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Employment Law in Virginia

Editors: R. Mark Dare
Thomas M. Winn, III

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Employment Law in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

EMPLOYMENT LAW IN VIRGINIA

Seventh Edition

Editors:

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CHAPTER 9

EMPLOYMENT AGREEMENTS

9.1 INTRODUCTION

An employment contract or contract of hire is an agreement in which an employee provides labor or personal services to an employer for wages, remuneration, or some other thing of value supplied by the employer.[1] To be binding, a contract must be definite and certain as to its terms and requirements. Courts generally favor an interpretation that will uphold a contract and, in the case of a written contract, will find the document sufficient if it contains expressions that enable the court to ascertain the terms and conditions agreed upon.[2]

9.2 RIGHTS, RESPONSIBILITIES, AND PRINCIPAL DEFENSES

9.201 Essential Elements of Employment Contracts.

A. In General. Virginia recognizes the three traditional elements of contract formation: offer, acceptance, and consideration.[3] These elements apply to employment contracts the same way they apply to contracts generally.[4]

B. Offer and Acceptance. An offer, which is usually, but not always, a promise, is a manifestation of a willingness to enter into a bargain. The offer identifies the bargained-for exchange and creates a power of acceptance in the offeree.[5] To accept an offer, assent need not be given in express

[1] See *Charlottesville Music Ctr., Inc. v. McCray*, 215 Va. 31, 205 S.E.2d 674 (1974); *Hoffman Specialty Co. v. Pelouze*, 158 Va. 586, 164 S.E. 397 (1932).

[2] *See In re Aero-Auto Co.*, 33 B.R. 107, 108 (Bankr. E.D. Va. 1983).

[3] *See Dulany Foods, Inc. v. Ayers*, 220 Va. 502, 513, 260 S.E.2d 196, 203 (1979) (Poff, J., dissenting); *see also Spiller v. James River Corp.*, 32 Va. Cir. 300 (Richmond 1993).

[4] *See, e.g., Thompson v. Kings Entm't Co.*, 674 F. Supp. 1194 (E.D. Va. 1987); *Richmond Eng'g & Mfg. Corp. v. Loth*, 135 Va. 110, 115 S.E. 774 (1923) (both relying on hornbook contract law to determine whether an offer of employment had been extended and accepted).

[5] *See Chang v. First Colonial Sav. Bank*, 242 Va. 388, 410 S.E.2d 928 (1991).

words but may be inferred from the acts and conduct of the offeree.[6] Full performance can constitute acceptance.[7] A gift or gratuity bestowed on an employee by an employer is not a contractual offer.[8]

C. Consideration. In the employment context, Virginia courts find consideration in a variety of situations.

1. *Hercules Powder Co. v. Brookfield.* In *Hercules Powder Co. v. Brookfield*,[9] the employer promised to pay a bonus to its employees who remained on the job. The plaintiff remained on the job until the plant shut down, but the employer refused to pay the bonus. The court held that the promise of a bonus, when made in exchange for performance of a task, "is not a gratuity or a gift, but is an offer on the part of the employer."[10] Because "[p]laintiff was under no obligation to continue in defendant's employ . . . his reliance upon and continued service because of the promise is sufficient consideration to support the contract and makes the agreement complete."[11]

2. *Norfolk Southern Railway v. Harris.* In *Norfolk Southern Railway v. Harris*,[12] Norfolk Southern discharged the plaintiff without just cause despite a provision in the employment contract requiring just-cause termination. The court held that the promise not to fire the plaintiff without just cause was a term of the plaintiff's employment granted in return for the plaintiff's services. Thus, it furnished sufficient consideration for the contract to be binding and moved the employment relationship out of employment at will and into employment for a fixed period.

3. *Twohy v. Harris.* In *Twohy v. Harris*,[13] an employee threatened to resign because of inadequate compensation. The employer promised to hold certain corporate stock for the employee if he would agree to continue his employment. The court held that the employer's promise to hold

[6] *See Bernstein v. Bord*, 146 Va. 670, 675, 132 S.E. 698, 699 (1926).

[7] *See Richmond Eng'g & Mfg. Corp. v. Loth*, 135 Va. 110, 115 S.E. 774 (1923).

[8] *See Dulany Foods, Inc. v. Ayers*, 220 Va. 502, 260 S.E.2d 196 (1979) (Poff, J., dissenting).

[9] 189 Va. 531, 53 S.E.2d 804 (1949).

[10] *Id.* at 541, 53 S.E.2d at 808 (quoting *Roberts v. Mills*, 114 S.E. 530 (N.C. 1922)).

[11] *Id.* at 541, 53 S.E.2d at 808-09.

[12] 190 Va. 966, 59 S.E.2d 110 (1950).

[13] 194 Va. 69, 72 S.E.2d 329 (1952).

the stock was supported by consideration because the employee refrained from exercising his right to resign and continued to perform the services required of him.

Hercules Powder, *Norfolk Southern*, and *Twohy* are three of the most commonly cited cases in Virginia employment law.[14]

4. *Sea-Land Service, Inc. v. O'Neal.* In *Sea-Land Service, Inc. v. O'Neal*,[15] O'Neal agreed to resign one position with Sea-Land Service in exchange for a promise that she would be hired for another position with the same employer. After her resignation, Sea-Land Service refused to rehire her. The court found valid consideration in the employer's promise to rehire the employee at the second position. In *Sartin v. Mazur*,[16] however, the plaintiff resigned her job after receiving an offer of employment from the commonwealth. Upon showing up for her first day of work, the plaintiff was informed that the commonwealth would not hire her. The court held that because the plaintiff's employment with the commonwealth was terminable at will, she could not challenge the termination. Although she had resigned from the previous job, her resignation was not a precondition of her acceptance of employment with the commonwealth, the court reasoned. Accordingly, her case was dismissed.

5. *Thompson v. Kings Entertainment Co.* In *Thompson v. Kings Entertainment Co.*,[17] the plaintiff began his employment with the defendant employer as an at-will employee. Subsequently, the employer issued a handbook stating that the employee could be fired only for cause. Later, the employer issued a second handbook stating that the employment was at will. The employer argued that even if the first handbook changed the employee's legal status from at-will to employee for a fixed period, the second handbook

[14] In recent years, courts have provided helpful insights into this line of cases. *See Chapman v. Asbury Auto. Grp., Inc.,* No. 3:15CV679, 2016 U.S. Dist. LEXIS 121043, 2016 WL 4706931, at *5 (E.D. Va. Sept. 7, 2016) (distinguishing *Hercules Powder* and *Twohy* when employee failed to allege that the offered compensation at issue was made in exchange for employee refraining from severing the business relationship and when employee did not satisfy conditions placed on offered compensation); *see also JTH Tax, Inc. v. Aime,* 744 Fed. Appx. 787, 793 (4th Cir. 2018) (stating that *Twohy is* "based on the well-recognized rule that in the context of at-will employment, an employee's continued work can serve as adequate consideration to make a change in the terms of her employment (or some other promise) enforceable" and noting *Twohy* as describing itself as a case where one party "ma[d]e[] a promise conditioned upon the doing of an act by another").

[15] 224 Va. 343, 297 S.E.2d 647 (1982).

[16] 237 Va. 82, 375 S.E.2d 741 (1989).

[17] 674 F. Supp. 1194 (E.D. Va. 1987).

changed his status back to that of an at-will employee. The court held that, even assuming the employment to be for a fixed term because of the first handbook, issuance of the second handbook did not necessarily change that status to at-will. For the second handbook to effect such a change in status, the employer had to show that the employee received additional consideration for the change in status. Nothing showed that the employee had intended to accept the change to at-will employment.

6. *Paramount Termite Control Co. v. Rector.* In *Paramount Termite Control Co. v. Rector*,[18] the plaintiffs had an at-will employment contract with the defendant employer. The employer subsequently required the employees to sign a noncompete clause. The court found that the employer's continued employment of the employees constituted consideration and upheld the noncompete clause.[19]

7. *R.K. Chevrolet, Inc. v. Hayden.* In *R.K. Chevrolet, Inc. v. Hayden*,[20] the defendant had been the plaintiff's used car manager and an employee at will. Subsequently, the defendant agreed to work continuously and in good faith for the plaintiff for two years, with the only permissible reason for leaving his employment during the two-year period being the death of his father. When the defendant left his employment before the two-year term expired, the plaintiff sued him for breach of his employment contract. The trial court granted the defendant's motion to strike, holding, *inter alia*, that the contract was unenforceable because it lacked consideration. The Virginia Supreme Court disagreed, holding that when the defendant agreed to work for the plaintiff for two years, he was no longer an employee at will. Before the agreement, the plaintiff could have discharged the defendant for any reason, but after the agreement, the plaintiff could only terminate the defendant for good cause. The court held that this advantage to the defendant and

[18] 238 Va. 171, 380 S.E.2d 922 (1989) (*overruled on other grounds by Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 718 S.E.2d 762 (2011) (holding that the functional element of the noncompete provision was overbroad and therefore unenforceable, but not addressing the effectiveness of the consideration)).

[19] Other Virginia courts have reached the same conclusion. In *Phoenix Renovation Corp. v. Rodriguez*, 461 F. Supp. 2d 411, 425 (E.D. Va. 2006), *aff'd,* in *Mona Elec. Grp., Inc. v. Truland Serv. Corp* 258 Fed. Appx. 526 (4th Cir. 2007), the court reaffirmed the holding in *Paramount Termite*, stating that the Supreme Court of Virginia "held that continued employment furnished sufficient consideration to support a covenant not to compete." In doing so, the *Phoenix* court corrected a misstatement of law in *Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 193 F. Supp. 2d 874, 876 (E.D. Va. 2002) (stating, without citing *Paramount Termite*, that the Supreme Court of Virginia had not decided issue), *aff'd*, 56 Fed. Appx. 108 (4th Cir. 2003) (applying Maryland rather than Virginia law, which was applied by district court).

[20] 253 Va. 50, 480 S.E.2d 477 (1997).

inconvenience to the plaintiff supplied sufficient consideration to support the contract.[21]

9.202 Certainty. A contract is based on the representations of the two contracting parties, and once the nature and extent of those representations have been determined, the question of whether a contract was formed is a question of law and is not within the province of the jury. However, where there is doubt about the character or nature of the representations, the determination of the precise nature and extent of the representations is a question for the jury.[22]

To be binding, an agreement must be sufficiently definite to enable the court to give it an exact meaning. An agreement for a service must be certain and definite as to the nature and extent of the service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid. Where a contract of employment does not specify the position to be filled or the wages to be paid, it is void for uncertainty.[23] Similarly, precatory statements relating to job security are not sufficiently definite to constitute the basis of an employment contract.[24]

But in *R.K. Chevrolet, Inc. v. Hayden*,[25] the Virginia Supreme Court held that the trial court should have allowed the jury to infer some essential terms from surrounding circumstances. As discussed in paragraph 9.201(C)(7) above, the defendant was the plaintiff's used car manager and an employee at will. Subsequently, the defendant signed a document in which he agreed to work continuously and in good faith for the plaintiff for two years. When the defendant left his employment before the two-year period expired, the plaintiff sued him for breach of his employment contract. The trial court granted the defendant's motion to strike the plaintiff's breach of contract claim, holding, *inter alia*, that the contract was so indefinite and incomplete as to be unenforceable. The Supreme Court disagreed, holding that through parol evidence the jury could infer the two-year period's commencement date from the date on the document itself, and could infer the defendant's position, hours,

[21] *Id.* at 54, 480 S.E.2d at 480.

[22] *See Cave Hill Corp. v. Hiers*, 264 Va. 640, 645, 570 S.E.2d 790, 793 (2002); *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 48, 10 S.E.2d 492, 493 (1940).

[23] *Mullins*, 176 Va. at 49-50, 10 S.E.2d at 494; *cf. Chang v. First Colonial Sav. Bank*, 242 Va. 388, 391, 410 S.E.2d 928, 930 (1991).

[24] *See Spiller v. James River Corp.*, 32 Va. Cir. 300 (Richmond 1993).

[25] 253 Va. 50, 480 S.E.2d 477 (1997).

and compensation from the document itself and the circumstances surrounding its creation. Such surrounding circumstances included the inferred extension of the defendant's position, hours, and compensation from the prior employment relationship between the parties.

9.203 At-Will Employment.

A. Definition. In Virginia, courts presume that an employment relationship is at will. In an at-will employment relationship, either party may terminate the relationship upon reasonable notice.[26] An employer may not, however, terminate an employee in a manner that violates the public policy of Virginia as that policy is reflected by state statutes.[27]

B. Rebutting the Presumption. To rebut the presumption of an at-will employment relationship, a party must present sufficient evidence that the employment is for a definite term.[28] If such evidence is presented, the presumption is rebutted, and the employee may be terminated only for just cause.

In order to show sufficient evidence of a definite term, "there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement."[29] Furthermore, even where the employment contract specifies a definite term of employment, it will be deemed to create an at-will employment relationship where the agreement is subject to a condition allowing either party to terminate it within a specified notice period.[30] Whether the at-will presumption has been rebutted is an issue of fact for the jury to decide when the evidence concerning the terms of the contract of employment is in conflict. Where there is no reasonable inference of a specific intended duration, however, the issue is one of law for the court to decide.[31] A statement

[26] *See Graham v. Central Fid. Bank*, 245 Va. 395, 428 S.E.2d 916 (1993).

[27] *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985); *see also*; *Francis v. Nat'l Accrediting Comm'n of Career Arts & Scis., Inc.*, 293 Va. 167, 796 S.E.2d 188 (2017); *VanBuren v. Grubb*, 284 Va. 584, 733 S.E.2d 919 (2012). *See generally* Chapter 8 of this book concerning *Bowman* claims.

[28] *See Progress Printing Co. v. Nichols*, 244 Va. 337, 421 S.E.2d 428 (1992).

[29] *See Miller v. SEVAMP, Inc.*, 234 Va. 462, 465, 362 S.E.2d 915, 917 (1987) (citation omitted).

[30] *Cave Hill Corp. v. Hiers*, 264 Va. 640, 646, 570 S.E.2d 790, 793-94 (2002) (holding that such a notice provision effectively trumped the effect of the designated period in the employment contract).

[31] *See Nguyen v. CNA Corp.*, 44 F.3d 234 (4th Cir. 1995); *Cave Hill Corp.*, 264 Va. at 646, 570 S.E.2d at 793-94.