

# A Review of Vermont Employment Termination Law— Cautious Correction to the Abuses of the Employment-At-Will Doctrine

## Part II

Roger E. Kohn, Esquire

*Part I* of this article appeared in the February issue of the Vermont Bar Association *Journal*. *Part I* discusses the "employment-at-will" doctrine, the possibility that Vermont may adopt an implied covenant of good faith and fair dealing in employment relationships, and the effect of express and implied oral or written contracts. *Part II* will discuss other theories of liability, as well as undertaking a policy analysis and providing a checklist for use by the practitioner.

### IV. Promissory Estoppel

In *Foote v. Simmonds Precision Products Co.*, 3 Vt.L.W. 98 (May 8, 1992), the Vermont Supreme Court held that the doctrine of promissory estoppel may provide a remedy in an employment-at-will relationship. *Foote* cites the Restatement (Second) of Contracts §90(1) (1981) for the elements of promissory estoppel:

A promise which the promisor could reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

*Id.*, 3 Vt.L.W. at 100.

The difference between promissory estoppel and a contract is that a contract requires consideration to support it, whereas promissory estoppel requires reliance by the person to whom the promise is made, in lieu of consideration.<sup>9</sup>

The question arises whether merely continuing to work for an employer constitutes consideration on the part of the employee for an implied contract and/or reliance sufficient to make out a claim for promissory estoppel. With regard to consideration required to support an implied contract, there are conflicting decisions from the courts in other jurisdictions, although the better reasoned cases recognize that there is no reason not to consider an individual's continued willingness to work for an employer, thereby foregoing other employment opportunities, as consideration. In Vermont, it appears to have been established that continuing to work for an employer constitutes consideration for an express or implied contract. See *Benoir v. Ethan Allen, Inc.*, 147 Vt. 268, 514 A.2d 716 (1986) (the only consideration in this case

was continued employment); *Larose v. Agway, Inc.*, 147 Vt. 1, 508 A.2d 1364 (1986); *Sherman v. Rutland Hospital, Inc.*, 146 Vt. 204, 500 A.2d 230 (1985). A more difficult issue arises as to whether such continued employment, without more, constitutes sufficient reliance for promissory estoppel. In *Larose v. Agway, Inc.*, *supra*, the Vermont Supreme Court held:

Nothing in plaintiff's complaint, or in plaintiff's affidavit submitted in opposition to the motion for summary judgment, or in the stipulation of the parties suggests that plaintiff was aware of, or relied upon, the provisions of the personnel manual in deciding to enter into or to remain in defendant's employment.

147 Vt. at 4 (emphasis added). Accordingly, it would appear that promissory estoppel can be established if the plaintiff's attorney proves that the employee continued to remain in the employer's employment because of the promises made to the employee.

The doctrine of promissory estoppel is applicable in wrongful termination cases in two ways. First, as represented by the *Foote* case, if an employer makes specific promises to an employee, and then does not keep them, the doctrine applies. In *Foote*, the employee was promised that he would not be penalized for utilizing the grievance procedure set forth in the employee handbook, but he was subsequently fired when he did so.

The second use of promissory estoppel is to make the same arguments which were previously mentioned as contract theories — namely, that a promise was made, and relied upon by the employee, that the employee would be treated fairly, and would remain employed as long as the employee properly did his or her work and as long as there was work for the employee to do. One problem with the promissory estoppel theory in this context is that it is often difficult to identify a specific "promise." Although the author has found no Vermont law specifically on point, it should be possible to argue that the "promise" required by the doctrine of promissory estoppel can be established by a course of conduct as well as by specific words. After all, a contract also requires a "promise", and the doctrine of implied con-

tract developed to demonstrate that a promise could exist without there being specific words which constituted the promise. Accordingly, in the employment termination context, the second use of the promissory estoppel doctrine is very similar to — and merges into — the implied contract theory previously discussed in this article.

### V. Termination In Violation Of Public Policy

One of the most well-established and most useful exceptions to the employment-at-will doctrine is the doctrine that an employee who is fired in violation of a clear and compelling public policy has been unlawfully discharged. This doctrine has been established in numerous cases around the country.

In *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979), the Vermont Supreme Court stated, in *dictum*, that the courts have been willing to entertain suits by discharged employees when there is a "clear and compelling" public policy against the reason for the discharge. The court cited cases involving dismissal for serving on a jury; dismissal for filing a workers' compensation claim; and dismissal for refusal to give perjured testimony. In *Jones*, the court refused to find such a clear and compelling policy based merely upon allegations of bad faith, malice, and retaliation for reliance on contract rights.

*Payne v. Rosendaal*, 147 Vt. 488, 520 A.2d 586 (1986), reaffirmed and substantially expanded the doctrine. *Payne* held that a discharge from employment solely on the basis of age contravenes a clear and compelling public policy, although at the time of the incident on which the case was based there was no statute prohibiting discrimination against an employee on the basis of age (the federal and state statutes had been adopted, but were not in existence when the cause of action arose). The Supreme Court explicitly rejected the argument that the public policy exception must be legislatively defined, and gave extremely broad latitude in determining what is a clear and compelling public policy. The court held that such a policy could be determined from "the community common sense and common conscience." 147 Vt. at 492. There are also Vermont Superior Court Decisions dealing with this doctrine.<sup>10</sup>

The "leading edge" issues involving the public policy exception are whether the doctrine applies to a termination for exercising one's first amendment rights of freedom of speech, and the more general issue of determining exactly how far the doctrine extends.

#### VI. Termination For Exercise Of Rights Under Workers' Compensation Law

Vermont law prohibits termination of an individual for exercising his or her rights under the workers' compensation statute. 21 V.S.A. §710. The Attorney General has enforcement powers, and has been quite vigilant in enforcing the statute. Injured employees also have certain rights to reinstatement upon their recovery, and attorney's fees can be recovered in an action to enforce these rights. 21 V.S.A. §643b(e).

#### VII. Tort Theories

Wrongful terminations of employment often include various torts upon which a remedy can be based. Those torts which are most commonly involved are intentional infliction of emotional distress<sup>11</sup>; intentional interference with contract<sup>12</sup>; and defamation<sup>13</sup>.

#### VIII. Government Employment

If the employee is employed by a town, city, or the state, or by an entity which can be considered to be covered by the doctrine of "state action" (such as a state university or a federally-funded program), due process rights must be afforded when the employee is terminated, and the various provisions of the Civil Rights Act (42 U.S.C. §1983 *et seq.*) may apply. A delineation of these rights is beyond the scope of this article. It is important to note, however, that in the event of a violation of due process, or a violation of 42 U.S.C. §1983, a plaintiff can recover attorney's fees — both in federal and state court — pursuant to the provisions of 42 U.S.C. §1988. Plaintiffs must also keep in mind that if the provisions of 42 U.S.C. §1983 are alleged in state court, as they may be, the defendant may have the right to remove the case to federal court, arguably a less desirable forum for the plaintiff in a wrongful termination claim. 28 U.S.C. §1441.

#### IX. Policy Questions - Are Current Developments In The Law A Good Idea?

Having generally outlined the law of wrongful termination in Vermont and the manner in which the contours of this area of law are changing, it is appropriate to step back for a moment to consider whether the recent developments are a good idea. An attempt to balance competing interests is very much at work. On one hand, the "employment-at-will" doctrine, whereby an employee can be fired for any reason or no

reason, is harsh and inflexible. If an employee has been employed for thirty years with the same company, and a new supervisor is hired who takes a disliking to the employee, should the employee really have no remedy? On the other hand, the author believes that the employment-at-will doctrine substantially adds to economic growth, and is part of what has made the United States economy competitive. As a result of due process and union rights, it is probably unduly difficult to fire governmental employees; it is unlikely to be good policy to duplicate this problem in the private sector. Accordingly, the author does not believe that a requirement should be imposed in all employment relationships that termination be only "for cause."

What then is the solution? The author believes that the best way for the courts to ameliorate the problems with the "employment-at-will" doctrine is to adopt the doctrine that every employment relationship includes a "covenant of good faith and fair dealing". Should the legislature decide to legislate in this area, it would appear to the author that the seniority of an employee is the most important factor in determining whether the employee should have rights when he or she is terminated.

#### X. Practice Pointers

If an employee calls an attorney and complains that he or she has been unfairly fired, the attorney has a difficult task of determining whether the case is viable. The most important factor is whether the employee has truly been treated with substantial unfairness. If the case does not pass this threshold test, it is probably not worth taking on. It must be kept in mind that employment termination cases are extremely difficult. Wrongful termination cases in which the employer has not illegally discriminated against the employee, or otherwise violated a statutory prohibition, are some of the most difficult cases to pursue, and attorneys must beware of taking on a case which will involve lengthy litigation for little remuneration.

To analyze the viability of the case, the attorney should consider the following checklist:

1. Was there a written employment contract?
2. Is the employer unionized?
3. Was the firing based upon gender, age, religion, race, color, national origin, ancestry, place of birth, sexual orientation, or because the person was handicapped?
4. Was the employee employed by a governmental entity or an entity the actions of which constitute "state action"? If so, was due process followed?

5. Was the firing in retaliation for making a claim for workers' compensation benefits?

6. Was the firing in violation of any other statutory prohibition?

7. Was the firing in violation of some non-statutory public policy?

8. Were any torts committed, such as interference with contractual relations or defamation?

9. If some other tort cannot be made out, is the case outrageous enough, and are there facts to support, the tort of intentional infliction of emotional distress?

10. Are there facts to support the breach of an implied contract or a claim for promissory estoppel?

11. If liability is established, are there sufficient damages to make the case worth pursuing?

A bibliography appears at the end of this article, setting forth the most important Vermont cases concerning wrongful termination, as well as some secondary sources which may be of use.

#### XI. Summary

Except in cases of employment discrimination, for which statutory protection is provided, the Vermont law of employment termination has been in the past, and remains at present, very much oriented in favor of the employer. However, the law is in the process of changing, so that at least in egregious cases a remedy will be provided for an employee who has been unjustly and arbitrarily fired. To represent an employee in this area of the law it is necessary for an attorney to be innovative in an attempt to obtain a just result for the client.

<sup>11</sup>Because the impact of an enforceable promise is unexpected and unintended in the case of promissory estoppel, reliance on the promise is rigorously required. *Overlock v. Central Vermont Public Service Corp.*, 126 Vt. 549, 553, 237 A.2d 354 (1967).

<sup>12</sup>See *Brown v. Harbour Industries, Inc.*, Chittenden Superior Court, Docket No. S495-85 CnC (August 11, 1986). *Taylor v. Williamson*, Franklin Superior Court, Docket No. S434-90 Fc (June 25, 1992).

<sup>13</sup>The tort of intentional infliction of emotional distress was recognized in Vermont in the case of *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978). In the wrongful termination case of *Crump v. P & C Food Markets, Inc.*, 154 Vt. 284, 576 A.2d 441 (1990), a jury verdict based on this tort was upheld. *Birkenhead v. Coombs*, 143 Vt. 167, 174-75, 465 A.2d 244 (1983), a landlord-tenant case, also discusses the doctrine. *Crump* and *Birkenhead* upheld liability in cases where the emotional distress was not particularly extreme. Accordingly, the tort in Vermont is probably somewhat broader than originally envisioned under the Restatement, and broader than allowed in many other states. The Restatement presumably circum-

scribed the doctrine because the Restatement was essentially "inventing" a new tort which had not been previously recognized. Now that the doctrine has found widespread acceptance, the approach taken by the Vermont Supreme Court (in not requiring that the emotional distress be particularly extreme) appears to the author to be very sensible.

<sup>12</sup>This tort is well-established in Vermont. *E.g.*, *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 268-70, 583 A.2d 583 (1990); *Williams v. Chittenden Trust Co.*, 145 Vt. 76, 80, 484 A.2d 911 (1984); *Vermont National Bank v. Dourick*, 144 Vt. 504, 510, 481 A.2d 396 (1984); *Giroux v. Lussier*, 127 Vt. 520, 523, 253 A.2d 151 (1969); *Mitchell v. Aldrich*, 122 Vt. 19, 23, 163 A.2d 833 (1960); *In Re Kelton Motors, Inc.*, 127 B.R. 548, 552 (D.Vt. 1991). The Restatement makes it clear that one who intentionally causes a third person not to perform a contract or enter into a prospective contract by giving advice acts non-tortiously only if the advice is truthful and honest. Restatement (Second) of Torts §772. This doctrine is most often used in employment termination cases by claiming that a co-employee or a supervisor intentionally interfered with plaintiff's employment contract with his or her employer.

<sup>13</sup>The standard for defamation in an employment case was set forth by the Vermont Supreme Court in *Crump v. P & C Food Markets, Inc.*, 154 Vt. 284, 576 A.2d 441 (1990). In *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162 (1983), the Court undertook a thorough review of the law of defamation. Defamation is used most frequently in employment termination cases in two ways. First, an argument is

made that a co-employee or the employee's supervisor defamed the employee to other persons within the employing entity. Such communications are likely to be conditionally privileged, but are not likely to be absolutely privileged. Second, the issue of defamation arises frequently when the reasons for the termination are communicated to a future potential employer. The "leading edge" area of defamation law in the employment context is whether the requirement that defamation be "published" can be dispensed with, since an

employee may be compelled to publish the reason himself or herself to a new employer, because new employers usually want to know why the previous employment terminated. See Blythe, *Workplace Defamation: Public Policy, Compelled Self-Publication, and the Vermont Constitution*, 16 Vt.L.Rev. 341 (1991).

**Roger E. Kohn**, of *Kohn & Rath, Hinesburg*, is in general practice.

## Bibliography

### Vermont Supreme Court Cases

- <sup>1</sup>*Foot v. Simmonds Precision Products Co.*, 3 Vt.L.W.98 (1992)  
<sup>2</sup>*Ainsworth v. Franklin County Cheese Corp.*, 2 Vt.L.W. 145 (1991)  
<sup>3</sup>*Graff v. Eaton*, 2 Vt.L.W. 347 (1991)  
<sup>4</sup>*Crump v. P & C Food Markets, Inc.*, 154 Vt. 284 (1990)  
<sup>5</sup>*Payne v. Rozendaal*, 147 Vt. 488 (1986)  
<sup>6</sup>*Benoit v. Ethan Allen, Inc.*, 147 Vt. 268 (1986)  
<sup>7</sup>*Larose v. Agway, Inc.*, 147 Vt. 1 (1986)  
<sup>8</sup>*Sherman v. Rutland Hospital, Inc.*, 146 Vt. 204 (1985)  
<sup>9</sup>*Brower v. Holmes Transp., Inc.*, 140 Vt. 114 (1981)  
<sup>10</sup>*Jones v. Keogh*, 137 Vt. 562 (1979)  
<sup>11</sup>*Sheltra v. Smith*, 136 Vt. 472 (1978)  
<sup>12</sup>*Lambert v. Equinox House, Inc.*, 126 Vt. 229 (1967)

### Vermont Superior Court Cases

- <sup>13</sup>*State v. Town of Milton*, Chittenden Superior Court, Docket No. S1149-87CnC (January 7, 1991)  
<sup>14</sup>*Taylor v. Williamson*, Franklin Superior Court, Docket No. S434-90 Fc (June 25, 1992)  
<sup>15</sup>*State v. University of Vermont*, Chittenden Superior Court, Docket No. S749-87CnC (November 5, 1987)  
<sup>16</sup>*Satink v. National Life Ins.*, Washington Superior Court, Docket No. S462-86WnC (November 3, 1987)  
<sup>17</sup>*State v. R.S.D. Leasing, Inc.*, Chittenden Superior Court, Docket No. S882-86CnC (January 22, 1987)  
<sup>18</sup>*Bissonnette v. Wheeler*, Chittenden Superior Court, Docket No. S881-86CnC (December 22, 1986)  
<sup>19</sup>*Brown v. Harbour Industries, Inc.*, Chittenden Superior Court, Docket No. S495-85CnC (August 11, 1986)  
<sup>20</sup>*Lockwood v. State*, Washington Superior Court, Docket No. S290-85WnC (April 4, 1986)  
<sup>21</sup>*Graff v. Eaton*, Washington Superior Court, Docket No. S169-85WnC (October 28, 1985)

<sup>22</sup>*State v. Sears, Roebuck & Co.*, Washington Superior Court, Docket No. S471-83WnC (March 27, 1984)

<sup>23</sup>*State v. Champlain Cable*, Chittenden Superior Court, Docket No. S633-79CnC (October 7, 1983)

### Vermont Federal Court Cases

- <sup>24</sup>*Buckley v. American Int'l Adjustment Co.*, Docket No. 91-242 (D.Vt. March 27, 1992)  
<sup>25</sup>*Theide v. Kraft, Inc.*, Docket No. 86-313 (D.Vt. June 4, 1987)

### Other Materials

<sup>26</sup>Charge to the Jury in *State v. Town of Milton*, Chittenden Superior Court, Docket No. S1149-87CnC (February 26, 1991)

<sup>27</sup>Charge to the Jury in *Robbins v. Harbour Industries, Inc.*, Chittenden Superior Court, Docket No. S921-84CnC, reversed on grounds of federal pre-emption, 150 Vt. 604 (1988)

<sup>28</sup>"Workplace Defamation: Public Policy, Compelled Self-Publication, and the Vermont Constitution," by David J. Blythe, 16 Vt.L.Rev. 341 (1991)

<sup>29</sup>"Vermont Employment Law," Professional Education Systems, Inc. (1986) (seminar materials)

<sup>30</sup>Materials for the Vermont Bar Association Continuing Legal Education Program: Litigating Employee Terminations in Vermont - February 19, 1988.

<sup>31</sup>"The Ex-Parte Explosion: When Do Communications with Corporate Employees Result in Ethical Misconduct?" by Lawrence Weiss and Adam A. Reeves, reprinted in materials for Vermont Bar Association Practice and Procedure Committee Seminar - Discovery in Vermont - September 25, 1992

<sup>32</sup>2d Am.Jur.2d "Wrongful Discharge"

For two important cases concerning damages for emotional distress, see *Nichols v. Central Vermont Railway Co.*, 94 Vt. 14 (1919), and *Russell v. Insurance Company of North America*, Civil Action No. 82-264 (D.Vt. 1985).

### Postscript

Subsequent to the foregoing article, the Vermont Supreme Court decided Taylor v. National Life Insurance Co. (No. 92-389, December 17, 1993). Taylor reviewed Vermont termination law, and then held "that personnel manual provisions inconsistent with an at-will relationship may be used as evidence that the contract of employment requires good cause for termination despite the fact that the manual was not part of the initial employment agreement." Accordingly, the Vermont Supreme Court held that an employee manual could constitute a unilateral contract binding against the employer. To the extent that Larose v. Agway, Inc., 147 Vermont 1, 508 A.2d 1364 (1986) was inconsistent with this holding, Larose was overruled.

Taylor also held that economic circumstances that necessitate employer layoffs constitute good cause for termination. Accordingly, termination for this reason would not be a breach of contract absent a "clear and specific" promise to the contrary in an employment manual or in an oral agreement. The court agreed that a plaintiff could challenge the procedure followed in his discharge, even though economic necessity represents good cause for termination, but the court found that Taylor had not presented sufficient evidence to go to a jury on that issue.

Taylor represents an important case, particularly in its holding that an employment manual is binding upon the employer, even if not bargained for upon commencement of the employment. This, coupled with the doctrine that every contract includes a covenant of good faith and fair dealing, as discussed more fully in the foregoing article, provides some new protection for Vermont employees.

B51/323posts