A Review of Vermont Employment Termination Law

Cautious Correction to the Abuses of the Employment-at-will Doctrine

Part I

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I. The Common Law

The common law, as it originally developed, was harsh and unfair in its application in broad areas of the law. The doctrine of "caveat emptor" and the doctrine of contributory negligence as a complete bar to recovery are just two examples. Although the common law has grown and developed to become an instrument of justice, employment law has been a "late bloomer". The courts are, just now, beginning to modernize the law of wrongful termination to deal with the needs of modern society.

This article explores the development of the common law of employment termination in Vermont, primarily from the plaintiff's point of view. Termination for discriminatory reasons, including termination on the basis of gender, age, religion, race, color, national origin, ancestry, place of birth, sexual orientation, or because a person is a "qualified handicapped individual", is illegal under federal or state law or both. 42 U.S.C. §2000e, *et seq.*; 29 U.S.C. §§621-34; 21 V.S.A. §495. The statutes prohibiting such discrimination are of particular importance because they provide for attorney's fees to a prevailing plaintiff. The law of employment discrimination is quite complicated, and is beyond the scope of this article.

At common law, the employment relationship was considered contractual in nature. An employment contract, like any contract, could be express or implied. Employment contracts differ from other contracts, however, because the employee is required to render "personal services" to the employer. For this reason, the courts have generally denied both employers and employees specific performance of such contracts; the constitutional prohibition against involuntary servitude is generally considered to be a bar against granting specific performance against an employee. One exception to this rule is when an injunction is provided by statute; both federal and state statutes specifically provide for injunctive relief in cases of employment discrimination. There are also other exceptions.[1]

If an employment contract is for an ascertainable or definite term of employment, the issue of "employment-at-will" does not arise. In such cases, the general principles of contract law apply. In the usual case, the employee is considered to have agreed, as part of the employment contract, to complete his or her work to the best of his or her ability, not to be absent unreasonably, to act loyally towards the employer, and to act in the employer's best interest. Excessive absenteeism, theft, etc., would therefore be "just cause" for dismissal.

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The doctrine of "employment-at-will" arises only in the context of a contract, express or implied, which has no ascertainable or definite period of employment. Such contracts are deemed to be "terminable at will." This was the holding of *Mullaney v. C.H. Goss Co.*, 97 Vt. 82, 122 A. 430 (1923). In *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979), the Vermont Supreme Court reiterated this doctrine, while referring to the "public policy exception" which will be discussed later in this article. The Vermont Supreme Court reaffirmed the doctrine in *Brower v. Holmes Transp., Inc.*, 140 Vt. 114 (1981), *Larose v. Agway, Inc.*, 147 Vt. 1 (1986), and *Benoir v. Ethan Allen, Inc.*, 147 Vt. 1 (1986).

In *Foote v. Simmonds Precision Products Co.*, 3 Vt.L.W. 98 (1992), the Supreme Court explained that the employment-at-will doctrine is "simply a rule of contract construction", being merely a rebuttable presumption that an employment contract for an indefinite term contains an at-will provision. The Court went on to state:

> The rule imposes no substantive limitation on the right of contracting parties to modify terms of their arrangement or to specify other terms that supersede the terminable-at-will provision.

Foote held that promissory estoppel may modify an at-will employment relationship and provide a remedy for wrongful discharge, stating:

> Nothing about the at-will doctrine suggests that it does not co-exist with numerous modifications and exceptions imposed by law, including the law of promissory estoppel, depending on the facts of a particular case.

The doctrine of promissory estoppel will be discussed later in this article.

II. Implied Covenant of Good Faith and Fair Dealing

The most interesting aspect of *Foote* is that it may open the door to a holding that the employment relationship includes an implied covenant of good faith and fair dealing. A number of other states have recognized such a covenant.[2]

In *Satink v. National Life Insurance Co.*, Washington Superior Court, Docket No. S-462-86 WnC (November 3, 1987), Judge Morse dismissed a wrongful termination claim. In doing so, however, he stated that an employer "must act in good faith and honestly be dissatisfied with the employee's performance." It appears from the *Satink* decision that Judge Morse believed that Vermont law included a covenant of good faith and fair dealing in an employment-at-will context.

Other courts have refused to find such an implied covenant. *E.g.*, *Ring v. R.J. Reynolds Indus., Inc.*, 597 F.Supp. 1277 (N.D.Ill. 1984). In *Thede v. Kraft, Inc.*, Civil Action No. 86-313 (D.Vt. June 4, 1987), Judge Billings held that there was no implied covenant of good faith and fair dealing in a Vermont employment contract. Judge Billings held that such a doctrine would be a "back door" means of finding a cause of action for wrongful discharge in an at-will situation. Of course, the federal court in *Thede* was attempting to guess what the Vermont Supreme Court would do in a similar case. Judge Billings did not have the benefit of the decisions in the *Foote* case and the *Satink* case, and these cases may counsel that the Vermont Supreme Court would reach a different result.

It is the law of Vermont that there is a covenant of good faith and fair dealing implied in every contract.[3] In light of the *Foote* holding that the employment-at-will doctrine is merely a rule of contract construction, and may co-exist with other common law doctrines, there would appear to be no reason why a covenant of good faith and fair dealing should not be implied in an employment-at-will relationship.

Whether the Vermont Supreme Court

will ultimately hold that there is a covenant of good faith and fair dealing implied in employment contracts of indefinite duration is presently uncertain. It can be said, however, that *Foote v. Simmonds Precision Products Co.* provides fertile ground from which such a decision could take root.

III. Breach of Contract

In a wrongful termination case, it is important to determine whether the employer is unionized. If there is a union contract, the contract will provide various rights and remedies. A discussion of employment in the union context is beyond the scope of this article. It is important for the practitioner to keep in mind, however, that statute of limitations issues become crucial in the union context. There is a six-month statute of limitations for violations of the National Labor Relations Act. Union contracts often contain grievance procedures, and grievances may have to be taken within several days. This can be a substantial trap for the unwary. It is also important to note that the National Labor Relations Act provides protection not only to unionized employees, but also to employees who are attempting to organize or are otherwise acting in concert. *See* 29 U.S.C. §§157-58.

If the employer is not unionized, a determination should be made as to whether a contract has been entered into between the employer and the employee. If there has been an express written contract, the contract will govern the terms of the termination, although a covenant of good faith and fair dealing will be implied.[4] If there is no written contract, there may be an express oral contract[5], or an implied contract. Because an express contract is entered into when there is a concurrent meeting of the minds, without regard to

. . . whether the employer is unionized.

specific language[6], the law of express contract tends to blend into the law of implied contract in close cases.[7]

In wrongful termination cases in which there is no express written contract, there are primarily two approaches which have been taken by plaintiffs to argue that a contract has been formed. One approach plaintiffs have used successfully is to claim that the employer's handbook or policy manual establishes a contract of specified duration.[8] In ***Sherman v. Rutland Hosp., Inc.***, 146 Vt. 204 (1985), the Vermont Supreme Court recognized a cause of action based upon an employee handbook. Counsel for the plaintiff had skillfully presented evidence that the terms of the manual "were in fact bargained for by the parties, and that the parties agreed to make those terms a part of the plaintiff's employment agreement." That it is crucial, in Vermont, to show this reliance on the employee handbook was made clear in the case of *Larose v. Agway, Inc.*, 147 Vt. 1 (1986), in which the Supreme Court held that a unilaterally adopted personnel policy manual did not create an implied contract.

Benoir v. Ethan Allen, Inc., 147 Vt. 268 (1986), is a helpful case reaffirming that a cause of action can be based upon language in an employment handbook. *Benoir* upheld a verdict in favor of a plaintiff based upon an employee handbook; the Supreme Court held that the handbook was unambiguous and "by clear implication, foreclosed defendant's right to terminate without cause." *Benoir* is particularly important because it sets forth the standard of proof required:

> [A] contract for "permanent" employment will not be considered terminable at will "if the employer has, by expressed language or clear implication, foreclosed his right to terminate except for cause ..."

In determining whether there

> exists an implied-in-fact promise for some form of continued employment courts have considered a variety of factors ... includ[ing] the personnel policies or practices of the employer ... *Id.* at 270.

The job for plaintiff's counsel is to show reliance on the personnel manual. If there is evidence of actual reliance on the manual at the time of hiring, that would be ideal. In most cases, this evidence will not be available. Plaintiff's counsel must then attempt to show that the employee relied on the provisions of the manual in continuing his or her employment with the company, or that the law of promissory estoppel applies.

The second approach that has been used by plaintiff's counsel is to argue that there has been an express or implied contract to treat the plaintiff fairly, and to continue to employ the plaintiff as long as there is work for the plaintiff to do, and as long as the plaintiff does his or her job properly. This is very much akin to the implied-in-law covenant of good faith and fair dealing; unless and until that doctrine is established in Vermont, it may be necessary to prove a contract implied in fact. This is not as difficult as it sounds. One of the reasons why the courts are likely to hold that every employment contract contains an implied-in-law covenant of good faith and fair dealing is that most employees expect to be treated fairly, and to keep their jobs, unless there is a reason for them to be fired, and most employers expect the same. In the absence of an implied-in-law doctrine, plaintiff's counsel must be canny to attempt to establish such a doctrine based upon the course of dealings between the parties. In a deposition, the plaintiff's supervisor can be asked whether he or she attempted to treat employees fairly, and whether he or she attempted to give the impression that employees would be treated fairly. If it can then be established that employees relied upon such assurances in continuing to remain employed, an express or implied contract may be made out. A similar course of questioning could establish a contract to keep the employee employed as long as there was work for the employee to do, and as long as the employee performed his or her job properly.

Part II of this article will be in the April issue of the Vermont Bar Journal & Law Digest.

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[1] *Sadler v. Bunting*, Lamoille Superior Court, Docket No. S0124-90 LaC (June 25, 1990), in which Judge Fisher reinstated the President of Johnson State College, is an example of one exception. Judge Fisher held that an injunction would issue if, without the injunction, there was irreparable harm for which there would be no adequate remedy.

[2] Seminal cases include *Cleary v. American Airlines, Inc.*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980); *Pugh v. See's Candies, Inc.*, 166 Cal.App.3d 311, 171 Cal.Rptr. 917, *modified* 117 CalApp.3d 520 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Gates v. Life of Montana Ins. Co.*, 205 Mont. 304, 668 P.2d 213 (1983); and *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982). In *Crenshaw v,. Bozeman Deaconess Hosp.*, 231 Mont. 488, 693 P.2d 487 (1984), the Montana Supreme Court held that such a covenant extends even to probationary employees.

[3] *E.g., Shaw v. E.I. DuPont de Nemours and Co.*, 126 Vt. 206, 209, 226 A.2d 903 (1967), *H.P. Hood & Sons v. Heins*, 124 Vt. 331, 338, 205 A.2d 561 (1964); *McHugh v. University of Vermont*, 758 F.Supp. 945, 953 (D.Vt. 1991); *Phillips v. Aetna Life Insurance Co.*, 473 F.Supp. 984, 989 (D.Vt. 1979).

[4] If an employee has previously entered into an express contract, the possibility that the contract may be considered renewed should be thoroughly explored. There are cases indicating that a contract for a specified term is automatically renewed for the same term.

[5] *E.g., Lambert v. Equinox House, Inc.*, 126 Vt. 229 (1967). If a contract is oral, it should be kept in mind that there are a number of exceptions to the statute of frauds. If plaintiff has performed his work properly, h[illegible] be considered to have completely p[illegible] his contract, and complete performance by one of the parties takes the agreement out of the statute of frauds. *E.g., Mason v. Anderson*, 146 Vt. 242, 245, 499 A.2d 783 (1985).

[6] An express agreement can be entered into "without regard to the manner in which [it] has been attained, or the form in which it is announced, or the means by which it is to be proved." *Robinson v. Hurlburt.*

[7] An implied contract is a contract which is "based upon an actual agreement of the parties, deduced by the trier from the conduct of the parties and the circumstances of the case." *Underhill v. Rutland R.R. Co.*, 90 Vt. 462, 475 (1916). An implied contract is to be "inferred from the circumstances, - the conduct, acts or relation of the parties – rather than from their spoken words." *Peters v. Estate of Poro*, 96 Vt. 95, 102, 117 A. 244 (1922). *See* 17 Am.Jur.2d *Contracts* §3 (1964) ("Contracts implied in fact are inferred from the facts and circumstances of the case, and are not formally or explicitly stated in words."). *See also Bergeron v. Jackson*, 94 Vt. 91, 95 (1920); *Morse v. Kenney*, 87 Vt. 445, 448 (1914).

[8] A seminal case is *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980), and subsequent developments in Michigan are instructive. Another Michigan court held that an agreement signed by an employee that he could be discharged at any time could be invalidated by supplemental assurances of continued employment. *Schipani v. Ford Motor Co.*, 102 Mich.App. 606, 302 N.W.2d 307 (1981). The Sixth Circuit, in a Michigan case, has applied this doctrine even to a reduction in force due to adverse economic conditions, based upon testimony of oral representations and employer policies that the plaintiff would not be terminated even for adverse economic conditions. *Boynton v. T.R.W., Inc.*, No. 83-1773 (6th Cir., Jan. 17, 1986), 54 U.S.L.W. 2385.

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