION CAN BE TERMINATED, WITH OR WITHOUT CAUSE, AND WITH OR WITHOUT NOTICE, AT ANY TIME, AT THE OPTION OF EITHER [EMPLOYER] OR MYSELF. I UNDERSTAND AND ACKNOWLEDGE THAT NO REPRESENTATIVE OF [EMPLOYER], OTHER THAN THE PRESIDENT OR VICE-PRESIDENT OF [EMPLOYER], HAS ANY AUTHORITY TO ENTER INTO ANY WRITTEN OR ORAL AGREEMENT FOR EMPLOYMENT FOR ANY SPECIFIED PERIOD OF TIME, OR TO MAKE ANY AGREEMENT CONTRARY TO THE FOREGOING.¹⁰⁷

B. *The Hiring Interview*

The employer should ensure that recruiters and personnel interviewers receive careful instructions concerning what they can and cannot say about the duration of the employment and the condi-

107. A substantially similar clause was approved and used to establish the at-will nature of the employment in *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980).

tions for dismissal. Recruiters should be informed of the limitations on their authority to bind the employer or to make a contract with the prospective employee, and the recruiter should in turn inform the applicant of these limitations at the beginning of the interview. Those who recruit and interview should be told to avoid sweeping statements about length of employment, assurances of continued employment, or prospective career opportunities with the employer. If appropriate, the recruiter should emphasize to applicants that either the employer or employee can terminate the employment with or without cause, with or without notice, at any time.

C. *The Employment Contract*

Obviously, the most certain way to establish the at-will nature of the employment is by a written contract with each employee. The contract should directly address the at-will nature of the employment by a clause such as the following:

[Employer] agrees to employ [Employee] commencing on [date]. [Employee's] employment with [Employer] can be terminated, with or without cause, and with or without notice, at any time, at the option of [Employee] or [Employer].

The employer may wish to modify the clause to provide a notice period prior to the effective date of termination.

If such a written contract is used, it should contain a merger clause providing that "[t]his contract embodies the entire understanding between the parties and cancels and supersedes all prior agreements and understandings; and no change, alteration, or modification may be made except in writing signed by both parties."¹⁰⁸ The contract should address the employee's compensation in terms of a rate rather than a specified amount for a specified time period.¹⁰⁹ Finally, the contract should contain a clause obligating the employee to conform to the rules, regulations, and policies of the employer, to perform the duties of his employment to

108. A similar merger clause was upheld and enforced to preclude evidence of additional terms to the employment relationship in *Meinrath v. Singer Co.*, 482 F. Supp. 457, 460 (S.D.N.Y. 1979).

109. *Title Ins. Co. v. Howell*, 158 Va. 713, 716, 164 S.E. 387, 390 (1932) (contract specifying compensation "at the rate of \$708.34 per month" is different from one specifying compensation as "\$708.34 per month"); see also *supra* text accompanying notes 56-62.

the highest standards of competence, skill, and efficiency, and to perform the duties of his employment exclusively in furtherance of his employer's best interests.

D. *Personnel Manuals and Policies*

If the employer has a personnel manual or written disciplinary and termination procedures, the manual or procedures should expressly disclaim any intent to create a binding contract with the employee. A clause like the following should appear at the beginning of the manual:

This manual has been prepared for the guidance of supervisory employees of [Employer]. It is not intended to form and is not a contract or a part of any contract between [Employer] and its employees. The manual describes [Employer's] general philosophy concerning personnel procedures and may be modified or altered unilaterally by [Employer] at any time.¹¹⁰

The employer may wish to place a similar disclaimer at the beginning of any section addressing disciplinary and/or termination procedures. If possible, personnel manuals outlining disciplinary or termination procedures should be distributed only to supervisory personnel. Statements of personnel policy or practices distributed to all employees should reserve broad discretion for the employer to modify the policies without giving notice to the employees. As a further safeguard, the termination procedure should not be described in any greater detail than necessary.

E. *Termination*

Before discharging an employee, the employer should carefully document all the facts leading to termination. If the employer has received the information from others, he should seek sworn written statements from the original sources of the information.

The employer may also wish to review the termination decision with his attorney. Counsel should be informed of all the facts underlying the decision to terminate. If the employee is allegedly being discharged for violation of a rule, regulation, or policy, the em-

110. See Baxter, *Managing the Risks in Firing Employees*, 6 NAT'L L.J., Sept. 12, 1983, at 20.

ployer's attorney should satisfy himself that the rule, regulation, or policy actually exists and is uniformly applied. He should also determine whether any statutory problems, such as charges of discrimination based on age, sex, or race, may be presented by the proposed termination. Counsel should review the history of the employee's relationship with the employer, including any written employment contract, representations concerning job security or causes for dismissal, and any other factors which suggest a relationship other than at-will employment. After reviewing this information, counsel can assist the employer in evaluating the advisability of terminating the employee and the possible exposure to a lawsuit because of this action.

Once he has decided on dismissal, the employer should meet with the employee to inform him of the decision. The meeting should be brief and direct, with only the employee and the employer or his representative present. The employer should not be apologetic. If he decides to offer the employee a reason for the firing, he should be candid. Of course, where the employee can be discharged only for cause, the employer must articulate the reason for termination.

If the employer anticipates litigation, he should consider the possibility of entering into a separation agreement with the dismissed employee to settle all differences which may arise from either the employment or the termination. Such an agreement must be supported by consideration, such as a severance payment, provided that such a payment is not already required by the employment contract. The employer should make every effort to demonstrate that the employee knowingly and voluntarily executed the agreement; that is, that the employee understood the consequences of signing the document and the fact that he was under no obligation to sign. Such agreements have been enforced by the courts.¹¹¹

VI. CONCLUSION

With an awareness of the law on dismissal of employees, careful structuring of all aspects of the employment relationship from the first interview through termination, and careful consideration before discharge of the facts and probable consequences, an employer and his attorney can manage the probability and minimize

111. *E.g.*, *Bachorik v. Allied Control Co.*, 34 A.D.2d 940, _____, 312 N.Y.S.2d 272, 275 (1970).

the risks of suit by a dismissed employee. A few hours spent in properly structuring the employer's recruitment, disciplinary, and termination procedures and documents may save countless hours and resources in defending employee lawsuits later.