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Annual Survey of Virginia Law: Employment Law

Keith D. Boyette

Robert T. Billingsley

Randal M. Reaves

Paul A. Simpson

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EMPLOYMENT LAW

*Keith D. Boyette, Robert T. Billingsley, Randal M. Reaves
and Paul A. Simpson**

This survey covers judicial and legislative developments in Virginia employment law between June 1988 and June 1989. The survey does not address judicial and legislative developments in the areas of workers' compensation or unemployment compensation.

During the period covered by this survey, the Supreme Court of Virginia unequivocally recognized a cause of action against employers for their negligent hiring, retention or supervision of employees and removed a significant defense available to former employees resisting enforcement of a non-competition covenant. The state and federal courts continued to reaffirm the vitality of the at-will employment presumption, addressed the parameters of the public policy exception to that presumption and clarified the status of oral "just cause" employment contracts under the statute of frauds. Legislative developments during this period were relatively sparse. The General Assembly limited the ability of employers to discharge employees for absence due to a work-related injury and adopted civil penalties for an employer's failure to comply with statutes governing the medium and time of payment of wages.

I. NEGLIGENCE HIRING, RETENTION OR SUPERVISION

In *J. V. Victory Tabernacle Baptist Church*,¹ the Supreme Court of Virginia recognized the tort of negligent hiring. This cause of action has been increasingly employed in other jurisdictions in recent years and its recognition by the supreme court will have immediate and far-reaching impact on the hiring and supervi-

* Mr. Boyette is a principal and Messrs. Billingsley, Reaves and Simpson are associates with Hirschler, Fleischer, Weinberg, Cox & Allen, P.C., Richmond, Virginia. Mr. Boyette received his B.A. from George Washington University in 1975 and his J.D. from Washington & Lee University in 1978. Mr. Billingsley received his A.B. from the College of William & Mary in 1976 and his J.D. from the University of Richmond in 1980. Mr. Reaves received his B.A. from the University of Virginia in 1980 and his J.D. from the University of Virginia in 1985. Mr. Simpson received his B.A. from Washington & Lee University in 1976 and his J.D. from Wake Forest University in 1987.

1. 236 Va. 206, 372 S.E.2d 391 (1988).

sion policies and practices of Virginia employers.² Under this doctrine and the closely related theory of negligent retention and supervision, tort liability is imposed on employers under certain circumstances for the intentional and/or criminal acts of their employees, as well as for the employees' negligence. These theories broaden the scope of employers' liability for the acts of their employees by allowing compensation to a plaintiff when *respondeat superior*, the traditional basis for employer liability to third parties, does not apply. Specifically, the theories of negligent hiring, retention and supervision enable plaintiffs to recover in situations where *respondeat superior's* "scope of employment" limitation previously protected employers from liability. Moreover, causes of action under these theories allow for the imposition of punitive damages against an employer under appropriate facts.³

Under the traditional doctrine of *respondeat superior*, an employer is liable for the negligent, willful or intentional act of his employee only if, at the time of the act, the employee was performing his employer's business and acting within the scope of his employment.⁴ Generally, an act is within the scope of employment if: (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business. Such an act may not arise wholly from some external, independent and personal motive on the part of the employee to do the act upon his own account.⁵ Thus, if the act causing the injury to a third party is done while the employee is acting on his own behalf rather than for the employer, the employer is not liable to the third party under the *respondeat superior* doctrine.⁶ Moreover, the employer is not liable under *respondeat superior* for an act com-

2. *Id.* at 209, 372 S.E.2d at 393.

3. Punitive damages may be awarded for gross negligence in hiring or retaining an unfit employee who causes injury to a third party. *See, e.g.*, *Estate of Arrington v. Fields*, 578 S.W.2d 173, 182-83 (Tex. Civ. App. 1979); *King v. McGuff*, 149 Tex. 432, 434-35, 234 S.W.2d 403, 405 (1950).

4. *Kensington Assocs. v. West*, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987); *Davis v. Merrill*, 133 Va. 69, 77-79, 112 S.E. 628, 629-31 (1922).

5. 234 Va. at 432, 362 S.E.2d at 901.

6. *See, e.g.*, *Appalachian Power Co. v. Robertson*, 142 Va. 454, 476-77, 129 S.E. 224, 227-28 (1925) (employer not liable for negligent act of employee who, while returning from dinner, assists the driver of a wagon to raise some wires so the wagon may pass beneath them); *Drake v. Norfolk Steam Laundry Corp.*, 135 Va. 354, 360-61, 116 S.E. 668, 670 (1923).

mitted by an employee who has markedly deviated from his employer's business.⁷

In contrast, under the doctrines of negligent hiring, retention and supervision, an employer may be held liable for the acts of his employee, whether or not the employee is acting within the scope of employment, if the employer is negligent in hiring or retaining an employee who is either incompetent or unfit.⁸ Such negligence usually consists of hiring, supervising, retaining or assigning the employee with the knowledge of his unfitness, or failing to use reasonable care to discover the unfitness. The liability of the employer to a third person based on negligent hiring or retention is entirely independent of the liability of the employer under the doctrine of *respondeat superior*.⁹

In *Victory Tabernacle*, the plaintiff alleged that her ten year-old daughter had been repeatedly raped and sexually assaulted by an employee of the defendant church. Plaintiff also alleged that when the church hired the employee, the defendant knew or should have known that the employee recently had been convicted of aggravated sexual assault on a young girl, that he was on probation for this offense, and that a condition of his probation was that he not be involved with children. Plaintiff further alleged that, despite the foregoing facts, the employee was hired and given duties that encouraged him to come freely into contact with children, and that he was given keys that enabled him to lock and unlock all of the church's doors.¹⁰ Based on these allegations, the Supreme Court of Virginia held that a cause of action for negligent hiring was stated.¹¹

In reaching its decision in *Victory Tabernacle*, the court held that the tort of negligent hiring exists in Virginia, independent of the doctrine of *respondeat superior*.¹² The court stated that:

7. See, e.g., *Broaddus v. Standard Drug Co.*, 211 Va. 645, 654, 179 S.E.2d 497, 504 (1971) (traffic guard, assigned to store's parking lot, was held to have temporarily departed and deviated from his employer's business when he shot the plaintiff, who was involved in an altercation with a police officer assigned to "shoplifting detail."). *Taylor v. Robertson Chevrolet Co.*, 177 Va. 289, 295, 13 S.E.2d 326, 329 (1941).

8. See generally 35 AM. JUR. 2D *Master and Servant* § 422 (1970) (discussing "ownership of instrumentality" and accident).

9. See *id.*

10. 236 Va. at 207, 372 S.E.2d at 392.

11. *Id.* at 211, 372 S.E.2d at 394.

12. *Id.* at 209, 372 S.E.2d at 394.

[N]egligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others. Negligent hiring, therefore, enables plaintiffs to recover in situations where *respondeat superior's* 'scope of employment' limitation previously protected employers from liability.¹³

Although the court did not directly address the issue of employer liability to a third party for negligent retention or supervision of an employee in *Victory Tabernacle*, it is likely that the court will recognize such liability. The two torts are closely related. In fact, some courts identify the two as a single tort for "negligent hiring or retention." Moreover, the charitable hospital cases cited by the court in *Victory Tabernacle* spoke in terms of liability for "negligent selection and retention" of unfit employees, thus supporting the existence of the tort of negligent retention or supervision in Virginia.¹⁴

Unfortunately for Virginia employers, the *Victory Tabernacle* court did not address the parameters of the negligent hiring cause of action. As a result, one must turn to the case law from other jurisdictions to scrutinize the possible ramifications of the *Victory Tabernacle* holding. In light of the decision, the prudent employer and counsel will be well-advised to reexamine the employer's hiring and supervision practices to shield against potential liability based on negligent hiring, retention or supervision.

As with any other negligence cause of action, to be liable for negligent hiring, retention or supervision, the employer must first owe a duty of care to the plaintiff. After the duty has been established, courts in other jurisdictions generally have cited six requisite elements for the cause of action: (1) an employment relationship must have existed between the defendant and the tortfeasor;¹⁵ (2) the

13. *Id.* at 211, 372 S.E.2d at 394 (quoting Note, *Minnesota Developments-Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory*: Ponticas v. K.M.S. Invs., 68 MINN. L. REV. 1303, 1306-07 (1984)).

14. 236 Va. at 208, 372 S.E.2d at 393; see, e.g., *Hill v. Leigh Memorial Hosp., Inc.*, 204 Va. 501, 504-06, 132 S.E.2d 411, 413-15 (1963). These charitable hospital cases establish the proposition that an exception to the charitable immunity doctrine, which among other things shields charitable institutions from *respondeat superior* liability, exists on the ground of negligent hiring or retention of an unfit employee. 204 Va. at 504-06, 132 S.E.2d at 413-15.

15. For a discussion of the issues in this area, see generally 12B Michie's Jur. *Master and Servant* § 97 (Repl. Vol. 1978) and the cases cited therein. But see *Coath v. Jones*, 277 Pa. Super. 479, ___, 419 A.2d 1249, 1250-52 (1980) (employer held liable for a rape committed

employee must have been unfit under the circumstances of the employment;¹⁶ (3) the employer must have known or should have known through reasonable investigation that the employee was unfit;¹⁷ (4) the employee's tortious act must have been the cause in fact of the plaintiff's injuries;¹⁸ (5) the negligent hiring, retention

by a fired employee under the rationale that the employment situation required customers to admit the former employee into their homes and, thus, the employer should have warned customers of the former employee's violent propensities).

16. Since an employer will be negligent only if his employee poses an unreasonable risk in a particular employment position, "employee unfitness" is determined by the circumstances of employment. What makes an employee unfit in one situation does not necessarily constitute unfitness in others. *See Kendall v. Gore Properties*, 236 F.2d 673, 679 (D.C. Cir. 1956). The list of characteristics or traits that courts have used to establish unfitness include habitual intoxication, lack of training and skills, physical and mental infirmities, prior "malicious horseplay," and prior criminal convictions. *See, e.g., Id.* at 678 (physical and mental infirmities); *Watsontown Brick Co. v. Hercules Powder Co.*, 265 F. Supp. 268 (M.D. Pa. 1967) (lack of training and skills); *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 388 P.2d 824 (1964) (horseplay); *Guedon v. Rooney*, 160 Or. 621, 87 P.2d 209 (1939) (habitual intoxication); *Estate of Arrington v. Fields*, 578 S.W.2d 173 (Tex. Civ. App. 1979) (prior criminal convictions).

17. Although there are reported decisions that require actual knowledge of the employee's unfitness before the hiring will constitute negligence, most courts hold that an employer has a duty to conduct a reasonable inquiry before hiring, and thus negligence may be based on the employer's constructive knowledge. *See, e.g., Hersh v. Kentfield Buildings, Inc.*, 385 Mich. 410, 412-13, 189 N.W.2d 286, 288-89 (1971). A number of jurisdictions require that an employee's unfitness must have been ascertainable for the employer's failure to conduct an investigation to constitute a breach of duty. *See, e.g., Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1980), *rev. denied*, 392 So. 2d 1374 (Fla. 1981) (employer chargeable with such information concerning employee's background as it could have been obtained through a reasonable inquiry); *Stein v. Burns Int'l Sec. Servs., Inc.*, 102 Ill. App. 3d 776, 779-80, 430 N.E.2d 334, 337 (1981) (not shown that a more complete investigation would have enabled employer to determine employee had a propensity for violence); *Stone v. Hurst Lumber Co.*, 15 Utah 2d 49, 51, 386 P.2d 910, 911 (1963) (no evidence employer could have discovered employee's vicious temperament through investigation). However, at least one court has found that an employer's failure to conduct any pre-employment investigation is a *per se* breach of duty, regardless of whether the employee's fitness was ascertainable. *Weiss v. Furniture-In-The-Raw*, 62 Misc. 2d 283, 285, 306 N.Y.S.2d 253, 255 (N.Y. Civ. Ct. 1969) (employer liable for failure to use any standards in hiring temporary workers for furniture delivery).

In general, the greater contact that the prospective employee is to have with the public or certain segments of the public, the more stringent the employment screening process should be. For example, in *Williams*, where a condominium management company was sued by a guest of a condominium owner for assault by an employee, the court concluded that while the company had no obligation to make inquiry of the employee's past as long as he had only incidental contact with tenants (he was originally employed to do yard maintenance), it had a duty to make a reasonable inquiry about his background before transferring him three weeks after employment to an inside job that provided him with the possibility of "intimate contact" with tenants and access to the condominium passkeys. *Williams*, 386 So. 2d at 1240.

18. The plaintiff must show that he was injured by the tortious act of the employee. *See Comment, Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52

or supervision must have been the proximate cause of the plaintiff's injuries;¹⁹ and (6) actual damage or harm must have resulted from the tortious act.²⁰

In *Victory Tabernacle*, the Supreme Court of Virginia did not consider the scope of the duty owed by an employer who negligently hires or retains an employee who injures a third party. Most jurisdictions accepting these theories, however, have held that an employer's duty to hire competent and "fit" employees extends to any member of the general public who comes into contact with the employment situation.²¹ Thus, courts have found employers liable for negligent hiring or retention of employees where employers invite the general public onto the business premises,²² or require em-

OR. L. REV. 296, 298-300 (1973).

19. The requisites of proximate cause are "the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally or probably produce the inquiry" by such act or omission, and the infliction of the injury by such act or omission. *Virginia Iron, Coal & Coke Co. v. Kiser*, 105 Va. 695, 705, 54 S.E. 889, 892 (1906). In *Victory Tabernacle*, the court stated:

[T]he very thing that allegedly should have been foreseen in this case is that the employee would commit a violent act upon a child. To say that a negligently hired employee who acts willfully or criminally thus relieves his employer of liability for negligent hiring when willful or criminal conduct is precisely what the employer should have foreseen would rob the tort of vitality by improperly subjecting it to factors that bear upon the separate concept of employer liability based on *respondent superior*.

236 Va. at 210, 372 S.E.2d at 394. Moreover, as one court stated in upholding the liability of an employer for the negligent hiring of an employee who had a long history of having committed violent crimes:

The negligence in hiring found by the jury was clearly the proximate cause of the injury The negligence in hiring [the employee] was the only reason he was on the premises, had contact with the tenant . . . , and was provided with a passkey facilitating his entry into her apartment in order to rape her.

Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 915 (Minn. 1983).

In *respondent superior* cases, the existence of an "efficient intervening cause," usually the wrongful act of the employee outside the scope of his employment, will absolve the employer of liability. As the foregoing implies, however, once the employer's negligence in hiring, retaining or supervising the employee is established and the other requisites of the case of action are met, the act of the employee cannot be an intervening cause. In fact, the *Ponticas* court explicitly held: "[T]he inherent nature of a negligent hiring cause of action precludes the application of superseding [sic] intervening cause. By its definition, the factfinder . . . has already determined [that] the injury-causing conduct of the employee was foreseeable." 331 N.W.2d at 915-16.

20. As with any other negligence cause of action, some injury is essential. If there is no injury, there can be no recovery, whatever may have been the negligence of the defendant. See *Richmond & Danville R.R. Co. v. Moffett*, 88 Va. 785, 788, 14 S.E. 370, 371-72 (1892).

21. See, e.g., *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951); *Evans v. Morsell*, 284 Md. 160, 165-66, 395 A.2d 480, 483-84 (1978).

22. See, e.g., *Priest v. F.W. Woolworth Five & Ten Cent Store*, 228 Mo. App. 23, 25-26, 62 S.W.2d 926, 927 (1933).

ployees to visit residences.²³

One commentator, in analyzing the requisite connection between plaintiffs and employment situations in negligent hiring cases, has stated that three common factors underlie most case law imposing a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, if only potential or indirect, from the meeting of the employee and the plaintiff.²⁴ However, these factors have not been uniformly applied and serve as little guide.²⁵

Generally speaking, an employer does not have a duty to check for a criminal record in making a reasonable investigation of the prospective or retained employee unless the employer is put on notice to do so.²⁶ However, suspicious factors such as short residency periods, gaps in employment, or admissions of prior criminal convictions that are revealed in employment applications or in interviews, put the employer on notice.²⁷

Where the employer does not know the real nature of the employee's offense, or where the offense, though known to the employer, is not tortious in character or is unrelated to the employee's act, some courts have held the employer is not liable to the injured third party.²⁸ Moreover, the mere fact that the employee had a criminal record, even a conviction for a crime of violence, does not

23. See, e.g., *Coath v. Jones*, 277 Pa. Super 479, —, 419 A.2d 1249, 1250 (1980).

24. Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI-KENT L. REV. 717, 724 (1977).

25. See, e.g., *Henley v. Prince George's County*, 305 Md. 320, 337-38, 503 A.2d 1333, 1342 (1986) (*suspected vandal* was within class of persons subjected to an increased risk of harm by the negligent assignment of security duties to unfit employee); *Coath*, 277 Pa. Super. at —, 419 A.2d at 1250-51 (employer may be held liable for rape committed by a *fired employee* in a customer's home).

26. See, e.g., *Evans v. Morsell*, 284 Md. 160, 168, 395 A.2d 480, 484-85 (no duty to check for criminal record if employer has sufficient basis for relying on employee); see also *Abraham v. S.E. Onorato Garages*, 50 Haw. 628, 632-33, 446 P.2d 821, 825 (1968); *Amendolara v. Macy's New York*, 19 A.D.2d 702, 703, 241 N.Y.S.2d 39, 40 (1963). *But see Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 915 (Minn. 1983).

27. See generally Shattuck, *Negligent Hiring: Are Employers Liable for Employee Misconduct?*, 13 ALI-ABA Course Materials Journ. 7, 16 (1988).

28. In *Argonne Apartment House Co. v. Garrison*, 42 F.2d 605 (D.C. Cir. 1930), for example, the fact that an employee had been convicted of intoxication was held not to be sufficient of itself to put the employer (apartment house owner) on notice of the dishonesty of the employee and subject the employer to liability to a tenant for the theft by the employee of the tenant's jewelry. *Id.* at 608.

by itself establish that the employer would be negligent in hiring him; instead, it is a factor the jury can consider.²⁹

The Supreme Court of Virginia's decision in *Victory Tabernacle* underscores the importance of employers and their counsel reviewing the employer's interviewing and screening procedures utilized prior to employment, and developing appropriate procedures for monitoring employee conduct after employment.

II. COVENANTS NOT TO COMPETE

Counsel for employers are frequently asked to prepare agreements containing covenants not to compete for execution by individuals already employed by the employer. In connection with the preparation of such post-employment non-competition agreements, a question has existed as to whether the continuation of the employment relationship after the execution of the agreement constitutes consideration for the agreement or whether the employer must provide some benefit to the employee, such as increased compensation, enhanced position or title, or added job security, to provide consideration for the post-employment agreement.

In *Paramount Termite Control Co. v. Rector*,³⁰ the Supreme Court of Virginia answered this question, at least with respect to at-will employment relationships. In 1982, certain employees of Paramount, including two sales representatives, a service coordinator, a service technician and an insect inspector, were required for the first time to execute non-competition agreements as a condition of their continued at-will employment.³¹ The non-competition covenant prohibited the employees from engaging in the pest control business in any of the counties in which they were assigned by Paramount during a two-year period from and after the date upon

29. *Hersh v. Kentfield Builders, Inc.*, 385 Mich. 410, 415-16, 189 N.W.2d 286, 289 (1971). Additionally, a policy of refusing employment based on arrest records is unlawful without evidence that the requirement is necessary to the operation of the employer's business. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970). Such inquiries alone violate Title VII of the Civil Rights Act of 1964 because the fact that an individual has been arrested is not conclusive as to any wrongdoing and is irrelevant to work qualifications, and because the mere inquiry into arrest records tends to have a chilling effect on black applicants. *Id.* at 402-03. Also, VA. CODE ANN. § 19.2-389(C) (Repl. Vol. 1983) provides that "[n]o criminal justice agency or person shall confirm the existence or nonexistence of criminal history record information for employment or licensing inquiries except as provided by law." *Id.*

30. 238 Va. 171, 380 S.E.2d 922 (1989).

31. *Id.* at 172, 175, 380 S.E.2d at 923-24, 926.

which they ceased, for any reason, to be an employee of Paramount.³²

The Supreme Court of Virginia held that because the non-competition covenant was limited to the counties in which the employees were assigned by Paramount during their employment, the covenant was not overbroad geographically.³³ The court also held that it was not necessary for the employees, to whom the covenant was applicable, to have acquired or possessed specific information, which was confidential or constituted a trade secret, in order for the employer to have a legitimate business interest which could be protected by the covenant.³⁴ The court stated that the exposure of the employees to the employer's methods of estimating the cost of its work, its specifications for doing the work and its techniques of pest control, as well as the employees' frequent contact with the employer's customers, constituted legitimate business interests of the employer entitled to protection.³⁵ Thus, the court held that the covenant was no greater than reasonably necessary to protect the employer's legitimate business interest.³⁶

The court also observed that the non-competition covenant did not unreasonably curtail the employees' legitimate efforts to earn a livelihood because they were not prohibited from engaging in the employer's business in a number of areas within commuting distance; furthermore, they could engage in work other than the type done by the employer's business in the counties where they formerly worked.³⁷ In addition, the court found that the covenant did not unreasonably restrain trade or violate public policy because the "pest control business was highly competitive, with a limited supply of customers, and an ample supply of businesses and personnel willing to supply such services."³⁸

Each of the foregoing holdings of *Paramount* simply applies ex-

32. *Id.* at 172-73, 380 S.E.2d at 924.

33. *Id.* at 175, 380 S.E.2d at 925. The Supreme Court of Virginia has previously upheld non-competition covenants which were coterminous with the territory in which the employer did business. *E.g.*, *Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 548, 553, 290 S.E.2d 882, 884-85 (1982); *Meissel v. Finley*, 198 Va. 577, 582-83, 95 S.E.2d 186, 190 (1956).

34. 238 Va. at 175, 380 S.E.2d at 925.

35. *Id.*

36. *Id.* The Supreme Court of Virginia has previously recognized that an employer has a legitimate business interest in protecting its customers from former employees who had contact with them. *See, e.g.*, *Meissel v. Finley*, 198 Va. at 582, 95 S.E.2d at 190.

37. 238 Va. at 175, 380 S.E.2d at 925.

38. *Id.*

isting Virginia law in this area. However, the court's discussion of whether continuation of employment constituted consideration for the non-competition covenant addressed an area not specifically dealt with previously by the court. In *Paramount*, the former employees argued that the non-competition covenant lacked consideration because they were employed when they signed the agreements.³⁹ The court rejected the former employees' argument and held that "[e]ven though Paramount could have terminated the employees at its will after they signed the non-competition agreements, Paramount continued to employ them and to give them access to valuable information. This supplied the consideration for their promise not to compete."⁴⁰

The court's conclusion in *Paramount* that continuation of employment constituted adequate consideration to support a post-employment non-competition covenant was made in the context of an at-will employment relationship. The court did not address whether a post-employment, non-competition covenant entered into within the context of an employment relationship for a specified term or terminable only for cause would be supported by adequate consideration if there was no other change in the employment relationship and the employment continued.⁴¹ Additionally, the employees in *Paramount* did not argue that the employer had acted in bad faith or that the employer's conduct was unconsciona-

39. *Id.* at 176, 380 S.E.2d at 926. The case law throughout the United States on the issue raised by the employees is divided. See generally Annotation, *Sufficiency of Consideration for Employee's Covenant not to Compete, Entered Into After Inception of Employment*, 51 A.L.R.3d 825 (1973). Courts in other jurisdictions have held that continuation of employment alone will not provide consideration for a post-employment non-competition covenant. *E.g.*, *George W. Kistler, Inc. v. O'Brien*, 464 Pa. 475, 484-85, 347 A.2d 311, 316, (1975); see also *Pemco Corp. v. Rose*, 257 S.E.2d 885, 889 (W. Va. 1979) (purportedly applying Virginia law).

40. 238 Va. at 176, 380 S.E.2d at 926. Such a holding is consistent with the majority of case law throughout the United States. Annotation, *supra* note 39. In its opinion in *Paramount*, the court cited two earlier decisions where continued employment was found to provide consideration for a post-employment contract providing for severance pay, a right which had previously not been granted to the employees. *Dulany Foods, Inc. v. Ayers*, 220 Va. 502, 510-11, 260 S.E.2d 196, 201-02 (1979); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 541-42, 53 S.E.2d 804, 808-09 (1949). In each of these cases, the court found that both parties to the contract received a benefit. The employee received the guarantee of severance pay and the employer received the continued employment of the employee.

41. Some courts have held that where an employee has a definite term of employment, the continuation of employment cannot be the sole consideration for a post-employment non-competition covenant. *E.g.*, *Kadis v. Britt*, 224 N.C. 154, 162-63, 29 S.E.2d 543, 548-49 (1944); *Schneller v. Hayes*, 176 Wash. 115, 118-21, 28 P.2d 273, 274-75 (1934).

ble or resulted in a contract of adhesion.⁴²

Finally, the *Paramount* decision applied *Roanoke Engineering Sales Co. v. Rosenbaum*⁴³ which held that any injunction issued in the case on remand would extend for a total of two years from the date of the injunction and not simply two years from the date of the termination of the employment.⁴⁴ The court awarded this remedy despite the fact that the non-competition agreement did not provide for such relief and despite the fact that the employer did not specifically request such prospective enforcement in its Bill of Complaint or in connection with requesting the appeal.⁴⁵

III. WRONGFUL DISCHARGE LITIGATION

In 1987, the Supreme Court of Virginia in *Miller v. SEVAMP, Inc.*,⁴⁶ strongly reaffirmed the continued vitality of the employment-at-will doctrine in Virginia. The court continued this approach during June 1988 to June 1989.

In *Addison v. Amalgamated Clothing & Textile Workers Union*,⁴⁷ the court held that the employer's assurance that the employee could have a job "as long as he wanted one and as long as one existed" was insufficient to overcome the presumption of at-will employment.⁴⁸ In so ruling, the court distinguished the employment contract at issue in *Addison* from a contract in which an employee is assured job security so long as his performance is satisfactory.⁴⁹ The court refused to imply a "satisfactory performance" term, noting that to do so would result in the court rewriting the contract to supply a deficiency.⁵⁰ Although the court stopped short of saying that even the presence of such a term would overcome the at-will presumption, such a contract would seem to be legally indistinguishable from an agreement not to discharge an employee "without just cause," which was deemed sufficient to rebut the at-will presumption in *Norfolk Southern Railway v. Harris*.⁵¹

42. See *Pemco Corp. v. Rose*, 163 W. Va. 420, —, 257 S.E.2d 885, 892-93 (W. Va. 1979) (Neely, J., dissenting).

43. 223 Va. 548, 290 S.E.2d 882 (1982).

44. *Id.* at 556, 290 S.E.2d at 887.

45. 238 Va. at 177, 380 S.E.2d at 926.

46. 234 Va. 462, 362 S.E.2d 915 (1987).

47. 236 Va. 233, 372 S.E.2d 403 (1988).

48. *Id.* at 235, 372 S.E.2d at 405.

49. *Id.* at 236, 372 S.E.2d at 405.

50. *Id.* at 236, 372 S.E.2d at 405 (citing *Plaskitt v. Black Diamond Trailer Co.*, 209 Va. 460, 465, 164 S.E.2d 645, 649 (1968)).

51. 190 Va. 966, 976, 59 S.E.2d 110, 114-15 (1950).

In *Sartin v. Mazur*,⁵² the Supreme Court of Virginia addressed “whether the doctrine permitting free terminability of ‘at will’ employment also applies to an offer of such employment.”⁵³ The plaintiff, in reliance on an offer of employment from the Virginia Department of Corrections, resigned from her position with the Veteran’s Administration and moved to another part of the state. When she subsequently was notified that the offer was being withdrawn because she had omitted certain information from her job application,⁵⁴ she filed suit for breach of contract, relying on *Sea-Land Service, Inc. v. O’Neal*.⁵⁵ In *Sea-Land*, the Supreme Court of Virginia ruled that an employer’s failure to rehire an employee as a teletype operator-messenger, after she resigned her position as a sales representative as required by the employer as a condition of assuming the new position and in reliance on the employer’s promise of reemployment, constituted a breach of contract.⁵⁶

The court in *Sartin* distinguished *Sea-Land* on two grounds. First, the court noted that in *Sea-Land*, the employee resigned from one position to accept another position with the same employer.⁵⁷ Second, the court noted that *Sartin*’s employment with the Commonwealth was not conditioned upon her resignation from her prior employment.⁵⁸ Observing that the Department of Corrections had entered into no “contract to exchange jobs” with Ms. *Sartin*, the Supreme Court of Virginia rejected her reliance on *Sea-Land*.⁵⁹ The court also held that, because the position offered to Ms. *Sartin* was terminable at will, the offer itself was also terminable at will. To hold otherwise, the court said, would be “illogical.”⁶⁰

52. 237 Va. 82, 375 S.E.2d 741 (1989).

53. *Id.* at 83, 375 S.E.2d at 741.

54. The data omitted from her application “related to a one-year period of employment some 30 years earlier, which had been included in a resume attached to her application.” *Id.* at 83, 375 S.E.2d at 742.

55. 224 Va. 343, 297 S.E.2d 647 (1982).

56. *Id.* at 349, 297 S.E.2d at 650.

57. 237 Va. at 85, 375 S.E.2d at 742.

58. *Id.*

59. *Id.*

60. *Id.* at 85, 375 S.E.2d at 743. Ironically, although the court went on to state that “[i]t would be absurd to require an employer, which had changed its mind after an offer had been made, to actually employ the applicant for one hour or one day so that the employee could then be discharged,” *id.* the court in *Sea-Land* penalized an employer precisely because it had not followed such a course of conduct. Essentially, in light of *Sartin*, the theory of recovery announced in *Sea-Land* may have effectively been limited to the facts of that

In its 1985 decision in *Bowman v. State Bank of Keysville*,⁶¹ the Supreme Court of Virginia recognized a "narrow exception" to the employment at will doctrine for discharges in violation of public policy. In a case tried in February 1989 in the Richmond Division of the United States District Court for the Eastern District of Virginia, an employee prevailed on a wrongful discharge claim based on the public policy exception. In *Gobble v. AT&T Information Systems, Inc.*,⁶² the employee alleged that a supervisor had tried to force her to have sex and, when she refused, she received poor evaluations and eventually was dismissed. The plaintiff's dismissal for refusing to engage in adultery, which is illegal in Virginia, was alleged to violate public policy. The court permitted the plaintiff to go to the jury on this theory and the jury awarded substantial compensatory and punitive damages. On April 28, 1989, however, the trial court, noting that the employee had presented only evidence of malice and ill-will on the part of her supervisor and had not connected that malice and ill-will with the employer, overturned the award of punitive damages.⁶³ In addition, citing an error in the instructions given to the jury, the court ordered a new trial on liability. The court concluded that, in order to prevail in an action for wrongful discharge based upon the public policy exception, the employee must prove that the employer's decision to terminate was based *solely* upon a reason that violated public policy.⁶⁴

The at-will presumption is inapplicable, of course, where the employment contract provides that the employment relationship is to continue for a specified duration. Under such circumstances, the employer must have cause or otherwise comply with the termination provisions in the contract in order to terminate the employ-

case.

61. 229 Va. 534, 331 S.E.2d 797 (1985).

62. No. 88-0503-R (E.D. Va. April 28, 1989).

63. *Id.*, slip op. at 5-6.

64. *Id.*, slip op. at 11. In *Crescent Horseshoe & Iron Co. v. Eynon*, the court held that, to justify the discharge of an employee, an employer need only prove that the employee breached an express or implied condition of the employment contract during the term of the employment relationship and that the employer need not show that such breach was the inducing motive for the discharge, or even that the employer was aware of the breach at the time of the discharge. 95 Va. 151, 158, 27 S.E. 935, 936 (1897). Accordingly, a question left unresolved by the federal district court's adoption of the "sole" cause standard in *Gobble* is whether an employer may justify its decision to discharge an employee and thereby defeat an action under the public policy theory by proving that the employee violated a condition of the employment agreement, even though such violation did not induce the discharge and the employer may even have been unaware of the violation at the time of the discharge.

ment relationship prior to expiration of the term.⁶⁵ In *Nan Ya Plastics Corp. U.S.A. v. DeSantis*,⁶⁶ a Texas company hired an employee from a Virginia competitor, but then discharged the employee after the Virginia company obtained an injunction enforcing the employee's non-competition agreement. The employee's contract with the Texas company provided for a five-year term. The employee sued the Texas company for breach of contract. In its defense, the Texas company argued that the employee had knowingly assumed the risk of the injunction, thereby making his employment with the Texas company "impossible." The Supreme Court of Virginia, however, rejected this defense, noting that the Texas company had been well aware of the non-competition agreement when it hired the employee.⁶⁷ The *Nan Ya* court also ruled, on the issue of damages, that the trial court had properly refused to provide an offset for amounts the discharged employee "was likely to earn in the future" on the grounds that such amounts were "purely speculative."⁶⁸

A contract of employment can be written or oral. However, in recent years, courts applying Virginia law have disagreed on the applicability of the statute of frauds⁶⁹ to an oral employment contract providing for "just cause" dismissal. The issue was first addressed by the Supreme Court of Virginia in *Silverman v. Bernot*,⁷⁰ in which the employer had orally promised his employee that if she would remain in his employ until she reached age sixty-two or until his death, whichever occurred first, she would receive a pension for the rest of her life. Observing first that the crucial inquiry under the statute of frauds is whether the contract *could* be fully performed on either side within a year from its effective date, the court held that the contract was not within the statute of

65. See, e.g., *Twohy v. Harris*, 194 Va. 69, 80, 72 S.E.2d 329, 335-36 (1952).

66. 237 Va. 255, 377 S.E.2d 388 (1989).

67. *Id.* at 263, 377 S.E.2d at 393.

68. *Id.* at 263, 377 S.E.2d at 393. In *Standard Laundry Serv., Inc. v. Pastelnick*, 166 Va. 125, 184 S.E. 193 (1936), the court held that the employer in a wrongful discharge action is entitled to an offset for "the amount [the employee] has earned or *might, by reasonable effort, have earned* in other employment." *Id.* at 129, 184 S.E. at 195 (emphasis added). The ability of the employer to offset damages with future earnings will turn on the quality of the evidence presented by the employer to establish the future earnings.

69. The Virginia Statute of Frauds provides, in pertinent part, that no action shall be brought "[u]pon any agreement that is not to be performed within a year. . . . [u]nless the promise, contract, agreement, representation, assurance or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged. . . ." VA. CODE ANN. § 11-2(7) (Repl. Vol. 1989).

70. 218 Va. 650, 239 S.E.2d 118 (1977).

frauds because it *could* have been performed fully by the employee, i.e., if the employer had died, within a year after its effective date.⁷¹ The court thus distinguished between termination of a contract by operation of law and completion by performance, and suggested that the statute of frauds defense might have succeeded if the contract had provided for the employee to work for the employer until age sixty-two.⁷²

Although the Supreme Court of Virginia has not had occasion to revisit the issue, three separate federal district court decisions, all arising out of the Eastern District of Virginia, have examined the applicability of Virginia's statute of frauds to an oral "just cause" employment contract. In the first of the three decisions, *Frazier v. Colonial Williamsburg Foundation*,⁷³ Judge McKenzie held that the statute did not apply to an oral "just cause" employment contract because such a contract "could be performed within one year since, for example, [the employee] could have been discharged for cause within a year of having been hired."⁷⁴

Frazier was criticized by the authors of a 1986 law review article, who stated that the court had failed to observe the distinction made in *Silverman* between "termination by operation of law" and "completion by performance."⁷⁵ The authors observed that, if the employee in *Frazier* had been discharged for cause within his first year of employment, neither party would have fully "performed" the contract; rather, the employee would have breached his promise to render satisfactory service, thus excusing the employer from further performance.⁷⁶ Agreeing with the authors, both Judge Spencer in *Haigh v. Matsushita Electric Corp.*⁷⁷ and Judge Ellis in *Windsor v. Aegis Services, Ltd.*,⁷⁸ subsequently held that an oral "just cause" employment contract is unenforceable under the statute of frauds because it cannot be performed fully within a year.⁷⁹ In a recent per curiam opinion, the Court of Appeals for the

71. *Id.* at 654, 239 S.E.2d at 121.

72. *Id.* at 654-55, 239 S.E.2d at 121-22.

73. 574 F. Supp. 318 (E.D. Va. 1983).

74. *Id.* at 320.

75. Marshall & Wicker, *The Status of the At-Will Employment Doctrine in Virginia*, 20 U. RICH. L. REV. 267, 285-86 (1986).

76. *Id.* at 285-86.

77. 676 F. Supp. 1332, 1348 (E.D. Va. 1987).

78. 691 F. Supp. 956, 958 (E.D. Va. 1988).

79. Citing the "sound reasoning" of *Windsor*, the Circuit Court of the City of Richmond recently held that an oral "just cause" contract is unenforceable under the statute of frauds. *Hahn v. Virginia Farm Bureau Mut. Ins. Co.*, 13 Va. Cir. 335 (City of Richmond 1988).

Fourth Circuit affirmed and adopted the reasoning of Judge Ellis in *Windsor*,⁸⁰ thus resolving the split of authority in the Eastern District of Virginia.

IV. LEGISLATIVE DEVELOPMENTS

The Virginia General Assembly adopted two new provisions during its 1989 session which are significant in the employment arena. First, the General Assembly enacted section 40.1-27.1 of the Code of Virginia limiting the ability of an employer to discharge an employee for absence due to a work-related injury.⁸¹ This provision declares that it is an unfair employment practice for an employer who has established an employment policy of discharging employees who are absent from work for a specified number of days to include in the computation of the period the employee has been absent from work any day that the employee is absent due to a compensable injury under the Worker's Compensation Act.⁸² However, an employer will not be held in violation of section 40.1-27.1, if the employee's absence exceeds six months or if the employer's circumstances have changed during the employee's absence making it impossible or unreasonable not to discharge such employee.

Second, the General Assembly amended section 40.1-29 of the Code of Virginia.⁸³ That section deals with the time and medium of payment of wages. The General Assembly added a new subsection,⁸⁴ subjecting employers who knowingly fail to make payment of wages in accordance with the provisions of the section⁸⁵ to a civil penalty of up to \$1,000.00 for each violation. Such fines are levied by the Commissioner of Labor and Industry and the decision is

80. *Windsor v. Aegis Servs., Ltd.*, 869 F.2d 796 (4th Cir. 1989) (per curiam).

81. See 1989 Va. Acts 572.

82. VA. CODE ANN § 65.1-1, to -160 (Repl. Vol. 1987 & Cum. Supp. 1989). The Code of Virginia section provides, however, that absences compensable under the Worker's Compensation law can be calculated into an employee's work record for purposes of discharge after all steps of the "excessive absenteeism" policy have been exhausted. The term "excessive absenteeism" policy is not defined and presumably refers to a policy adopted by the employer. VA. CODE ANN. § 40.1-27.1 (Cum. Supp. 1989).

83. See 1989 Va. Acts 583.

84. VA. CODE ANN. § 40.1-29(A)(2) (Cum. Supp. 1989).

85. The section provides, in pertinent part, that all employers operating a business shall pay salaried employees at least once each month and employees paid on an hourly rate at least once every two weeks or twice each month. Upon termination of employment, an employee shall be paid all monies due him for work performed prior thereto, with payment of such monies to be made on or before the date on which the employee would have been paid for such work had his employment not been terminated. *Id.* § 40.1-29(A)(1).

final.⁸⁶ The Commissioner is empowered to prescribe procedures for the payment of proposed assessments of penalties which are not contested by employers, including provisions by which an employer may consent to abatement of the alleged violation and pay a proposed penalty or negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.⁸⁷ Any employer failing to make payment of wages in accordance with the section is liable for all wages due plus interest at an annual rate of eight percent accruing from the date the wages were due.⁸⁸

86. Civil penalties imposed under the section are paid to the Commissioner for deposit into the general fund of the State Treasurer. *Id.* § 40.1-29 (H).

87. *Id.*

88. *Id.* § 40.1-29(G).

