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Cook v. Heck's: Erosion of Employment at Will in West Virginia

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DEVELOPMENTS IN WEST VIRGINIA LAW: 1986

STUDENT MATERIAL

Case Comments and Notes

Cook v. Heck's: EROSION OF EMPLOYMENT AT WILL IN WEST VIRGINIA

I. INTRODUCTION

The early English common law rule governing employment was based on the general presumption that a hiring would be for a term (generally a year), unless a contrary intent could be shown.¹ The English rule was broadly accepted in the United States until the late nineteenth century when the doctrine of employment at will was conceived.² This at will doctrine allowing either the employer or employee to terminate the employment at any time without justification, replaced the English rule of yearlyhirings and became the majority rule in American courts. One commentator noted that "judicial acceptance of the employment at will doctrine effectively eliminated for most workers all rights as to the future from the contract of employment, and thereby drained it of all substantial content."³ However, exceptions to the at will doctrine created by courts and legislatures in recent

² The doctrine of employment at will is attributed to a New York lawyer, Horace Gray Wood. In his treatise on the law of master and servant, he stated that, "[w]ith us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof." H. Wood, MASTER & SERVANT. § 134 (1877).
³ Summers, supra note 1, at 1085.

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years indicate a trend away from an absolute application of that doctrine.4

The principle of employment at will, first adopted in 1913,5 is still the general rule in West Virginia today. However, contractual or statutory provisions to the contrary6 and the "public policy" exception7 have modified the at will status of employees. These exceptions were designed to alleviate the harshness of the at will doctrine or, more specifically, to protect the employee from arbitrary dismissals.

Cook v. Heck’s Inc.8 represents a further erosion of the employment at will doctrine. In Cook, the West Virginia Supreme Court of Appeals held that "an employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specific reasons."9

This comment will discuss the developments in the area of at will employment which led to the court’s holding in Cook and its contribution to the erosion of the at will employment doctrine in West Virginia.

II. Statement of the Case

The plaintiff, Faith W. Cook, was a salesperson for the defendant, M & W Distributors, a subsidiary of Heck’s Inc. She was fired immediately following the


Professor Minda has identified three judicially created exceptions to the common law rule of employment at will:

The first is premised upon contract theories that seek to rebut the presumption of indefinite employment by allowing at will employees to prove that a promise of job security was either implied-in-fact, or made enforceable by reasonable employee reliance. . . .

The second basic approach has been the judicially created public policy exception. A number of courts have recognized an exception to the at will rule when the discharge of an employee would contravene some clear, specific and well-articulated public policy. . . .

A third approach is based on the idea that every employment contract, even those of indefinite duration, contains an implied-in-law covenant requiring the parties to exercise "good faith" and "fair dealing" in the performance of the contract.


5 Id. at 459.
dissemination of her husband, Douglas Cook, who was allegedly competing with Heck’s in the purchase of a chain of discount stores. Her complaint alleged breach of contract, violation of W. Va. Code, section 21-5-4 (Wage Payment and Collection Act), conspiracy, and intentional, reckless and malicious infliction of emotional distress. The circuit court directed a verdict for the defendant on all counts, except the statutory violation.

The supreme court, per Justice McHugh, reversed the directed verdict on the breach of contract count and remanded for a new trial on the issues of whether a contract existed limiting M & W’s right to terminate Ms. Cook without cause and whether M & W breached the contract. The lower court’s judgment on the remaining counts were affirmed. Justice Neely, the lone dissenter, found sufficient evidence to direct a verdict but did not elaborate on his conclusion.

Two months after the *Cook* decision, a federal district court in West Virginia was faced with a similar employment contract question. *Zeedick v. Thomas Memorial Hospital* also involved a personnel handbook.

The plaintiff, John F. Zeedick, an anesthesiologist, was hired in 1972 to head the defendant’s anesthesia department. In 1980, Zeedick was discharged for the proffered reason that the defendant could not meet Zeedick’s salary requirements. Yet, Zeedick retained his privileges at Thomas Memorial and continued to practice as an anesthesiologist in the Charleston area until 1982.

Zeedick’s complaint contained several theories. However, the count alleging that the defendant breached an employment contract is the only theory noted for the purposes of this article. The defendant moved for summary judgment on the ground that no contract of employment existed by virtue of the employment at will doctrine. The district court judge, Charles H. Haden, II, distinguished the *Cook* decision and granted the defendant’s motion for summary judgment.

III. Prior Law

A. Development of Employment At Will Principle in West Virginia

*Resener v. Watts, Ritter & Co.* gave the West Virginia Supreme Court of Appeals the first opportunity to determine whether an employment was for a year or at will when the duration of the employment was not specified.

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10 *Id.* at 455.
11 *Id.*
12 *Id.* at 459.
13 *Id.* at 460.
14 *Id.* at 460-61.
15 *Id.* at 462.
17 *Id.* slip op. at 4.
18 *Resener*, 73 W. Va. 342, 80 S.E. 839.
The plaintiff, Resener, was a traveling salesman for the defendant, Watts, Ritter & Co. Although there was no fixed term of employment, both parties agreed that Resener was to be paid a monthly salary and a five percent commission at the end of the year. After two and a half years of service, Resener notified the company of his intention to quit. The company had no objection to his leaving but refused to pay him the commission he had earned to that point.

Resener argued that his employment was terminable at will and that upon voluntary withdrawal, he was entitled to the earned commission. The defendant company contended that the employment was for the definite period of one year and that because he quit before full performance, Resener could not recover his commission. Though the jury found in favor of the plaintiff, the trial court set aside the verdict and awarded a new trial.\(^9\) On appeal, the supreme court reversed the trial court’s ruling and reinstated the jury’s verdict.\(^20\) The court initially observed that “[t]he authorities, while not wholly in accord, generally state the doctrine applicable to such cases to be that an employment upon a weekly, monthly, or annual salary . . . is presumed to be a hiring at will.”\(^21\)

In addition to citing cases from other states,\(^22\) the court also noted that:

The doctrine applied by the great majority of the courts, which have so far (1913) expressed an opinion on the subject, consists essentially in a complete repudiation of the presumption that a general or indefinite hiring for a year, and the substitution of another presumption, viz., that such a hiring is a hiring at will. Under this doctrine, the burden of proving that such a hiring was obligatory for a year rests on the party who seeks to establish that the contract covered that period.\(^23\)

The court also cited the originator of the employment at will doctrine:

[A] hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve; . . . and in such cases the contract may be put an end to by either party at any time, unless the time is fixed, and a recovery had, at the rate fixed, for the services actually rendered.\(^24\)

Persuaded by the majority rule, the West Virginia Supreme Court of Appeals concluded that “the contract proved was for an indefinite term, and, therefore, revocable at the will of either party.”\(^25\) Thus, Resener was not obliged to serve until the end of the year in order to recover his commission.

\(^9\) Id. at 343, 80 S.E. at 839.
\(^20\) Id. at 346-47, 80 S.E. at 840-41.
\(^21\) Id. at 344, 80 S.E. at 840.
\(^22\) Id. at 344-45, 80 S.E. at 840.
\(^23\) Id. at 345, 80 S.E. at 840 (citing 1 Labatt on Mas. & Serv. § 159).
\(^24\) Id., 80 S.E.2d at 840 (citing H. Wood supra note 2 at § 136).
\(^25\) Id. at 346, 80 S.E. at 840.
The resolution of the Resener case was undoubtedly equitable. Ironically, in fairly resolving that case, the court adopted a legal principle which opened the door to arbitrary dismissals. While the at will doctrine allowed employees the freedom of resignation, it also permitted employers to dismiss employees without cause.

In 1947, the West Virginia Supreme Court of Appeals reaffirmed the employment at will principle in Adkins v. Aetna Life Ins. Co., but three years later, Judge Haymond, who penned the Adkins opinion, introduced the first exception to the at will doctrine.

B. Development of Exceptions to the Employment At Will Principle in West Virginia

While the employment at will principle endured in the final disposition of Bell v. South Penn Natural Gas Co., the West Virginia Supreme Court of Appeals in dictum noted that "[u]nder the law governing the relation of master and servant an employment, unaffected by contractual or statutory provisions to the contrary, may be terminated, with or without cause, at the will of either party." Stated in the reverse, this means that contractual or statutory provisions to the contrary can limit the liberty to terminate an employment relationship.

It is difficult to surmise from the opinion whether the introduction of this exception was deliberate or unintended. The court cited no case law from other states and merely relied on the Corpus Juris Secundum for this proposition. Regardless of the court's intent, its dictum in Bell represented the first qualification of the employment at will principle and provided the basis for subsequent decisions to erode this doctrine further.

Five years after Bell, in Wright v. Standard Ultramarine & Color Co., Judge Haymond, again writing for the majority, restated the rule that "[w]hen a contract of employment is of indefinite duration it may be terminated at any time by either party to the contract." He also repeated the widely accepted notion that consideration, in addition to the employee's service and the employer's payment of wages must be offered to rebut the presumption of an employment at will. However, this requirement of additional consideration would later be discarded as the court adjusted the doctrine according to the tenor of the times.

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26 Id., 62 S.E.2d at 285.
27 Id. at 32, 62 S.E.2d at 288 (citing 56 C.J.S. Mas. & Serv. § 31 ).
29 Id. at Syl. pt. 2, 90 S.E.2d at 461 Syl. pt. 2.
30 Id. at 381, 90 S.E.2d at 467 (citing 56 C.J.S. Mas. & Serv. § 31).
31 See, infra, note 55 and accompanying text.
In 1978, the West Virginia Supreme Court of Appeals had occasion to decide whether an employee at will can recover damages against his employer when his discharge violates a substantial public policy. In *Harless v. First National Bank*, the plaintiff, John C. Harless, was manager of the consumer credit department in the defendant's bank. He alleged that the defendant fired him in retaliation for his efforts to require the defendant to operate in compliance with the state and federal consumer credit and protection laws.

The employer's chief defense was that the plaintiff's employment was for no fixed term and therefore terminable at the will of either party, with or without cause. The court agreed that "[t]his undoubtedly is an established rule," but "the general rule does not dispose of the issue in this case." The court seized the opportunity to examine the "growing trend that recognizes that an employer may subject himself to liability if he fires an employee who is employed at will if the employee can show that the firing was motivated by an intention to contravene some substantial public policy."

In addition to citing "substantial support from commentators", the court discussed several decisions from other states and held that:

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34 *Harless*, 162 W. Va. 116, 246 S.E.2d 270.
35 Id. at 118, 246 S.E.2d at 272.
36 Id. at 119, 246 S.E.2d at 273.
37 Id. at 119-20, 246 S.E.2d at 273 (citing *Wright*, 90 S.E.2d 459, and *Adair v. U.S.*, 208 U.S. 161 (1908)).
38 Id. at 120, 246 S.E.2d at 273.
39 Id., 246 S.E. at 273.
We conceive that the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle then the employer may be liable to the employee for damages occasioned by the discharge.42

With the decision in Harless, the court not only redressed an inequity, but, more importantly, it adopted a significant modification to the employment at will rule in West Virginia. The public policy exception served as the basis for remediying retaliatory and wrongful dismissals in the early 1980s.

In Shanholtz v. Monongahela Power Co.,43 the court held that "[i]t is a contravention of public policy and actionable to discharge an employee because he has filed a workmen's compensation claim against his employer."44

In Stanley v. Sewell Coal Co.,45 the plaintiff, Kenneth E. Stanley, an employee of Sewell Coal Company, was injured in an industrial accident.46 Sewell falsely reported the accident to the Mine Enforcement Safety Administration as a no lost-time accident and then discharged Stanley to prevent discovery of its false report.47 The court found that this constituted "constructive fraud . . . which contravened a substantial public policy".48

The public policy exception was once again employed in Cordle v. General Hugh Mercer Corp.49 to correct a wrongful dismissal. The court held that "it is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment."50

The decisions in Harless, Shanholtz, Stanley, and Cordle illustrate that the West Virginia Supreme Court will not hesitate to modify a rigid rule of law to achieve a fair result. Furthermore, these decisions paved the way for the court

Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977), and Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977) have indicated that they were willing to recognize the public policy exception to at will employment. (See also Decker, supra note 39, at 42, n.4. This commentator found that 18 states have recognized a judicially created public policy exception to at will employment, nine states and the District of Columbia indicate they might adopt the public policy exception to at will employment under appropriate circumstances, and six states have expressly rejected a judicially created public policy exception.).

42 Id. at 124, 246 S.E.2d at 275.
44 Id. Syl. pt. 2, 270 S.E.2d at 180 Syl. pt.2.
46 Id. at 73, 285 S.E.2d at 681.
47 Id., 285 S.E.2d at 681.
48 Id. at 77, 285 S.E.2d at 683.
50 Id. at 117.
to embark on a further deviation from the employment at will doctrine.

IV. DISCUSSION

In *Cook*, the crucial issue to be resolved by the court was whether job security guarantees, promises not to discharge except for cause, or express termination procedures contained in an employee handbook may be contractual provisions that abrogate the at will nature of the employment.31

At the outset, the court reaffirmed the general rule that West Virginia is an "at will" jurisdiction.32 But the at will principle is not wholly unqualified, as contractual and statutory provisions and the public policy exception have altered the at will status of an employment.33 These qualifications, however, were not broad enough to embrace the facts in *Cook*.

The issue being one of first impression, the court looked to decisions in other jurisdictions. Ten states recently held that an employer may be bound by promises, express or implied, in employee handbooks or policy manuals with respect to job security and termination procedures.34 Persuaded by these cases, the court concluded that:

[A] promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable.35

This statement effectively cast aside the traditional requirement of additional consideration beyond wages and service to overcome the presumption of a hiring at will.

31 *Cook*, 342 S.E.2d at 457.
32 Id. at 457 (citing *Wright*, 141 W. Va. 368, 90 S.E.2d 459).
35 Id. at 459.
In examining the cases from other jurisdictions, the court found that "[a] common thread running through those cases where personnel manuals are viewed as contracts is the existence of a definite promise by the employer not to discharge the employee except for cause."\(^{56}\) Concurring with these authorities, the court held that "an employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge except for specified reasons."\(^{57}\)

After reading M & W's handbook, the court found "evidence of a promise by the employer not to discharge those employees who are explicitly covered by the handbook, except for the offenses set forth in the handbook."\(^{58}\) The court also pointed out that, "[t]he inclusion in the handbook of specified discipline for violations of particular rules accompanied by a statement that the disciplinary rules constitute a complete list is *prima facie* evidence of an offer for a unilateral contract of employment modifying the right of the employer to discharge without cause."\(^{59}\) However, the court remanded the case for the jury to determine whether the handbook specifically applied to Ms. Cook.\(^{60}\)

Within two months of this decision, a federal district court had occasion to apply *Cook* when confronted with a similar employment case involving a personnel handbook. In *Zeedick v. Thomas Memorial Hospital*,\(^{61}\) the district court observed that even after *Cook*, the presumption of employment at will remains in West Virginia. The court analyzed the opinion and concluded that in *Cook* "the demonstration of a contract on the basis of a personnel manual is premised on 'the existence of a definite promise by the employer not to discharge except for good cause'."\(^{62}\)

In *Zeedick*, the district court found in the defendant's handbook only a promise to confer with the person to be dismissed and that the grounds for termination appear unlimited.\(^{63}\) Applying *Cook*, the district court held that:

> What the language of this personnel handbook lacked is the promise, one which was present in *Cook*, that a person would be discharged only for specified reasons. That element lacking, the rule of law is employment at will and there is no action

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\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) *Id.*


\(^{62}\) *Id.* slip op. at 3.

\(^{63}\) *Id.* slip op. at 4.
on the basis of employment contract as this contract was terminable by either party at either time.\textsuperscript{44}

Essentially, this means that the employment at will rule will govern despite an employee handbook so long as the reasons for dismissal are unlimited, thereby creating no promises not to dismiss except for specified reasons.

While the court's decision in \textit{Cook} is undoubtedly a significant modification to the employment at will rule, its limitation is already evident. In order to circumvent the courts in finding a promise not to discharge except for good cause or specified reasons, an ingenious employer could have an open-ended list of reasons for dismissal in its personnel handbook. However, from the line of cases leading to \textit{Cook}, it appears that the court is capable of devising another qualification to the at will rule should employers manage to frustrate the intent of \textit{Cook}.

\section*{V. Conclusion}

In recent years, extensive legislation and judicial modification designed to ensure job security manifest concern for the worker. In \textit{Cook}, the court continued to extend protection to the rights of employees. The almost unanimous decision, with one justice dissenting without opinion, revealed the court's propensity toward upholding employees' rights as it acknowledged that:

\begin{quote}
A policy manual that provides for job security grants an important, fundamental protection for workers . . . . If such a commitment is indeed made, obviously an employer should be required to honor it. When such a document, purporting to give job security, is distributed by the employer to a workforce, substantial injustice may result if that promise is broken.\textsuperscript{45}
\end{quote}

Such judicial protection is justified when considered in light of the bargaining position between the employer and employee. As it is generally an employer's market, most employees do not have the luxury of freely giving up their jobs for another any time even though the at will principle supposedly gives them that freedom.

\begin{quote}
\textsuperscript{44} \textit{Id.} slip op. at 4. The defendant hospital published a handbook which covered various kinds of prohibited conduct and discussed termination procedures as follows:

Dismissal . . . .

There are two general conditions that subject employees to suspension and/or dismissal. The first is failure to carry out the reasonable directions of a supervisor (insubordination). The second includes (but is not limited to) serious misconduct such as neglect or abuse of patients, visitors, or fellow workers, abuse or destruction of property; also theft, excessive absenteeism, unexcused absence, unkindness, discourtesy, etc.

\textit{Id.} slip op. at 3.

\textsuperscript{45} \textit{Cook}, 342 S.E.2d at 458 (citing \textit{Woolley}, 99 N.J. 284, 297, 491 A.2d 1257, 1264).
\end{quote}
As one commentator astutely observed:

[Many employers of nonunion employees attempt to maintain considerable unilateral discretion and view the statements in their handbooks and employment policies as general guidelines, subject to withdrawal, modification, exceptions, or interpretation at any time by the employer. Recently, many of these employers have been unpleasantly surprised to discover that courts are now consistently upholding these statements as binding commitments that may imply other rights as well. Consequently, employers should treat their handbooks and employment policies as they would collective bargaining agreements, i.e., as binding and enforceable commitments.]

The decision in Cook should not be viewed as a mere unpleasant surprise but an unequivocal message to employers that they no longer enjoy an absolute free hand in firing employees. While the court may not have renounced the at will rule, given its lack of tolerance for arbitrary and retaliatory dismissals, the court seems prepared to fashion remedies to correct such injustices.

The recognition of an employee handbook as an actionable promise by the employer signifies an important point in employer-employee relations. The immediate effect of Cook is that it represents another jolt to employers who engage in arbitrary dismissals from the license afforded by the at will principle. While it is true that the court in Cook did not abandon the at will principle, the court in future cases may fashion its decisions to require that an employer discharge employees only upon good cause, such as unsatisfactory performance or a genuine need for retrenchments, with or without such a promise in its employee handbook. Ultimately, Cook demonstrates that the West Virginia Supreme Court of Appeals, no longer satisfied with mechanically repeating the employment at will rule, will continue to modify the rule to protect the rights of workers.

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