South Carolina Law Review

Volume 40
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 11

Fall 1988

Labor Law

Daniel S. Sanders Jr.

LABOR LAW

I. Implied Contract Exception to Employment at Will Doctrine Recognized

In *Small v. Springs Industries*[1] the South Carolina Supreme Court adopted an implied contract exception to the employment at will doctrine. Unlike the relatively narrow public policy exception recognized in this state, the implied contract exception adopted in *Small* vastly increases the potential liability of all South Carolina employers.

In *Small* the plaintiff was hired as an at-will employee.Five years later, her employer provided all employees, including the plaintiff, with an employee handbook that outlined a progressive disciplinary system. The system provided a successive four-step procedure to be followed when dismissing employees, which required: (1) a warning, (2) a written warning, (3) a final warning, and (4) discharge. The employer distributed bulletins regarding the progressive warnings and made oral assurances that they would be followed.[2]

Later, Springs discharged the plaintiff after she caused a series of accidents.[3] Nevertheless, the company failed to give the plaintiff the benefit of the entire progressive disciplinary system. The company justifiably considered the plaintiff an at-will employee who could be terminated at any time or for any reason.[4]

The plaintiff sued her employer for breach of contract, claiming that the handbook, bulletins, and oral assurances con-

---

1. 292 S.C. 481, 357 S.E.2d 452 (1987). The court relied on Toussaint v. Blue Cross & Blue Shield, 408 Mich. 589, 292 N.W.2d 880 (1980), the seminal Michigan case addressing the implied contract exception to the at-will doctrine.

2. 292 S.C. at 483, 357 S.E.2d at 453.

3. *Id.* For a discussion of an employer's authority to discharge an unfit employee, see Dew v. City of Florence, 279 S.C. 155, 303 S.E.2d 664 (1983), *cert. denied,* 464 U.S. 936 (1983).

4. In South Carolina an employment contract that is terminable at the will of either party may be terminated at any time for any reason or for no reason at all. 292 S.C. at 484, 357 S.E.2d at 454; *see also* Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607 (1981); Ross v. Life Ins. Co. of Va., 273 S.C. 764, 259 S.E.2d 814 (1979).

stituted a contract. She claimed that her employer breached the contract by not following the entire disciplinary system outlined in the handbook.

The South Carolina Supreme Court affirmed the trial court's decision in favor of the plaintiff. The court held that "a jury can consider an employee handbook, along with other evidence, in deciding whether the employer and employee had a limiting agreement on the employee's at-will employment status."[5] The court found consideration for the contract when the plaintiff showed she had continued in employment in reliance upon the company's handbook and oral assurances that the handbook would be followed.[6]

It is important to realize that the court did not hold that an employee handbook will always constitute an employment contract. Rather, *Small* holds that an employee handbook, along with oral assurances issued by an employer, can alter the employee's at-will employment status.[7]

The implied contract exception adopted in *Small* may be applicable whenever an employee is discharged.[8] There are, how-

---

5. 292 S.C. at 486, 357 S.E.2d at 455. The court reasoned as follows: "It is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as 'a gratuitous, nonbinding statement of general policy' whenever it works to his disadvantage." *Id.* at 485, 357 S.E.2d at 455.

6. The court reasoned as follows:

> Springs made an offer or promise to hire Small in return for specific benefits and wages. Small accepted this offer by performing the act on which the promise was impliedly or expressly based. Springs' promise constituted the terms of the employment agreement. Small's action or forebearance in reliance on Springs' promise was sufficient consideration to make the promise legally binding.

Id. at 484, 357 S.E.2d at 454 (footnote omitted). Justice Gregory, in dissent, argued that "[m]ere continuation of employment is not sufficient consideration to support an agreement altering the terms of an employment contract." 292 S.C. at 487-88, 357 S.E.2d at 456 (Gregory, J., dissenting).

7. *Id.* at 486, 357 S.E.2d at 455.

8. Most cases alleging the implied contract exception involve disciplinary procedures. The plaintiff, however, may raise the implied contract exception in several handbook situations. For example, many employee handbooks have an equal opportunity provision, which states that an employer will not discriminate on the basis of race, sex, or religion. With such a clause, an employee who claims that he was discharged because of discrimination could sue his employer for breach of contract by alleging that the discharge breached the equal opportunity provision in the handbook. More importantly, an employee could allege such a breach even though his right to sue under state or federal civil rights provisions is precluded procedurally, for example, by the failure to file a

ever, certain measures an employer can take to help avoid implied contracts arising from employee handbooks. *Small* made it clear that no employer is under any obligation to provide a handbook to its employees.[9] Even if an employer provides a handbook, the at-will status of the work force can be maintained, despite handbook provisions, if the handbook contains a "conspicuous" disclaimer.[10] Since the court, however, did not define "conspicuous," it is important to realize that disclaimers do not ensure full protection.[11] The handbook and any disclaimers must be drafted carefully to preserve at-will status.

Although the implied contract exception adopted in *Small* is relatively clear, there has been considerable confusion regarding its application. For example, in *Tyler v. Roper Corp.*[12] the district court, applying *Small*, held that the employee's at-will status was not altered because (1) the employee had not relied on the handbook and knew she could be discharged at any time for any reason at the discretion of the company, and (2) the handbook's language was not mandatory because the employer had the sole discretion to determine appropriate discipline. The court stated that alteration of the at-will status will take place if the handbook and assurances are expressed in mandatory terms and the employee *relies* upon the expressions in continuing employment with the company."[13]

---

timely claim.

9. The court stated, "Springs was under no obligation to write and distribute the employee handbook or the bulletin." 292 S.C. at 485, 357 S.E.2d at 454.

10. The court stated:

> If an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document.

Id. at 485, 357 S.E.2d at 455.

11. *See* Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (1981) (court enforced a handbook provision despite a disclaimer). Also, it is important to note that some courts have not required an effective disclaimer to be in the handbook itself. Batchelor v. Sears, Roebuck & Co., 574 F. Supp. 1480 (E.D. Mich. 1983), *aff'd sub nom.* Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986).

12. Tyler v. Roper Corp., No. 5:86-2544-6, slip op. (D.S.C. Aug. 25, 1987). Regarding nonmandatory language, *Tyler* and *Small* cited with approval Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (N.C. Ct. App. 1985), *rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986) (employee handbook was not part of a contract because the employer retained sole discretion over discipline).

13. *Tyler*, No. 5:86-2544-6, slip op. at 8. A potential plaintiff must be prepared to

Another question concerning *Small* is whether it should be applied retroactively to a cause of action that arose prior to the date of the decision. Generally, when the South Carolina Supreme Court wants to apply a decision prospectively only, it either states this directly in the opinion[14] or adopts such an application when the new decision materially changes the existing law.[15] The court in *Small* did not provide explicitly for a prospective-only application, but it did acknowledge that the decision represented a change in existing law.[16]

The South Carolina Supreme Court, however, recently applied *Small* retroactively to a cause of action that arose prior to June 18, 1987,[17] the date of the *Small* decision. The wisdom of the retroactive application, however, is questionable. A strong argument can, and should, be made that a retroactive application of *Small* creates a tremendous unwarranted liability for all employers. Prior to *Small*, no employer could have been aware that adhering to South Carolina's well established at-will doctrine would later result in judicially imposed liability.

Following *Small*, the threat of potential liability surrounding employee discharges may force employers to retain unfit employees. As Justice Gregory argued in the dissent, the *Small* holding "tends to stifle quality economic growth and development and hinder expanded job opportunities in this State."[18] It is more important for the courts to focus on *why* an employee is discharged and not *how* an employee is discharged.

Daniel S. Sanders, Jr.

---

prove (1) that there were mandatory statements in the employee handbook, (2) that the company assured him that the handbook would be followed, and (3) that he relied on mandatory language and assurances in continuing employment with the company. *Id.* at 8-9.

14. *See, e.g.*, Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985); McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985); Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984); Walton v. Stewart, 277 S.C. 436, 289 S.E.2d 403 (1982); Brown v. Anderson County Hosp. Ass'n, 268 S.C. 479, 234 S.E.2d 873 (1977), *rev'd on other grounds*, Fitzer v. Greater Greenville S.C. Y.M.C.A., 277 S.C. 1, 282 S.E.2d 230 (1981).

15. *See* Douglass v. Florence Gen. Hosp., 273 S.C. 716, 259 S.E.2d 117 (1979).

16. 292 S.C. at 486, 357 S.E.2d at 455.

17. Francisco v. Black River Elec. Coop., No. 87-Mo-325, mem. op. (S.C. July 27, 1987). This is an unpublished memorandum opinion, which has no precedential value.

18. 292 S.C. at 488, 357 S.E.2d at 456.