LABOR AND EMPOYMENT REVIEW

Dorman v. Petrol Aspen, Inc.: The Death of Employment at Will?

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The Colorado Supreme Court's most recent foray into the longstanding doctrine of "at-will" employment may significantly impact wrongful termination litigation in Colorado as well as the means by which employers make offers of employment. On April 15, 1996, in *Dorman v. Petrol Aspen, Inc.*,[1] the court reversed a Colorado Court of Appeals decision upholding the dismissal, pursuant to Colorado Rules of Civil Procedure ("C.R.C.P.") 12(b)(5), of a complaint alleging breach of contract, promissory estoppel, and breach of and alleged duty of good faith and fair dealing.[2]

In reversing the Court of Appeals, the Supreme Court held that an employment offer letter that contained statements about future rates of compensation, the opportunity to purchase stock options in subsequent years, and long-range planning was ambiguous with respect to the term of the plaintiff's employment. As a result, the plaintiff had to be given the opportunity to offer extrinsic evidence as to the term of employment and had properly stated a claim for relief for breach of employment contract.

Prior to *Dorman*, courts have been reluctant to allow claims for breach of contracts of employment based on forward-looking statements in offers of employment. Typically, claims of breach of employment contract have been disposed of by courts at the pleading stage in the absence of specific evidence relating to a term of employment.[3] Despite prior decisions, the underlying facts and reasoning of the *Dorman* decision create significant question regarding both the strength and the scope of the at-will employment doctrine in Colorado.

Historical Background

At common law, in the absence of an explicit contract to the contrary, there was a presumption that every employment was employment at will.[4] As the court stated in *Martin Marietta Corp. v. Lorenz*:

> Re-enforcing this basic rule is a special rule of mutuality of obligation, pursuant to which either the employer or the employee was free to terminate the employment at any time for no cause whatever and without notice. The at-will employment doctrine thus evolved to the point where both employer and employee could terminate the employment relationship without thereby being subjected to legal liability for the termination.[5]

In *Justice v. Stanley Aviation Corp.*,[6] the plaintiff brought an action for breach of contract when he was terminated after less than four months on the job. The plaintiff's claim was base on the text of a written offer of employment setting forth: (1) an annual

salary of $12,000 per year; (2) reimbursement up to the equivalent of one month's salary for relocation costs; and (3) a provision that should the plaintiff resign within a twelve-month period, all travel and moving expenses would be reimbursed to the company.[7]

The Court of Appeals in *Justice* framed the issue as whether the "contract of employment was for a definite period of one year."[8] The court held that unless the facts and circumstances indicate otherwise, "a contract which sets forth an annual salary rate that states no definite term of employment is considered to be indefinite employment, terminable at the will of either party…."[9] The court further indicated that the surrounding circumstances--that the plaintiff was seeking permanent employment and that he assumed his employment would be permanent--were insufficient to establish a definite term.[10]

Thirteen years later, in *Continental Airlines, Inc. v. Keenan*,[11] the Colorado Supreme Court, despite reversing the trial court's grant of summary judgment, reaffirmed that employment for an indefinite period of time is presumed to be at-will employment. The Supreme Court stated that "[t]his presumption of 'at-will' employment, however, should not be considered absolute but rather should be rebuttable under certain circumstances."[12] *Keenan* involved a breach of employment contract claim on the theory that a unilaterally published employee manual altered the terms of an otherwise at-will relationship.[13]

The *Keenan* court refused to categorically rule that an employee manual either automatically amends the terms of an employment contract or represents only unilateral expressions of general employer policies that have no bearing on the employment relationship.[14] Instead, the *Keenan* decision established that a unilateral manifestation by the employer, such as in the form of an employee manual, may, under certain facts and circumstances, constitute and amendment to what is otherwise a terminable at-will employment relationship.[15] Indeed, the court stated,

> [u]nless this preliminary factual showing is sufficient to overcome the presumption of an employment terminable at the will of either party, the employee's cause of action should fail.[16]

In 1994, the Colorado Court of Appeals again addressed the question of the presumption of at-will employment in Colorado. In *Schur v. Storage Technology Corp.*,[17] the plaintiff brought suit for damages for breachof his employment contract and fraudulent nondisclosure. The defendant company had allegedly enticed the plaintiff to relocate form California and take a position, at a salary of $7,500 per month, in its Program Management Department.[18] As additional incentive, the defendatnt company offered enrollment in its stock option program, reimbursement of relocation costs, and participation in a Program Management Department Bonuses Program.[19]

The plaintiff accepted employment with the defendant and was provided withan employee handbook after reporting to work. Within the handbook was a disclaimer that "employment with the company is terminable at will of either the employee or StorageTek, at anytime, without notice, cause or any specific disciplinary procedures."[20] After only six months, the company decided to discontinue its Program Management Department, and the plaintiff was laid off. The trial court directed a verdict at the close of the plaintiff's evidence in favor of the defendant, base on the plaintiff's failure to establish a *prima facie* case of breach of contract.

On appeal, the plaintiff asserted that the presumption of at-will employment was evidentiary in nature, and as a result, the trier of fact should have been

allowed to determine the nature of the employment relationship; that is, whethe at will or for a definite term. In affirming the trial court's dismissal, the Court of Appeals held that the presumption of at-will employment is one of substantive law, rather than evidentiary in nature:

> Thus, if the evidence show that the hiring is for an indefinite term, the substantive law of Colorado would allow wither party to terminate the relationship at-will. The employee may, however, rebut the effect of that rule by proving that an *explicit* term of the employment contract restricts the employer's right to discharge….[21] [*Emphasis added*.]

Moreover, the court opined that use of the work "presumption" renders it the employee's burden to prove circumstances sufficient to establish employment for a definite term rather than an at-will relationship.

The above cases are merely representative. The substantive presumption of at-will employment has been consistently adhered to in the context of actions for breach of employment contract. Colorado courts also have adhered to the proposition that explicit evidence of a definite term of employment is necessary in order to rebut the substantive presumption of at-will employment.[22]

The Dorman Case

In early August 1991, the plaintiff in *Dorman* received a written offer of employment for the job of general manager of an Amoco station being acquired by the defendant. He accepted the position, but was terminated after only four months on the job. He subsequently brought suit alleging, *inter alia*, breach of employment contract.[23] The employment offer letter[24] contained neither an explicit term of employment nor a disclaimer that the letter did not constitute anything other than an offer of at-will employment. Rather, not unlike many employment offer letters, it contained references to future seminars, salary rates, long-range planning, and participation in later years in a stock option program.

The plaintiff filed a complaint alleging breach of contract, promissory estoppel, and breach of an alleged duty of good faith and fair dealing. The employment offer letter was attached as Exhibit A to the plaintiff's complaint.[25] In response, the defendant filed a C.R.C.P.12(b)(5) motion to dismiss, arguing that the employment offer letter did not constitute an employment contract other than for at-will employment. The plaintiff countered that the employment offer letter "offered employment for a definite period of time and thus was not terminable during the agreed employment period without just cause," or, in the alternative, that "at minimum the contract was ambiguous as to the employment term and that he therefore 'must be entitled to engage in discovery in order to determine the party's intent with regard to the intended length of his employment.'"[26]

In a 4-3 decision, the Supreme Court held that the employment contract was ambiguous as to the term of employment and that the plaintiff should therefore have been entitled to offer extrinsic evidence to resolve the ambiguity as to the term of employment. In so holding, the court stated that "[s]pecifically the employment agreement's (1) stock option provisions, (2) listed series of salaries applicable to specific years, and (3) other references to Dorman's long-term status as a Petrol Aspen employee create ambiguities regarding the intended term of Dorman's emplyment."[27]

In reaching this conclusion, the court relied on the general contract principle that an ambiguous agreement is subject to interpretation base on extrinsic evidence. Further, in determining that the Court of Appeals misconstrued *Justice v. Stanley Aviation*,[28] the court established that *Justice* does not establish a "bright line rule" that a contract setting forth an annual salary does not constitute a contract for a definite term. Instead, the Supreme Court focused on language in *Justice* that "unless the circumstances indicate otherwise," a contract merely setting forth an annual salary does not provide for employment for a definite term. Indeed, the court stated:

> *Justice* therefore is supportive of the admissibility of extrinsic evidence to determine whether a contract of employment is for a definite term when an annual rate of compensation is specified but the *term* remains undefined.[29] [*Emphasis added*.]
>
> The employment contract referenced the plaintiff's opportunity to purchase stock options after a three-year period subsequent to the letter as well as salary rates for subsequent years. As a result, the Supreme Court determined that the employment contract was "fairly susceptible to the interpretation that Petrol Aspen was offering Dorman employment at least through January 1, 1994…."[30]

The Dissent in Dorman

The dissent to *Dorman* argued that the majority opinion "skipped" a step in its analysis relative to whether the contract was ambiguous as to the term of employment. The dissent agreed that extrinsic evidence is admissible to determine whether a contract is ambiguous. However, the dissent stated that

> The majority fails to distinguish between the extrinsic evidence which is conditionally admissible to aid the court's determination of whether a contract is ambiguous and the extrinsic evidence which is admissible to assist the fact finder's interpretation of the contract once the court has determined that the contract is ambiguous.[31]

With respect to the compensation provisions, the dissent argued that *Justice* stands for the proposition that a fixed amount of compensation for a particular time period does not establish a term of employment of that length of time. Further, the dissent characterized the plaintiff's future participation in a stock option plan as merely a list of "compensation suggestions" and a form of deferred compensation, stating that "at most, the existence of the stock option plan 'would give rise to a duty of good faith on the part of [Petrol Aspen] not to terminate the employment or otherwise frustrate the exercise of the options *for that purpose or reason*.'"[32] [*Emphasis added*].

After viewing all of the specific terms and provisions contained within the employment offer letter, the dissent concluded that, as a matter of law, such provisions were insufficient to overcome the presumption of at-will employment where no express term of employment was set forth.

The Impact of Dorman

Arguably, the majority opinion in *Dorman* ignores the substantive presumption of at-will employment. The court determined, relying on ordinary contract pricniples, tht any ambiguity as to the term of employment must be resolved by looking at all extrinsic evidence. However, in the authors' opinion, had the court truly applied a substantive

presumption of at-will employment, an ambiguity as to the term of employment should have been resolved in favor of finding an at-will relationship. That is not to say that no circumstances give rise to the necessity of utilizing extrinsic evidence. Rather, such a conclusion would be consistent with prior decisions requiring explicit evidence of an express term of employment to overcome the presumption of at-will employment.[33]

Does *Dorman* sound the death knell of at-will employment in Colorado? Such a conclusion is premature. However, the significance of *Dorman* presently lies in the facts on which the court determined there was an ambiguity that warranted the trial court's consideration of further evidence. *Dorman* represents a significant change in the types of facts and circumstances that may be proven by an employee in order to establish employment for a definite term, because the statements relied on by the court are of a type that are common in the everyday hiring of employees. Employers frequently make statements with respect to participation in long-range planning, the availability of a stock option plan at a later specified date, and subsequent salary rates and increases.[34]

To be sure, the facts of *Dorman* are not unlike discussion of a company's future plans for growth or diversification, the ability of an employee to, at a later date, participate in a profit-sharing arrangement, or a company-sponsored retirement plan, all of which occur every day. Given such similarities, *Dorman* alters the significance of future-looking statements made during the hiring process.[35] Finally, *Dorman* places additional emphasis on express statements by an employer through employee handbooks or otherwise that employment is at will. Employers will be well served to explicitly disavow at every opportunity any type of employment relationship other than one that is at-will.[36] There is little doubt that the *Dorman* decision is significant form the viewpoint of plaintiff and defendant attorneys alike. It will likely impact the conversation and written banter that typically precede the establishment of an employment relationship. Because employers must be concerned about creating an ambiguity with respect to the term of employment, employees may receive less information about future aspects of their employment. Moreover, while the presumption of at-will employment has not been explicitly disavowed, *Dorman* raises questions about the strength of the presumption in light of an employer's statements about the future. Just how significant *Dorman* is, will ultimately depend on the Colorado courts' subsequent interpretations when faced with differing facts.

NOTES

1. 914 p.2d 909 (Colo. 1996).
2. *Id*. at 910.Although the Supreme Court did not reach the issue of the existence of an implied duty of good faith and fair dealing, it has granted *certiorari* on the issue of whether an employment relationship could give rise to a claim in tort for breach of an express covenant of good faith and fair dealing, in *Decker v. Browning-Ferris Ind. of Colo.*, 903 P.2d 1150 (Colo.App.1995), *cert. granted* Oct. 2, 1995.A decision by the court is expected soon.
3. *See, e.g., Snoey v. Advanced Forming Technology, Inc*., 844 F.Supp. 1394, 1398 (D.Colo. 1994) (verbal representations of long-term relationship did not create contract of employment for specific term); *Allen v. Dayco Products, Inc*., 758 F.Supp. 630, 632 (D.Colo. 1990) (statement that employee would need two years to

understand position insufficient to create contract for definite term); *Justice v. Stanley Aviation Corp*., 530 P.2d 984, 985 (Colo.App. 1974) (statement as to annual salary rate, without more, merely creates employment for an indefinite term).

4. *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100, 105 (Colo. 1992).
5. *Id*. (internal citations omitted).
6. *Supra,* note 3.
7. *Id*. at 985.
8. *Id*.
9. *Id*.
10. *Id*. at 986.
11. 731 P.2d 708 (Colo.1987).
12. *Id*. at 711.
13. *Id*. at 710
14. *Id*. at 711.
15. *Keenan* reaffirmed the presumption of at-will employment, but also created an exception thereto. Termination procedures in an employee manual may properly be enforced as a modification to an at-will employment relationship under either ordinary contract principles or under a theory of promissory estoppel. *Id*. at 711-12.
16. *Id*. at 712.
17. 878 P.2d 51 (Colo.App. 1994).
18. *Id*. at 52.
19. *Id*.
20. *Id*.
21. *Id*. at 53.
22. *See Martin Marietta Corp., supra,* note 4 at 104-105 (in the absence of an explicit contract to the contrary, every employment is presumed to be at will); *Schur, supra,* note 17 at 53 (rebuttal of at-will presumption requires proof of "an explicit term fo the employment contract restricting the employer's right to discharge"); *Snoey, supra,* note 3 at 1398 ("employee is rebuttably presumed to have been hired on an at-will basis absent an express contract for a definite period of time").
23. *Dorman, supra,* note 1 at 910.
24. The text of the letter received by the plaintiff in *Dorman* is set forth in Appendix A to the reported opinion. *Id*. at 916-17.
25. *Id*. at 910.
26. *Id*. at 911. Both the Court of Appeals and the Supreme Court assumed, without analysis, that the employment offer letter was a contract of employment. In light of the plaintiff's allegations of a contract and the procedural stage of the case, such as assumption was warranted. *Rosenthal v. Dean Witter Reynolds, Inc*., 908 P.2d 1095, 1099 (Colo.1995) (on motion to dismiss, the well-pleaded allegations of a complaint must be viewed in the light most favorable to the plaintiff).
27. *Dorman, supra,* note 1 at 912.
28. The Court of Appeals held that "a commitment on the duration of employment cannot be inferred from a contract provision fixing the rate of compensation during a given year….[T]he same rule applies when an employment contract provides that the rate of compensation will be fixed during a series of years and then subject to modification."

Dorman, supra, note 1 at 913, citing *Dorman v. Petrol Aspen, Inc*., Case No. 93CA1714 (Colo.App.Dec.15,1994, slip op. at 3.

29. Dorman, supra, note 1 at 913.
30. *Id*. at 914.
31. *Id*. at 917 (Erickson, J., dissenting).
32. *Id*. at 920 (Erickson, J., Dissenting), *citing Harrison v. Jack Eckerd Corp*., 342 F.Supp.348, 350 (M.D.Fla. 1972).
33. *See, e.*g., *supra*, notes 3 and 22 and cases cited therein.
34. The evolution of the Colorado courts' thinking is likewise underscored by the contrast between *Dorman* and *Justice*. In *Justice,* the Court of Appeals found a provision that required the employee to reimburse the employer for certain expenses if he terminated the relationship within a period of one year, thereby punishing the employee for not remaining for a definite term, insufficient to establish employment for a definite term. *Justice, supra*, note 3 at 985-86. By contrast, *Dorman* involves statements of future events that arguably do not so directly implicate the employer's expectations concerning an employee's length of service.
35. Additionally, there is no substantive reason why an employee could not rely on similar forward-looking statements to establish a definite term of employment even after accepting a position. *See Keenan, supra*, note 11 at 711-12 (subsequent acts by an employer may alter at-will employment relationship).
36. *See Schur, supra* note 17. The facts of Schur are not unlike *Dorman.* However, the employee manual in *Schur* contained express provisions establishing the employment relationship as at-will. *Id*. At 52. Accordingly, employers should take care to include language acknowledging at-will employment when communicating with prospective employees.