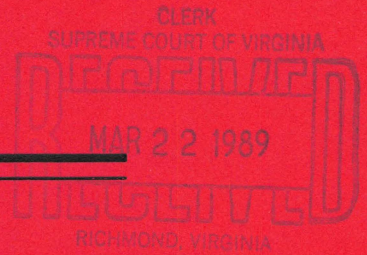


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 871248

WANDA BROWN ELLIOTT,

Appellant,

v.

SHORE STOP, INC., RAY KISHLAR, JOHN MYERS,
FRANKLIN SECURITY SYSTEMS, INC. AND DON POPE,

Appellees.

JOINT APPENDIX

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

LAW NO. _____

SHORE STOP, INC.

t/a LITTLE SUE FOOD STORES, INC.,
a Virginia Corporation,

and

RAY KISHLAR

and

JOHN MYERS,

individually and in their
capacity as agents, servants,
and employees of LITTLE SUE
FOOD STORES, INC.,

FRANKLIN SECURITY SYSTEMS, INC.

a Virginia Corporation,

and

DON POPE, individually and
in his capacity as agent,
servant and employee of
FRANKLIN SECURITY SYSTEMS, INC.

Defendants.

SERVE: SHORE STOP, INC.

c/o Hugh L. Patterson, Registered Agent
1800 Sovran Center
Norfolk, Virginia 23510

and

RAY W. KISHLAR

587 Eads Court

Newport News, Virginia 23602

-1-

and

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Virginia Beach, Virginia 24360

and

DON POPE
c/o Franklin Security Systems, Inc.
7909 Brookfield Road
Norfolk, Virginia 23518

MOTION FOR JUDGMENT

NOW COMES the Plaintiff, Wanda Brown Elliott, who moves for judgment against the above Defendants, jointly and severally, on the grounds and in the amounts as set forth:

1. Wanda Brown Elliott, Plaintiff herein, is a resident of the City of Gloucester Point, State of Virginia.

2. Defendant Shore Stop, Inc. t/a Little Sue Food Stores, Inc. (hereinafter "Little Sue") is a Virginia Corporation doing business in the State of Virginia, where it owns and operates convenience stores. Defendant Franklin Security Systems, Inc. is a Virginia corporation doing business in the State of Virginia and involved, among other things, in the administration of polygraph examinations. Defendants Ray Kishlar and John Myers are agents, servants and employees of Defendant Little Sue. Defendant Don Pope is an agent, servant and employee of Defendant Franklin Security Systems, Inc.

3. The Plaintiff Wanda Brown Elliott was hired by Little

Sue on or about April 16, 1984 as a manager of the Little Sue convenience store at Gloucester Point, Virginia, store number 126. At the time of her discharge, Plaintiff was making a base salary of \$590.00 every two weeks, with an average work week of 48 to 60 hours. Plaintiff's staff included an assistant manager and five (5) sales clerks.

4. Plaintiff's supervisor from April of 1984 until May of 1986 was Dave Foster. In May of 1986 Defendant John Myers, district sales manager, became Plaintiff's area supervisor. Defendant Ray Kishlar was the regional sales manager at all times relevant hereto.

5. During the entire period of her employment at Little Sue, Plaintiff faithfully, competently and without failure performed her duties as a manager. She received consistent raises and monthly bonuses and was given the highest recommendation by her former supervisor, Dave Foster.

6. On July 22, 1986, Defendant John Myers had a meeting with Plaintiff and the rest of the store managers in his area, regarding inventory procedure. Defendant Ray Kishlar, regional sales manager, was present at the meeting. Myers informed the management personnel that they should be "nice" to the inventory people (other employees of Shore Stop, Inc. and Little Sue) because their jobs were "in the hands" of the inventory personnel.

7. On July 23, 1986, the Plaintiff's store was inventoried by a Little Sue employee named "Bill" who completed the entire store inventory in approximately four hours. The Plaintiff's store was re-inventoried on July 25, 1986 by a Little Sue employee named "Sue" in approximately five hours.

8. The Plaintiff is aware that the above-mentioned inventory personnel attempted to inventory the store cooler in approximately ten minutes without benefit of a price list for cases of beer and beverages. Plaintiff is also aware that six cases of chili valued at \$572.40 were not credited to the inventory conducted by "Bill." Plaintiff informed "Sue" on July 25 that the chili was being held at another store until the Plaintiff had room for it, but is not aware of whether the value was credited to her.

9. On or about July 25, 1986, Plaintiff was informed by Defendant John Myers that she would "have" to take a polygraph test because of a "bad inventory" result in her store. Plaintiff refused to take the test because she had just been forced to undergo another polygraph the previous month, and had in fact taken and passed five (5) polygraph examinations since she was hired in April 1984. Defendant Myers told the Plaintiff to think about taking the polygraph over the weekend and that he would call her to find out her decision. On the same afternoon of July 25, 1986, Defendant Myers went to another Little Sue store in the Gloucester Point area and told the manager there, Ms. Carmena Waters, that he was looking for a prospective manager because Mr. Myers had a store available that afternoon.

10. On Sunday, July 27, 1986, Defendant Myers called Plaintiff at home, who informed him again that she refused to take the polygraph exam. Plaintiff stated that she was tired of proving herself to the company and she requested that either she or the company office be allowed to examine the invoices so that the inventory problem could be resolved. Defendant Myers refused this request, although Defendant Little Sue has a practice of allowing store managers to visit the corporate office in Belle Haven to review paperwork and verify shortages, and in fact pays employees for this practice.

11. On Monday, July 28, 1986, Defendant Myers brought Mary Robins to the Plaintiff's store. He told Plaintiff that she would be required to take the polygraph or leave her job, and that this directive was approved by Defendant Ray Kishlar, the regional sales manager. Plaintiff informed Myers once again that she refused to take another polygraph and handed him a letter of resignation.

12. Myers accepted Plaintiff's letter of resignation but stated that he would "hold the paperwork" for seven (7) days in case the Plaintiff changed her mind. Plaintiff was instructed to show Mary Robins where everything was, and then Plaintiff left her store.

13. Before Plaintiff left, Myers told her that if she decided to take the polygraph she could come back to work.

14. On the afternoon of Monday, July 28, 1986, Plaintiff called Myers and informed him that she would take the polygraph

examination so that she could return to work.

15. Myers arranged the polygraph examination to be taken on Wednesday, July 30, 1986, at 1:00 p.m. in Norfolk, Virginia. The examination was to be administered by Don Pope of the Defendant Franklin Security Systems, Inc. Myers assured the Plaintiff that as soon she took the polygraph she would be allowed to return to work.

16. On or about 10:00 a.m. on the morning of July 30, 1986, the Plaintiff received a phone call from an unidentified female caller who told the Plaintiff: "I overheard John Myers say that you would not pass the polygraph. You've been set up. Good luck." Plaintiff has reason to believe that this caller was Debbie Garrett, a receptionist at the corporate office in Gloucester.

17. At that point, Plaintiff called a friend, Kathy Cagle, who agreed to go in and take the polygraph examination in Plaintiff's place. Kathy Cagle was a former employee and sales clerk in the Plaintiff's store.

18. Upon their arrival in Norfolk, Kathy Cagle went in to the office of Franklin Security Systems, Inc. at 7909 Brookfield Road, and identified herself as Wanda Brown. Ms. Cagle was never asked for proof of identification by anyone at Franklin Security Systems, Inc. Approximately one hour later, Ms. Cagle was taken to Don Pope's office, where she correctly answered questions concerning Wanda Brown's birth date, birth place, and social security number.

19. Ms. Cagle (as "Wanda Brown") was then questioned about various aspects of her employment at Little Sue, including questions regarding "floating checks", improper use of her time card, taking money from the register, and use of the charge sheet for employee purchases.

20. Defendant Pope then handed Ms. Cagle a sheet of paper with four statements concerning matters they had discussed, which Ms. Cagle signed and dated as "Wanda Brown."

21. Ms. Cagle was then connected to the polygraph machine, at which time she answered a series of questions concerning her identity and her employment at the Gloucester Point Little Sue Store. At the end of the examination, a receptionist came in and said to Defendant Don Pope, "John Myers is on the phone". Following the examination, Ms. Cagle returned with the Plaintiff to Gloucester.

22. According to the polygraph examination results, Plaintiff Wanda Brown (Elliott) tested positive for deception when she answered "no" to the following questions:

(1) Since your last test did you steal any money from Little Sue?

(2) Since your last test did you steal any merchandise from Little Sue?

(3) Since your last test did you intentionally fail to pay for any beer that you took home from Little Sue?

23. On or about July 31, 1986, the Defendant Shore Stop, Inc. t/a Little Sue Food Stores, Inc. unlawfully and in breach of

contract discharged Plaintiff and terminated her employment with Little Sue. Said termination was related over the telephone to Plaintiff by Defendant John Myers, who said to Plaintiff that she could not go back to work because she had "failed the polygraph".

24. Plaintiff hereby incorporates each paragraph of this pleading into each and every other paragraph of this pleading as if the same were fully set forth therein.

25. As a direct and proximate result of the Defendant's dismissal of Plaintiff Wanda Brown Elliott and other actions during or about the month of July 1986 and subsequently, Plaintiff and her family have been caused to suffer scorn, ridicule, loss of income, severe and irreparable damage to her personal and professional reputation, severe and embarrassing damage to her earning capacity, hardship, and damage to her professional standing.

COUNT I

(Breach of Contract)

26. Taken together, there existed a valid contractual employment agreement between the Defendant Little Sue and Plaintiff Wanda Brown Elliott, which constituted an express and/or implied-in-fact agreement on the part of the Defendant not to terminate Plaintiff so long as her job performance was satisfactory, and upon which Plaintiff relied to her detriment. Defendant, through its agents, servants and employees, expressly and impliedly represented to Plaintiff, by various oral assurances concerning job security, that her employment with

Defendant was permanent in nature and could only be terminated by Defendant if Plaintiff gave Defendant good cause to terminate such contract of employment. Plaintiff in fact signed and acknowledged an "Employee Awareness Form" which set forth specific and particular grounds for dismissal, thereby impliedly representing to Plaintiff that she could and would not, in fact, be terminated except for good cause. Beginning on or about April 16, 1984, Plaintiff went through an orientation and ninety (90) day probation at Little Sue, under the guidance and supervision of her then-supervisor, Dave Foster. Plaintiff was led to believe that after successful completion of her probationary period, she would become a permanent, full-time employee with all benefits. Plaintiff was, in fact, given her own store even before the expiration of the 90-day probationary period because she was considered a highly competent and exemplary employee.

27. Defendant's company policy and procedure was based on a "pink slip" system used to warn an employee of infractions. Defendants also utilized a form captioned "Constructive Advice Report" which set forth grounds for termination and other lesser infractions which were deemed violations of company policy. Plaintiff Wanda Brown Elliott never received any such warnings or reports prior to her termination. The job performance of the Plaintiff was competent and exemplary for two and one-half years until Defendants knowingly and intentionally arranged for the Plaintiff to fail the polygraph examination in order for them

to have an alleged basis for Plaintiff's termination. Defendants unilaterally breached their contract of employment with Plaintiff Wanda Brown Elliott, which breach directly and proximately caused her severe harm as detailed above and for which monetary and punitive damages are sought, infra.

COUNT II

(Wrongful Discharge)

28. Without notice or warning, Plaintiff was terminated by Defendant on or July 31, 1986. Plaintiff alleges that her termination was a discharge in violation of public policy, said policy being the public policy against fraud, and other public policies which will be enumerated and set forth at trial, and bases these allegations on:

(a) the fact that defendant John Myers said to both Carmena Waters and Tia Rowe that "Wanda Brown is nothing but trouble" and that Defendant Myers had to get rid of the Plaintiff, that Plaintiff did not know what she was doing and that Defendant had to get her out of the company one way or the other;

(b) the fact that Defendant John Myers arranged for the Plaintiff to fail her polygraph examination even before she got there;

(c) the fact that the Plaintiff did not even take the polygraph examination on which her termination was based, yet allegedly "failed" said examination on the basis of three pre-arranged questions; and

(d) the fact that other employees of Little Sue who failed polygraph examinations were not terminated and were, in some instances, promoted.

29. As a direct and proximate result of Defendants' fraudulent conduct in violation of public policy, Plaintiff has sustained and suffered, and continues to suffer, substantial losses of earnings, retirement benefits, and other employee benefits, and humiliation and mental and physical pain and anguish, all to her damage and detriment, for which monetary damages and other equitable relief is sought, infra.

COUNT III

(Fraud)

30. At all times relevant hereto, Defendants, by and through their agents, supervisors, servants and employees, represented to the Plaintiff that she could remain in her employment if she consented to the administration of a polygraph examination, even though Defendants knew at the time these assurances were given to Plaintiff that they were false and intended merely to provide Defendants with false and pretextual grounds for discharging Plaintiff and to prevent her from obtaining unemployment benefits through the Virginia Employment Commission which Defendant Shore Stop would be obligated to pay if Plaintiff were admittedly fired without cause. That Plaintiff had Ms. Cagle take the polygraph examination in her stead, coupled with the fact that Ms. Cagle passed relevant portions as

to "her" identity but failed questions as to "her" purported honesty, provides ample evidence that Defendants' representations were known to Defendants to be false when made. Plaintiff's efforts to provide an examinee for the required test indicates that she relied on the assurances of her employer, but was discharged for showing "deception" only as to Ms. Cagle's integrity and not as to her identity, Defendants being unaware at the time of Plaintiff's discharge that a substitute examinee was tested.

31. Plaintiff has knowledge that other employees of Little Sue, specifically Ann Paulino and Jerry Williams, have failed polygraph examinations and were not terminated. In fact, Ms. Paulino is a management trainee currently awaiting placement in a Little Sue store.

32. Plaintiff consented to the administration of the polygraph examination in reliance upon representations made by Defendants, that were made with knowing falsity without Plaintiff being so informed when there existed a duty to so inform her, referring specifically to Defendant Myers' assurances that Plaintiff would be allowed to come back to her store once the polygraph examination had been taken. Said fraud and misrepresentation was ratified by Defendants.

33. As a direct and proximate result of the false representations and fraudulent assurances made by Defendants, Plaintiff has sustained severe harm and injury as alleged, supra and for which monetary damages are sought, infra.

COUNT IV

(Intentional Infliction of Emotional Distress)

34. Defendants intentionally inflicted severe emotional distress which was suffered by the Plaintiff as a direct and proximate result of Defendants' actions and conduct, which was outrageous, intolerable, exceeding and offending generally acceptable standards of decency and morality, and committed with malice and intent to cause Plaintiff resulting emotional distress, for which Plaintiff seeks monetary damages, infra.

COUNT V

(Negligence)

35. At all times relevant to this action, the Defendants owed a duty to the Plaintiff to follow and adhere to its own practices and policies with regard to termination of their employees. Defendants were negligent in their conduct and breach of said duties owed to said Plaintiff by failing to adhere to, or ignoring, their own established policies and procedures regarding termination of the Plaintiff's employment, in contravention of public policy. Said negligence also included the failure of Defendant Franklin Security Systems, Inc. and their agent, Defendant Pope to exercise reasonable care in the administration of the polygraph examination aforesaid, the results of which resulted in the termination of Plaintiff's employment of Defendant Little Sue. As a direct result of the Defendants' negligence and breach of duties, the Plaintiff was caused to suffer the substantial injuries as alleged, supra, and for which

monetary damages are sought, infra. In addition, Plaintiff alleges that the Defendants were negligent in their evaluation of her performance. The Defendants owed a duty to the Plaintiff to exercise reasonable care in their evaluation of her performance. Notwithstanding the aforesaid duty, Defendants breached said duty by recklessly and negligently evaluating her work performance, which negligence and breach of duty was a direct and proximate cause of the Plaintiff's injuries and damages, as alleged, supra, and for which monetary damages are sought, infra.

COUNT VI

(Tortious Interference With Contractual Relations)

36. At all times relevant hereto Defendant Little Sue, by and through its agents and employees and specifically Defendants John Myers and Ray Kishlar, and Defendant Franklin Security Systems, Inc., by and through its agent and employee Don Pope, did unlawfully conspire and interfere with Plaintiff's contractual employment relations with her employer Little Sue. Such illegal, fraudulent and conspiratorial actions constituted a tortious interference with Plaintiff's contractual relations and were the immediate and proximate cause of her unlawful termination. As a direct result of said unlawful conspiracy and interference between the Defendants, the Plaintiff was caused to suffer substantial injuries as alleged, supra, and for which monetary damages are sought, infra.

COUNT VII

(Defamation and Insulting Words)

37. In or about July, 1986, Defendant John Myers met Carmena Waters in her store and maliciously and falsely addressed the following remarks concerning the Plaintiff to Ms. Waters in full hearing of all passersby: "Wanda Brown is nothing but trouble and I have to get her out of the company one way or another." Defendant John Myers also addressed similar remarks to Ms. Waters' employee, Tia Rowe, in full hearing of passersby, in which he said: "Wanda Brown does not know what she is doing. Her paperwork is messed up and I have to get rid of her. She is going to hang herself." In the context in which they were made, the above remarks impugn the integrity of Plaintiff and imply that she is no better than common thief and liar. Said remarks did also impugn the Plaintiff's competency and fitness in the performance of her trade and occupation.

38. In or about September, 1986, Defendant John Myers maliciously and with defamatory intent addressed the following remarks to a customer of the Defendant's store in Gloucester Point, Virginia, in full hearing of all passersby: "I had to let Wanda go because she failed a polygraph."

39. The above remarks are, from their usual construction and common usage, construed as insults, made with intent to induce violation and breach of the peace in violation of Section 8.01-45 of the Code of Virginia, as amended. Defendant knew said remarks were defamatory, slanderous, and insulting and he made

them with intent to injure Plaintiff's good reputation, and with the intent to impugn Plaintiff's veracity and her employment and livelihood.

40. As a proximate result of said malicious, insulting, defamatory and slanderous remarks, Plaintiff has been caused to suffer humiliation, shame, vilification, ridicule, exposure to public infamy, disgrace, scandal, injury to her reputation and feelings, and financial loss, and has been hampered in the condition of her business and affairs, much of which injury will endure permanently, and for which monetary damages are sought, infra.

COUNT VIII

(Punitive Damages)

41. The Defendants, jointly and severally, committed independent and willful torts causing injuries to the Plaintiff for the commission of which, as proof will be offered at trial, Defendants are liable to the Plaintiff in the amount as set forth, infra.

AD DAMNUM

WHEREFORE, Plaintiff prays for judgment against the named Defendants, jointly and severally, in the amount of ONE MILLION DOLLARS (\$1,000,000.00) compensatory damages and ONE MILLION DOLLARS (\$1,000,000.00) in punitive damages, said ad damnum, totaling TWO MILLION DOLLARS (\$2,000,000.00).

Wanda Brown Elliott
WANDA BROWN ELLIOTT

W. Vinton Hoyle Jr., Esquire
James M. McCauley, Esquire
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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

Law No. L-86-2537

SHORE STOP, INC.,

RAY KISHLAR
and JOHN MYERS,

FRANKLIN SECURITY SYSTEMS, INC.,

and

DON POPE,

Defendants.

DEMURRER

Now Come, by counsel, the defendant Shore Stop, Inc., while reserving its right to maintain that it is not the proper defendant since it was not the employer of the plaintiff, and the defendant Ray Kishlar (hereinafter the "Defendants") and demur to the Motion for Judgment filed by the plaintiff and state as grounds therefor the following:

1. Count I of the Motion for Judgment fails to state a claim for breach of contract since plaintiff's allegations do not establish a cause of action beyond the well-settled rule in Virginia that an employment contract is terminable at will by either party.

2. Count II of the Motion for Judgment fails to state a claim for wrongful discharge since plaintiff's allegations

do not establish a cause of action beyond the well-settled rule in Virginia that an employment contract is terminable at will by either party.

3. Count III of the Motion for Judgment fails to state a claim for fraud since such allegations fail to aver the necessary reliance by the plaintiff on Defendants' alleged misrepresentations.

4. Count IV of the Motion for Judgment fails to state a claim for intentional infliction of emotional distress since plaintiff's allegations fail to aver such conduct on the part of Defendants to support such a claim.

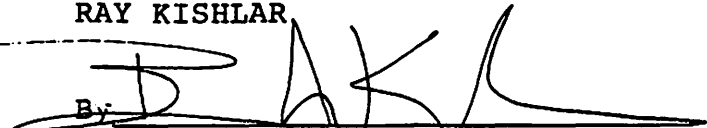
5. Count V of the Motion for Judgment fails to state a claim for negligence since plaintiff alleges no actionable duty running from defendants to plaintiff to support such a claim.

6. Count VI of the Motion for Judgment fails to state a claim for tortious interference with contractual relations since plaintiff's employment was terminable at will by either party.

7. Count VII of the Motion for Judgment fails to state a claim for defamation or insulting words since such statements as alleged are not defamatory or insulting as a matter of law.

8. Count VIII of the Motion for Judgment fails to state any independent cause of action and sets forth only a prayer for punitive damages.

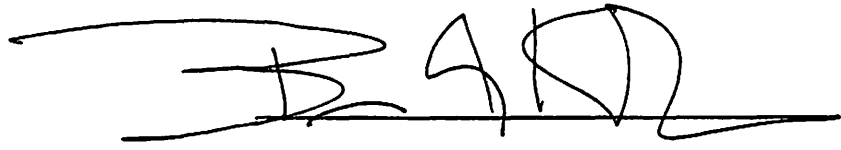
SHORE STOP, INC.
RAY KISHLAR

By 
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1800 Sovran Center
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(804) 628-5500

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing
Demurrer was mailed/hand delivered to all counsel of record
this 1st day of December, 1986.



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

Law No. L-86-2537

SHORE STOP, INC.,
RAY KISHLAR and
JOHN MYERS,
FRANKLIN SECURITY SYSTEMS, INC.,
and DON POPE,

Defendants.

DEMURRER

COME NOW defendants Franklin Security Systems, Inc., and Don Pope, by counsel, and demur to the Motion for Judgment filed herein and say that it is not sufficient in law and ought not to be prosecuted on the following grounds:

1. Counts I and II fail to state a cause of action against these defendants, since plaintiff fails to allege that any contract ever existed between them and the plaintiff, and further any contract the plaintiff may have had with these defendants was terminable at will by any party.

2. Count III fails to state a cause of action against these defendants, since the allegations fail to allege that these defendants made any representations to the plaintiff upon which she relied.

3. Count IV fails to state a cause of action against these defendants, since the allegations fail to allege such conduct as would support a claim for emotional distress.

4. Count V fails to state a cause of action against these defendants, since these defendants owed no duty to the plaintiff.

5. Count VI fails to state a cause of action against these defendants, since plaintiff's employment was terminable at will.

6. Count VII fails to state a cause of action against these defendants, since it fails to allege that these defendants made any statements whatsoever.

7. Count VIII fails to state a cause of action against these defendants, since it fails to state any independent cause of action and merely sets forth a prayer for punitive damages.

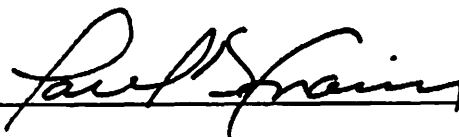
FRANKLIN SECURITY SYSTEMS, INC.,
and DON POPE,

By


Of Counsel

Paul D. Fraim
Heilig, McKenry, Fraim & Lollar
700 Newtown Road
Norfolk, VA 23502

I hereby certify that a true copy of the foregoing Demurrer was mailed to all counsel of record this 12th day of February, 1987.



VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

WANDA BROWN ELLIOTT

Plaintiff

v.

SHORE STOP, INC., et al.

Defendants

:
:
:
:
:
:
:
:
:
:

Law No. L-86-2537

BRIEF IN OPPOSITION
TO DEFENDANT'S DEMURRER

Plaintiff relies on the factual allegations to be established by fact at trial of this matter as set forth in the Motion for Judgment filed with the Court and which brings the parties together on Defendant's motion. This Brief is offered to assist the Court in dealing with Defendant's request to extinguish Plaintiff's claims without benefit of a trial by jury. Plaintiff simply has stated, in the Motion for Judgment, causes of action that are recognized under Virginia law and which entitle Plaintiff to to have them heard at trial.

Plaintiff will deal with the Causes of Action in this brief in the order in which they were presented in Plaintiff's Motion for Judgment filed November 11, 1986.

BREACH OF CONTRACT

Plaintiff's allegations, in this and all other counts pleaded, along with the logical inferences that may be taken from

the pleadings as a whole, are to be taken as true for the purposes of this demurrer. Vostis v. Ward's Copy Shop, 217 Va. 652 (1977). Thus, the only question for the Court to decide on Defendant's motion now is whether the pleading states a cause of action against Defendant.

At-Will Presumption

Defendant contends Plaintiff has failed to plead a cause of action for breach of contract because Plaintiff was subject to the so-called "at will" presumption in Virginia, under which Plaintiff could be discharged at any time and for any reason or no reason whatsoever. While Virginia, like most states, has recognized the presumption that an oral contract of employment for an unspecified term can be terminated at the will of either the employer or employee, the doctrine is merely that: a presumption that tentatively fixes for the parties a period of time for the employment, just as the law in England presumes that such a contract is for a one-year period.

Yet Virginia, like nearly all of her sister states, has recognized numerous exceptions to the at-will rule. This is merely another way of saying that the parties can contractually bind themselves -- mutually or unilaterally -- to a term other than one at will. When the parties, by their conduct or promises, provide that the contract is terminable only for good cause, the presumption is overcome. It is, at that point, unnecessary.

In Sea-Land Service, Inc. v. O'Neal, 224 Va. 343 (1982), the Virginia Supreme Court said:

. . . where no specific time is fixed for the duration of employment, it is presumed to be an employment at will, providing a dismissed employee no basis for recovery of damages against his erstwhile employer. Hoffman Specialty Company v. Pelouze, 158 Va. 586, 164 S.E. 397 (1932). We said, however, that "this presumption . . . is rebuttable" in Hoffman by "the interpretation which the parties themselves placed upon the matter."

See also, Barger v. General Electric Co., 599 F.Supp. 1154 (W.D. Va. 1984), applying Virginia Law, which holds that the question of whether handbook provisions constitute an element of the employment contract is for the jury.

Plaintiff and Defendant had an employment contract which removed Plaintiff from the precarious position of being subject to being dismissed "at will," and Defendant breached its employment contract with Plaintiff.

Just Cause

Plaintiff has alleged in the Motion for Judgment that a contract between Defendant and Plaintiff existed at the time Plaintiff was discharged, the terms of which included assurances to Plaintiff that discharge would be only for just cause.

Defendant's argument that no time was fixed for the contract of employment between Plaintiff and Defendant was dealt with by the Virginia Supreme Court in 1950 in Norfolk Southern R.R. Co. v. Harris, 190 Va. 966, 57 S.E.2d 110. The Court held:

. . . a definite time was fixed for the duration of the employment. It was, by the terms of the contract, to continue until the plaintiff gave to the defendant just cause to end it. The result of being discharged after long years of services in a particular occupation can well

be serious. The defendant's agreement that it would not discharge plaintiff without just cause was a thing of value to him, a safeguard against the loss and embarrassment to be expected from an arbitrary discharge. The defendant's agreement that it would not be done was a term of plaintiff's employment, compensation for his work which he had earned along with his wages. The defendant ought not to take that promised reward from him without incurring a penalty for violating its agreement. It was a promise in return for services which the plaintiff performed and which furnished sufficient consideration for a binding contract. In such a case the doctrine of mutuality is inapplicable.

Post-Probationary Status

Plaintiff, likewise, had successfully completed Defendant's required probationary period at the beginning of employment. Defendant promulgated the policy of requiring its employees to undergo an initial period during which Defendant stated and Plaintiff understood that Plaintiff could be discharged at any time and for any reason. Plaintiff accepted Defendant's condition of employment, successfully completed the probationary period, and became a "permanent" or "regular" employee who could only be discharged for just cause.

Courts dealing with the issue of whether successful completion of the probationary period entitles the employee to just cause status have let the jury decide this element of the employment contract, just as with other provisions. For example, in Rilee v. Newport News Shipbuilding and Dry Dock Company, Law No. 8894-S (Circuit Court for the City of Newport News 1985), the court held that the plaintiff's successful completion of a six-month probationary period during which the

plaintiff could be terminated at any time without cause created a question for the jury as to whether his post-probationary status was such that he could only be fired for just cause.

In that case a 20-year-old firefighter for the shipyard was discharged under what the defendant termed a "probationary release" six and a half months after being hired. The defendant in that case argued that "six months" really constituted "180 actual working days" (about nine and a half calendar months). The court upheld a verdict of \$70,000 for Rilee, holding that the jury could properly find that the plaintiff became a "permanent" employee who could only be fired for just cause after he completed six calendar months' of probationary status. See also, Wiskotoni v. Michigan Nat'l Bank - West, 716 F.2d 378 (6th Cir. 1983) (evidence was sufficient to raise jury question as to whether there was an implied contract not to discharge employee following completion of probation except for "just cause").

Employer's Policies

An employer in Virginia can unilaterally issue policies, or promises, to its employees which are binding on the employer. These promises by the employer are valid contractual provisions, the consideration for which is the employee's continued loyalty and efforts on behalf of the employer.

In Hercules Powder Co. v. Brookfield, 189 Va. 531, 53 S.E.2d 804 (1949), the employer promised its workers a severance bonus if they would continue working in the face of what seemed to be almost certain lay-offs instead of looking for other jobs immediately. Although the Court found the employer had reserved

the right to discontinue its severance-pay policy, "it could not deprive the plaintiff of benefits of dismissal salary already earned as of the date of the discontinuance." 53 S.E.2d 804 @ 809.

Additionally, the Court held in Hercules the the severance pay provision was not "a mere promise of a gratuity revocable at will," but rather "Performance of the condition imposed . . . is a full and complete acceptance of the offer." The Court continued, at 808, to hold that "Ample authority sustains the view that such a promise amounts to an offer, which, if accepted by performance of the service, fulfills the legal requirements of a contract."

The holding in Hercules was forcefully affirmed by the state's high Court in Dulany Foods, Inc. v. Ayers, 220 Va. 502, 260 S.E.2d 196 (1979), wherein the Court held neither mutuality nor reliance are requisite to finding that a Plaintiff is entitled to the benefits of his employer's promise. The Court said, at 200:

The fact that its employees . . . could leave for another job [before the plant shutdown] and still be entitled to severance pay is not material, and neither is it material whether they continued to work because they relied upon the promise of severance pay. In Hercules Powder Co. v. Brookfield, supra, it was settled that because severance pay is a matter of contract between the parties, the question of reliance is not significant."

Likewise, an employer's promise to provide a set of rules

of guidelines under which he can be discharged is binding, as is an employer's promise to provide a system of warnings and procedures for employees to protect themselves from unjust disciplinary actions by the employer.

Discharge Procedures

Defendant also contracted with Plaintiff to provide Plaintiff, in exchange for continued competent and honest job performance, with a procedure for providing Plaintiff with adequate notice should Defendant ever believe Plaintiff had violated company rules or policies or otherwise been guilty of acts or omissions that would place Plaintiff's job status, security or income in jeopardy.

Plaintiff says Defendant failed to live up to these assurances of job security, which Plaintiff was entitled to rely on.

In this case, the employer-Defendant had issued an employee handbook setting forth its policies, including procedures under which the employees of the Defendant would be evaluated, warned about perceived shortcomings and given an opportunity to correct any deficiencies that do not warrant summary dismissal, and a chance to rebut unwarranted criticism.

At least three recent federal cases applying Virginia law have held that handbook provisions created triable issues of fact so the jury could determine whether the Plaintiff-employee had rebutted the defense of "at-will" employment. Where the

Plaintiff, as alleged here, contends that the Defendant-employer had made binding promises that had the force of contractual provisions, and further alleges the Defendant-employer breached those provisions by failing to allow Plaintiff to take advantage of in-house procedures, then the issue is one for the jury.

Frazier v. Colonial Williamsburg Foundation, 574 F.Supp. 318 (E.D. Va. 1983); Barger v. General Electric Co., 599 F. Supp. 1154 (W.D. Va. 1984); and Thompson v. American Motor Inns, Inc., 623 F.Supp. 409 (W.D. Va. 1985).

In Thompson, the Court noted that the handbook given the plaintiff provided for a 90-day probationary period, after which the employee became "permanent," and could only be fired for just cause and through implementation of the employer's express system of providing warnings and specific acts under which the employee could be disciplined.

Plaintiff's Motion for Judgment, which must be taken as true in its entirety for purposes of Defendant's motion, lays out all the necessary elements of a contract under which Plaintiff was entitled to the benefit of Defendant's policies regarding warnings, redress and terminability only for cause. The question of the existence of such a contractual provision -- and whether it was breached as Plaintiff avers -- is clearly one for the trier of fact: the jury.

Good Faith and Fair Dealing

Virginia's common law requires that, in every contract of

employment, the parties are bound by a contractual provision, implied by law, that they deal with each other fairly and in good faith. In Forsberg v. Zehm, 150 Va. 756, 143 S.E. 285 (1928), the Virginia Supreme Court found that in an employment contract for a music director of a church, there was implied in law a covenant of good faith and fair dealing, and that the employee could not be discharged arbitrarily or in bad faith. See also, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (Mass. 1977), where the court held that a salesman's employment contract, even though one "at will," could not be terminated in bad faith, in this case to avoid paying the salesman bonuses.

WRONGFUL DISCHARGE

Fraud

Plaintiff's Motion for Judgment alleges Plaintiff was discharged in contravention of public policy, wrongfully, and that Defendant is liable in tort because of its actions. Specifically, Plaintiff alleges Defendants breached the long-standing policy of the Commonwealth, recognized both in the case law and by statute, against fraud, as well as other public policies to be set forth at trial.

Virginia, in Bowman v. State Bank of Keysville, 229 Va. 534, 331 S.E.2d 797 (1985), joined the the majority of states in recognizing the tort of wrongful discharge, holding that such an

action will lie where the Defendant violates an express statutory provision or where the discharge contravenes a firmly established principal of public policy.

In the case at bar, Defendant knew that it would not follow its own policies and procedures with respect to Mrs. Elliott, and intentionally concealed from her its intention to have her "set up" to fail the established channels through which she could vindicate herself against her supervisor's allegations.

Plaintiff was contractually entitled to have available and rely on Defendant's fair application of its disciplinary rules and procedures, yet Defendant fraudulently insisted that Plaintiff undergo a bogus polygraph examination, the results of which were held out by Defendant as "justification" for Plaintiff's discharge.

That Plaintiff had been forewarned of Defendant's scheme did not prevent or cut off Plaintiff's reliance on Defendant's assertions to which Defendant was contractually bound: Plaintiff was deprived of her employer's procedural safeguards per se, although Plaintiff relied on them throughout her employment. That Plaintiff substituted an examinee on the bogus polygraph who passed all the substantive questions she should have failed and failed the substantive questions regarding dishonest acts she could not reasonably have committed merely proves Defendant's fraudulent deprivation of Plaintiff's contractual rights to protect herself against such actions that are the subject of this

suit.

Plaintiff has pled a prima facie case in her Motion for Judgment for wrongful discharge and fraud. She has alleged, and will establish at trial, that 1) Defendant misrepresented to her the nature and existence of a procedure and policy whereby she would be safeguarded from arbitrary discharge based on charges of dishonesty; 2) Defendant, through its agents, knew that its representations to Plaintiff were false at the time it made them; 3) Defendant intended to induce Plaintiff to continue her employment and be subjected to the bogus discharge procedures it had substituted for valid discharge procedures; 4) Defendant's misrepresentations and acts caused Plaintiff to continue in the employment of Defendant beyond the time Defendant has covertly decided to withdraw the safeguards it had promised to Plaintiff; 5) Plaintiff relied on the false assurances of Defendant; and 6) Plaintiff was made to suffer the substantial harms she has alleged in her Motion for Judgment and which will be proven at trial.

Virginia, in 1982, affirmed that fraud coupled with breach of an employment contract warranted a general verdict of \$125,000 in Sea-Land v. O'Neal, 224 Va. 343. The plaintiff in that case was promised a new position with her employer if she resigned the one she held at the time the promise was made. After quitting her job and reporting for the promised one, she was told the new job did not exist.

And constructive fraud, which springs from the deceitful acts of one person toward another (referred to Prof. W. W. Berryhill as the "it just ain't fair doctrine"), requires a showing of neither a dishonest purpose nor an intent to deceive, according to Kitchen v. Throckmorton, 223 Va. 164, 286 S.W.2d 673 (1982). Here, clearly, the Plaintiff has pled with particularity significantly more than is necessary to establish actual fraud, alleging both elements, which must be assumed to be true by this Court for purposes of this motion.

In Jordan v. Sauve, 219 Va. 448, 247 S.E.2d 739 (1979), the state high court held in a fraud action the jury could find defendant acted recklessly and negligently to show a conscious disregard of the plaintiff's rights when he sold plaintiff a previously-owned but returned automobile as "new." The Court held punitive damages were appropriate for jury consideration.

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

AND CONSPIRACY TO INDUCE BREACH OF CONTRACT

Plaintiff has alleged a second violation of established public policy; the public policy prohibiting conspiracy to induce a breach of contract and intentional interference with contractual relationships. This conduct is expressly prohibited by Va. Code Sections 18.2-499 and -500 as well as decisional law in this Commonwealth.

Clearly, plaintiff has alleged a wrongful discharge in

violation of established public policy as recognized in Bowman, supra.

EMOTIONAL DISTRESS

Plaintiff's Motion for Judgment, taken as a whole, lays out a facts that amply support the elements required in pleading intentional infliction of emotional distress. In Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974), the elements were laid out simply, and are applicable here: 1) Intentional - or reckless conduct by Defendant; 2) that is outrageous and offends against generally accepted standards of decency and morality; and 3) is causally connected to such conduct and the Plaintiff's 4) severe emotional distress.

Plaintiff has pleaded each of these elements, and intends to establish their validity at trial and develop these facts in discovery.

Likewise, damages for negligent infliction of emotional distress will lie even where Plaintiff is unable to prove Defendant intended Plaintiff to suffer distress or knew that his conduct would or likely could cause Plaintiff to suffer this injury. Sanford v. Ware, 191 Va. 43, 59 S.E.2d 124.

NEGLIGENCE

Defendants claim Plaintiff alleges "no actionable duty running from defendants to plaintiff" to support a count of negligence, which is alleged both generally and specifically in the Motion for Judgment.

Clearly, Plaintiff's assertions that Defendant Franklin Security Systems and Defendant Pope "to exercise reasonable care in the administration of the polygraph examination" which resulted in Plaintiff's discharge provides sufficient notice for those Defendants to be aware of Plaintiff's position. The tort of negligence, notwithstanding Plaintiff's pleading of specific facts and duties, requires pleading with only such particularity as to place the defendant on notice. The Plaintiff has carried this burden here.

With respect to Defendant Shore Stop and its Defendant employees, Plaintiff has alleged "Defendants owed a duty to the Plaintiff to follow and adhere to its own practices and policies with regard to termination of their employees."

In addition, Defendants were negligent in that they breached common law duties owed to the Plaintiff, as discussed supra, and which breach resulted in severe harm to the Plaintiff.

Here, Plaintiff has asserted that the employment-at-will doctrine does not apply, and that assertion must be taken as true for the purposes of Defendant's motion. Plaintiff could only be dismissed for just cause after a series of warnings and procedural safeguards granted to the Plaintiff were followed. Defendant was negligent in failing to effectively evaluate Plaintiff's job performance (or integrity), which resulted in the loss of Plaintiff's job.

Additionally, Plaintiff's employer was negligent for

failing to assure that abuses of the kind Plaintiff suffered did not fall on their employees as a result of acts by Defendant's supervisors. Likewise, Defendants had a duty to correct and mitigate the harm caused Plaintiff once it had learned of the wrongful acts of its employee, Plaintiff's supervisor, which were directly in contravention of public policies against fraud and bad faith and unfair dealing in the employment relationship. Defendants completely ignored and disregarded the employment rights of Plaintiff, which is a breach of its duty to Plaintiff.

When an employer undertakes an affirmative duty toward an employee, the employer must use reasonable care in performing that duty. In Schipani v Ford Motor Co., 102 Mich. App. 606 (1981), the plaintiff alleged that his termination violated his contractual rights, derived from the employer's handbook, policies and procedures, and also that his termination resulted from negligent performance evaluations. The court stated that there is a duty to use reasonable care in the performance of an obligation, even a gratuitous one, to do something for another and that such a duty could also arise from the contract. Thus, where the employer undertakes to perform its obligations with respect to Plaintiff and does so recklessly and without reasonable care, a tort of negligence will lie. It is precisely that standard of "reasonable care" that prevents violation of such formidable public policies as fraud.

Likewise, in Chamberlan v. Bissell, Inc., 547 F.Supp. 1067

(W.D. Mo. 1982), a federal court held that an employer who does not use reasonable care in evaluating an employee's performance is guilty of negligence.

Here, Plaintiff has alleged that she was given no opportunity to evaluate the records held at Defendant's Belle Haven office to determine why the inventory shortage was reported at her store and where the problem lay, as other employees were encouraged -- and paid -- to do under Shore Stop's policy. The Defendant employer was negligent in failing to allow Mrs. Elliott the simple opportunity to review the records on her store to see if she could not explain the discrepancy. Instead, she was forced into a situation where her honesty was falsely impugned and used as a basis for discharging her -- after she and her supervisor agreed withdraw her letter of resignation from consideration.

The Defendant employer is under no duty to provide job security or assurances of procedural safeguards in employee discipline unless, as in this case, the employer undertakes to provide them. The employer, in agreeing to be bound by the provisions it has contractually promised the employee, also undertakes the responsibility to do so with reasonable care. Thus, Defendant has not common-law duty to evaluate employees unless it assumes that duty. Once one volunteers to perform a duty to the benefit of another, however, he is bound to do so with due care.

TORTIOUS INTERFERENCE

Va. Code Secs. 18.2-499 and 18.2-500 provide prohibitions against and remedy for conspiracy or interference with contractual relationships. This principle, recognized by the Commonwealth's common law, was applied to an employment situation in the landmark case of Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956). There the Court recognized a tort action lies for damages for conspiring to interfere with a contractual relationship. Damages include punitive damages if the act is done with malice or wantonness, which the Court defined as intentionally and without justification inducing one of the contracting parties to breach the contract. Worrie v. Boze, supra.

Damages also include the loss the Plaintiff suffered because of the tortious breach. Berlage-Bernstein Builders, Inc. v. Lear, 213 Va. 566, 193 S.E.2d 786 (1973).

In Heckler Chevrolet, Inc. v. GMC, 230 Va. 396 (1985), the Court held that the tortious interference tort stops short of "redressing interference with contracts terminable at will provided no improper methods are used" And, in that case, the plaintiff did not plead improper methods or unlawful conduct, as the Plaintiff has in the case at bar. Additionally, Plaintiff has provided ample argument and allegation that this matter is not one dealing with an employment-at-will situation. The Heckler Chevrolet case, then, is of no significance in deciding whether Plaintiff's allegations should be stricken

because they are supported by no law. The entire course of this cause of action is in accord with Plaintiff's allegations.

DEFAMATION

Defendant contends Plaintiff was not defamed by remarks of its agents and employees, which included specific assertions that Plaintiff was incompetent to perform her trade or occupation and directly impugned Plaintiff's integrity, from which the non-privileged communication would readily lead the typical hearer to believe falsely that Plaintiff was guilty of a crime for which, if she were indicted and tried, she could be sentenced to jail. On its very face, Defendant's defamatory statements that Plaintiff has failed a polygraph were tantamount to saying Plaintiff was lying and unworthy of trust, which is required of a store manager, which occupation Plaintiff had been engaged in for more than two years.

Additionally, Plaintiff specifically invoked Va. Code Sec. 8.01-45, et seq., under which publication of a defamation is not required in order for such Insulting Words to be actionable, and damages are presumed! False statements that impugn a person in his business, trade or occupation are defamatory per se, and this and other aspects of defamation have been suitably pled by Plaintiff in the Motion for Judgment.

PUNITIVE DAMAGES

Plaintiff's allegations have met throughout the standard of legal sufficiency required in Virginia to state a cause of action for punitive damages. In this context, Plaintiff has alleged independent, willful torts (fraud, conspiracy, intentional infliction of emotional distress, negligence and defamation) which far exceed any mere breach of contract, and which, if proven, entitle plaintiff to an instruction on Punitive Damages. Kamlar Corp. v. Haley, 224 Va. 699, 299 S.E.2d 514 (1983).

CONCLUSION

Plaintiff, therefore, incorporates each and every paragraph of this Brief and Motion for Judgment into each and every other paragraph of this Brief and Motion for Judgment, and moves that Defendant's demurrer be OVERRULED. In the alternative, Plaintiff respectfully prays this Court grant Plaintiff Leave to Amend should the Court find Plaintiff's pleading to be lacking on any count, and that the Parties be placed at issue and Trial on the Merits be had.

Respectfully submitted,

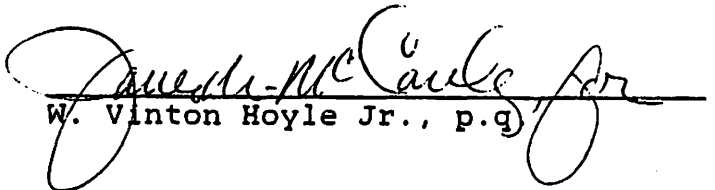
WANDA BROWN ELLIOTT

By  Of Counsel

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CERTIFICATE

I hereby certify that I have hand-delivered a true copy of
this Brief to all counsel of record on this 20th day of
February, 1987.


W. Vinton Hoyle Jr., p.g.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

Law No. L-86-2537

SHORE STOP, INC.,
RAY KISHLAR, JOHN MYERS,
FRANKLIN SECURITY SYSTEMS, INC.,
and DON POPE,

Defendants.

MEMORANDUM OF LAW

COME NOW the defendants, Franklin Security Systems, Inc., and Don Pope, by counsel, and submit the following Memorandum of Law in support of their demurrers to Counts V and VI of the Motion for Judgment.

The right of action for tortious interference with contractual relations arises in instances in which a contract between parties is damaged by the intentional acts of a third party. This cause of action is recognized in Virginia and requires proof of the following elements to establish a prima facie case: (1) The existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.

The definition of the cause of action as it appears in the Restatement (Second) of Torts §766 (1977), and which is followed

in this jurisdiction, states in part that a cause of action lies where there is intentional and improper interference with the performance of a contract between another and a third person.

Chaves v. Johnson, 230 Va. 112 (1985). Therefore, at the basis of actions of this sort, there must be intentional tortious conduct by someone not a party to the contractual relations damaged.

In the case at bar, it is alleged that Franklin Security Systems (hereinafter "Franklin") and Don Pope (hereinafter "Pope") did unlawfully conspire and interfere with the plaintiff's contractual relations with her employer. Franklin and its employee Pope were hired by the plaintiff employer, Shore Stop, for the purpose of conducting a polygraphic examination. Franklin's and Pope's involvement with the plaintiff arose entirely out of the retention of their services by Shore Stop. An agency relationship existed between Franklin and Shore Stop, and, in that regard, the role of Franklin and Pope does not fit that of a third-party tortfeasor who has intentionally interfered with the contractual relations of another. This distinction was recognized in Brown v. Loudon Golf and Country Club, Inc., 573 F.Supp. 399 (E.D.Va. 1983), in which the Court held that an employer of a party to a contract could not be held liable for contractual interference, since he was not a third party to the contract. While the relationship between these defendants is not that of employer-employee as in Brown (supra), the result is the same. Franklin and Pope were acting on behalf of Shore Stop in an agency capacity, and not as an individual third party.

Cases dealing with this cause of action always present a factual scenario in which a third party motivated by some economic reason of one form or another, or some other self-serving purpose, acts with the intention of destroying a contractual relation to which that person is not a party. (Chaves, supra; Hechler Chevrolet v. General Motors Corp., 230 Va. 396 (1985); Allen Realty Corp. v. Holbert, 227 Va. 441 (1984).)

Because there are no allegations that Franklin and Pope acted in any capacity other than on behalf of Shore Stop in providing polygraph services, there exists no independent third party; therefore, a cause of action for tortious interference with contract will not lie.

The same argument applies to the allegation that these defendants conspired to interfere with the plaintiff's contractual arrangement with her employer. Even if Franklin planned with Shore Stop to damage the plaintiff's employment, there is still no third-party interference. For there to be a conspiracy, there would have to be at least one third party, since the conspiracy requires the planning of at least two parties. None of these circumstances exist in this case.

In support of its demurrer to Count V of the Motion for Judgment, these defendants maintain that the allegations against them charging that they failed to exercise reasonable care in the administration of the polygraph examination is without merit.

At the basis of any action for negligence is some legal duty owed by the defendant to the plaintiff. Balderson v. Robertson,

203 Va. 484 (1982). Any legal duty in this case arose from the contractual agreement whereby Franklin provided polygraph services to Shore Stop. Any legal duty exists between these parties and not between Franklin and the plaintiff. An analogy appears in medical malpractice cases where a plaintiff sues a doctor who has been retained by the plaintiff's employer, and not by the plaintiff, for the purposes of conducting a work-related physical examination. In addressing this issue, a number of jurisdictions, including Virginia, have held that the usual doctor-patient relationship does not exist under these circumstances. Because such examination was wholly for the employer's benefit to determine whether the job applicant was employable from the standpoint of health, courts have held that the doctor's duty to perform his services was owed to the employer and not to the employee because any legal duty the physician owed to the patient-employee would arise only upon the creation of a patient-physician relationship. Lyons v. Grether, 218 Va. 630 (1977).

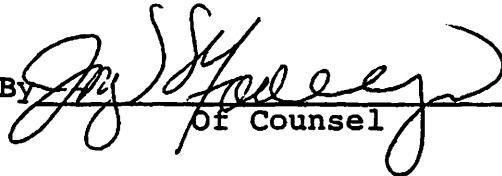
Similarly, Shore Stop contracted for Franklin to perform a service to make certain determinations about this plaintiff-employee. Franklin did not contract with the plaintiff and therefore no duty was created between these parties to which Franklin can be held.

Even if a legal duty does inure to the polygraph examinee, it is difficult to imagine how Franklin could possibly owe a duty to the plaintiff, since she intentionally sent an imposter to take her examination. A duty, if any, would be owed to the person

actually taking the examination and not to the person the examinee represents herself to be. Otherwise, the examinee could represent herself as anyone, and the defendant would presumably be liable to any person named.

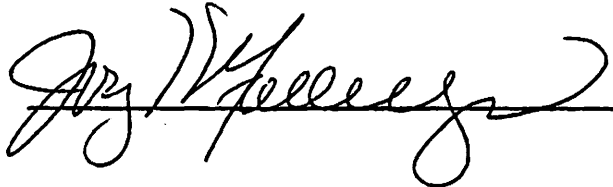
On the basis of the foregoing arguments, the defendants, Franklin and Pope, maintain that their demurrers should be sustained.

FRANKLIN SECURITY SYSTEMS, INC.,
and DON POPE,

By  _____
Of Counsel

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I hereby certify that a true copy of the foregoing Memorandum of Law was mailed to counsel of record this 16th day of March, 1987.

 _____

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

AT LAW NO. L-86-2537

SHORE STOP, INC.,

RAY KISHLAR
and JOHN MYERS,

FRANKLIN SECURITY SYSTEMS, INC.,

and

DON POPE,

Defendants.

MEMORANDUM IN SUPPORT OF DEMURRER OF DEFENDANTS
SHORE STOP, INC. AND RAY KISHLAR'S

Based upon a bizarre and unprecedented state of factual allegations, including a surrogate polygraph examinee, plaintiff brought suit in eight counts against her former employer, Shore Stop, Inc., her former supervisor, Ray Kishlar,¹ and the Franklin Security Systems, Inc. and its employer, Don Pope, who were retained by Shore Stop to administer a polygraph examination to the plaintiff.

¹ Another Shore Stop employee, John Myers, is a named defendant but has not been served in this matter.

Shore Stop, Inc. and Ray Kishlar [hereinafter collectively referred to as "Shore Stop"] filed a Demurrer to each of the plaintiff's counts. Following oral argument on Shore Stop's demurrer, it was deemed advisable for counsel to submit written memoranda in support of their positions. For that purpose, Shore Stop submits the following in support of its Demurrer to each of plaintiff's counts.

A. Plaintiff's Factual Allegations

Taken in the light most favorable to the plaintiff as we must do on our demurrer but stripped of the surplussage and hyperbole, plaintiff's allegations amount to the following. Plaintiff was employed as a manager of a Shore Stop convenience store at Gloucester Point, Virginia. Following an inventory of plaintiff's store in July of 1986, plaintiff was told by her supervisor that she would have to take a polygraph examination because of the "bad" inventory in her store. Plaintiff refused to take such test.

Plaintiff's supervisor told plaintiff to "think about taking the polygraph over the weekend" and he would allow her to reconsider her decision the following week. Thereafter, according to the plaintiff's allegations, she was told no less than two more times that she would be required to take the polygraph or she would be discharged. Plaintiff's supervisor again gave plaintiff an opportunity to reconsider her refusal.

Eventually plaintiff informed Shore Stop she would take the examination as requested. Plaintiff next alleges she received an anonymous telephone call wherein the caller stated plaintiff was "set up" and would not pass the polygraph examination. Plaintiff then arranged for a friend of hers to represent herself to be the plaintiff and to take the polygraph examination in plaintiff's place. Plaintiff was thereafter fired for failing the polygraph examination.

B. Counts I and II: Breach of Contract and Wrongful Discharge

Virginia has long adhered to the doctrine of employment at will whereunder a contract of employment with no specified duration is deemed terminable at-will by either party. Bowman v. State Bank of Keysville, 229 Va. 534, 535 (1985), citing, Stonega Coal and Coke Co. v. Louisville and Nashville R.R., 106 Va. 223 (1906).

While apparently conceding the fact that there was no specified duration for plaintiff's employment, plaintiff seeks to rely on federal district court cases for the proposition that plaintiff's employment was not at will because she could supposedly be discharged only for just cause. In an attempt to bring herself within the purview of, for example, the decision in Frazier v. Colonial Williamsburg Foundation, 574 F. Supp. 318 (E.D. Va. 1983), plaintiff alleges defendant assured her

her position was permanent and could be terminated only for just cause.² Plaintiff also seeks to rely on Barger v. General Electric Compnay, 599 F. Supp. 1154 (W.D. Va. 1984) and Thompson v. American Motor Inns, Inc., 623 F. Supp. 409 (W.D. Va. 1985).

However, the three federal court cases upon which plaintiff seeks to rely not only recognize the split among the various jurisdictions regarding oral assurances and contracts based upon employee handbooks, e.g., Barger, 599 F. Supp. at 1158 n.3, but also correctly held that the "Supreme Court of Virginia has never expressly decided whether the terms of [an] employer handbook constitute contractual terms that rebut the presumption of at-will employment." Barger, 599 F. Supp. at 1161.

Simply stated, the federal precedent is not binding herein and there has been no Virginia Supreme Court decision which has implied such conditions into a contract while the State's highest court has strongly adhered to doctrine of employment at-will.

Without further debating the legal theories discussed in those opinions, plaintiff fails to realize her pleadings set forth just cause for her termination as a matter of law. In

2 Plaintiff's claims in count II: Wrongful Discharge reflect the same reasoning that plaintiff could not be discharged save for just cause.

her Motion for Judgment plaintiff admits her continued employment was conditioned upon her undergoing a polygraph examination. Plaintiff next frankly admits her deceit practiced upon her employer when she connived to have her friend pretend to be the plaintiff and take the examination in her stead. Plaintiff's conspiracy to that end constitutes just cause for discharge as a matter of law.

C. Count III: Fraud

To assert a proper cause of action for fraud, plaintiff must allege that the defendant intentionally misrepresented an existing material fact with the intent to mislead the plaintiff upon which the plaintiff relied to her detriment. Hicks v. Wynn, 137 Va. 186 (1923). Notwithstanding the other deficiencies of this Count, plaintiff cannot show the essential element of reliance. Plaintiff admits she did not take the polygraph examination in reliance on returning to her position. Rather she arranged a third party impersonator of herself in an obvious attempt to deceive her employer. Simply stated, the allegations are insufficient as a matter of law as there are no legitimate allegations of reliance.

D. Count IV: Intentional Infliction of Emotional Distress

The seminal case in Virginia involving the cause of intentional infliction of emotional distress is Womack v. Eldridge, 215 Va. 338 (1974). The standard required to adjudge a defendant's conduct actionable is extreme.

Although each case must turn upon its own facts, to support a claim for this cause of action the defendant's acts must be "outrageous and intolerable in that it offends against the generally accepted standards of decency and morality." Id. at 342.

Similarly, Prosser has described the standard as "conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause ... mental distress of a very serious kind." Prosser Torts §12 at 60. Plaintiff's allegations clearly fail to achieve such level and her claims are insufficient as a matter of law.

For example, in Womack an innocent plaintiff's photograph taken under false pretenses was used at a preliminary hearing of a man charged with the sexual molestation of young boys. As a result plaintiff was approached by a police detective who told him he could voluntarily or involuntarily be summoned to the trial and was questioned both as witness and several times thereafter by police.

Indeed, the Womack decision cites four cases from other jurisdictions which are typical of the shocking behavior that must characterize a defendant's conduct in order to sustain a claim for intentional infliction of emotional distress. 215 Va. at 341, citing Aetna Life Insurance Co. v. Burton, 12 N.E.2d 360 (Ind. App. 1938); Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950); Boyle v. Chandler, 138 A. 273 (1927); Samms v. Eccles, 358 P.2d 344 (1961).

In Aetna Life Ins. Co. v. Burton, 12 N.E.2d 360 (Ind. App. 1938), a widow brought suit where a wrongful, illegal and perhaps fraudulent autopsy was performed on her husband of more than fifty years and the father of her seven children. In conducting the autopsy which was performed after the decedent's body was embalmed, the body was cut from the Adam's apple to four inches below the naval and was sewn up in such a manner as to "leave fluids therein which exuded from the mouth of the decedent." Id. at 361.

In Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950), the plaintiff's five year old son was accidentally shot and killed in her home when she was temporarily absent. After she was notified, plaintiff immediately returned to her home. However, prior to her arrival, the defendant undertaker had removed the child's body to his place of business. Thereafter, defendant performed an unauthorized autopsy on the child and refused to

surrender the child's body to the mother for several days until she paid him an excessive fee for performing the autopsy.

Similarly, in Boyle v. Chandler, 138 A. 273 (Del. 1927), involved the mutilation of the body of the plaintiffs' mother and surviving widower and the substitution of a much cheaper casket than plaintiffs had selected and paid for.

The final case cited by the Womack Court involved repeated and unsolicited indecent proposals of illicit sexual relations to a married woman. Samms v. Eccles, 358 P.2d 344 (Utah 1961). Defendant's behavior not only included persistent phone calls to plaintiff's home including calls late at night but also involved an incident where defendant came to plaintiff's home and indecently exposed himself.

Contrasted with such behavior, plaintiff's allegations herein appear trivial. According to plaintiff's allegations, the present defendants decided to discharge the plaintiff from her position with Shore Stop based upon the fabrication that she failed a polygraph examination. Such allegations are insufficient to state a cause for intentional infliction of emotional distress as a matter of law.

E. Count V: Negligence

Plaintiff attempts to allege a cause of action for negligence "based upon defendant's [failure] to adhere to ... their own establish policies and procedures regarding termination of [her] employment."

Even assuming such factual allegations are correct, there is however, no duty in tort to follow such procedures that runs from the defendants to the plaintiff. It is axiomatic that a cause of action for negligence presupposes the existence of some common law duty running from the alleged tortfeasor to the injured party. The absence of such a duty herein leaves this count factually defective.

F. Count VI: Tortious Interference with Contract

A ruling on Shore Stop's Demurrer to this Count is inexorably tied to the issue of whether plaintiff's employment relationship was terminable at will. Virginia law is clear that there is no cause of action for interference with contracts that are terminable at will. Heckler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396 (1985).

Accordingly, inasmuch as plaintiff's employment was for an unspecified duration, her relationship was terminable at will and no cause lies for any alleged interference therewith. Id. at 402.

G. Count VII: Defamation and Insulting Words

The parties have agreed that Shore Stop's Demurrer to Count VII alleging causes of defamation and insulting words would not be pursued at the present time. It was also expressly agreed that this course of action was not to be deemed a

waiver of the grounds raised in its Demurrer and that this was done without prejudice to Shore Stop in any manner. Accordingly, the Court need not rule in the legal sufficiency of this Count at the present time.

H. Count VIII: Punitive Damages

Plaintiff's Count VIII amounts merely to a plea for punitive damages. There is no separate independent cause of action for punitive damages and insofar as Count VIII attempts to state such a cause, it should be stricken.

Moreover, in the Virginia Supreme Court has made clear that punitive damages are proper only when there is a willful independent tort apart from any breach of contract. Kamlar Corp. v. Haley, 224 Va. 699 (1983). As noted above, plaintiff's claims in tort are insufficient as a matter of law. Accordingly, plaintiff's claims are not proper and must be dismissed.

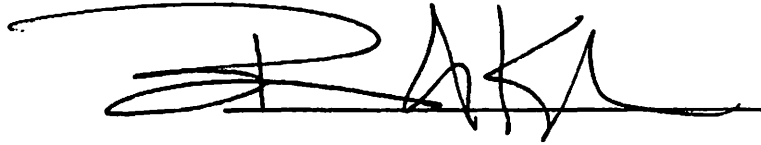
SHORE STOP, INC.
RAY KISHLAR

By  Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 17th day of March, 1987, to W. Vinton Hoyle, Jr., Esquire, James M. McCauley, Esquire, and Laurie A. Middleton, Esquire, HOYLE, CORBETT, HUBBARD AND SMITH, 11048 Warwick Boulevard, Suite 201, Newport News, Virginia 23601, and to Paul D. Fraim, Esquire, and Joseph T. McFadden, Jr., Esquire HEILIG, MCKENRY, FRAIM & LOLLAR, 700 Newtown Road, Suite 15, Norfolk, Virginia 23502.

A handwritten signature in black ink, appearing to be 'R. A. K.', written over a horizontal line.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

LAW NO. L-86-2537

SHORE STOP, INC., t/a
LITTLE SUE FOOD STORES, INC.,
RAY KISHLAR,
JOHN MYERS,
FRANKLIN SECURITY SYSTEMS,
INC.
and
DON POPE,

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEMURRER FILED
ON BEHALF OF DEFENDANTS SHORE STOP, INC. AND RAY KISHLAR

Plaintiff relies on the factual allegations set forth in her Motion for Judgment filed with the court and which brings the parties together on the Demurrers filed on behalf of all of the defendants served. At the hearing on defendants' Demurrers on February 20, 1987 it was deemed advisable for the parties to file Briefs in support of their positions. This Memorandum of Law responds to a brief filed on March 17, 1987, on behalf of the defendants Shore Stop, Inc. and Ray Kishlar.

The defendants' attempt to paraphrase plaintiff's factual allegations, at page 2, is woefully inadequate inasmuch as all of the factual allegations plaintiff relies on to support her claim of breach of contract have been omitted by the defendants. Therefore, plaintiff will discuss the facts in this case vis-a-vis the various counts which are addressed below.

In addition, plaintiff incorporates by reference, a separate Brief she filed in opposition to Demurrers filed on behalf of defendants Franklin Security Systems, Inc. and Don Pope.

COUNT I -- BREACH OF CONTRACT

Defendants Kishlar and Shore Stop, in their recitation of the facts, overlook the factual allegations in plaintiff's Motion for Judgment contained at pages 8 through 10. Plaintiff maintains that there was an express and/or implied-in-fact agreement that she could only be terminated for cause, i.e., that she would not be terminated as long as her job performance was satisfactory. Plaintiff alleges that agents, servants or employees of the defendants made oral assurances to her concerning job security, that her employment was permanent in nature and could only be terminated by defendant if plaintiff gave defendant good cause to terminate such contract of employment. See, Motion for Judgment, pages 8-9, paragraph 26. In fact, plaintiff further alleges that defendants made her sign and acknowledge a form which set forth specific and particular grounds for dismissal, and, therefore, the defendants impliedly represented to her that she could only be terminated for those reasons, i.e., for cause.

In addition, at paragraph 27 of her Motion for Judgment, plaintiff further alleges that she was entitled to warnings that she was in violation of company policy, before she could be terminated. Plaintiff alleges that she never received any such warnings or notifications prior to her dismissal.

Also, at paragraph 26, plaintiff alleges that defend-

ants led her to believe that after successful completion of her probationary period, she would become a full time, permanent employee, who could only be terminated for just cause.

Plaintiff's allegations, along with the logical inferences that may be taken from the pleadings as a whole, are to be taken as true for the purposes of this Demurrer. Vostis v. Ward's Copy Shop, 217 Va. 652 (1977).

At-Will Presumption

Defendants contend plaintiff has failed to plead a cause of action for breach of contract because plaintiff was subject to the so-called "at-will" presumption in Virginia, under which plaintiff could be discharged at any time and for any reason or no reason whatsoever. While Virginia, like most states, has recognized the presumption that an oral contract of employment for an unspecified term can be terminated at the will of either the employer or employee, the doctrine is merely that: a presumption that tentatively fixes for the parties a period of time for the employment, just as the law in England presumes that such a contract is for a one-year period. 1 W. Blackstone, Commentaries 425.

Yet Virginia, like nearly all of her sister states, has recognized numerous exceptions to the at-will presumption. This is merely another way of saying that the parties can contractually bind themselves--mutually or unilaterally--to terms other than one at-will. When the parties, by their conduct or promises, provide that the contract is terminable only for good cause, the presumption is overcome. It is, at that point, unnecessary, and irrelevant.

(1982), the Virginia Supreme Court said:

"... Where no specific time is fixed for the duration of employment, it is presumed to be an employment at-will, providing a dismissed employee no basis for recovery of damages against his erstwhile employer. Hoffman Specialty Co. v. Pelouze, 158 Va. 586, 164 S.E. 397 (1932). We said, however, that "this presumption ... is rebuttable" in Hoffman by "the interpretation which the parties themselves placed upon the matter."

That the "at-will" rule is nothing more than an evidentiary presumption, and not a substantive doctrine of contract law, is evident by the Virginia Supreme Court's statement in Hoffman Specialty Co. v. Pelouze, 158 Va. 586, 164 S.E. 397, 400 (1932) wherein the court stated:

"There was no expressed stipulation, either written or oral, which fixed the time for the continuance of the employment of the plaintiff by the defendant. That element of their contract depended upon the understanding and intent of the parties; which could be ascertained only by inference from their written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment, and all the circumstances of the case. It was an inference of fact, to be drawn only by the jury."

Plaintiff has alleged in the Motion for Judgment that a contract between defendant and plaintiff existed at the time plaintiff was discharged, the terms of which included assurances to plaintiff that discharge would be only for just cause.

Defendant's argument that no time was fixed for the duration of employment between plaintiff and defendant was dealt with by the Virginia Supreme Court in Norfolk Southern R.R. Co.

v. Harris, 190 Va. 966, 57 S.E.2d 110 (1950). In that case the court held:

... A definite time was fixed for the duration of the employment. It was, by the terms of the contract, to continue until the plaintiff gave to the defendant just cause to end it. The result of being discharged after long years of services in a particular occupation can well be serious. The defendant's agreement that it would not discharge plaintiff without just cause was a thing of value to him, a safeguard against the loss and embarrassment to be expected from an arbitrary discharge. The defendant's agreement that it would not be done was a term of plaintiff's employment, compensation for his work which he had earned along with his wages. The defendant ought not to take that promised reward from him without incurring a penalty for violating its agreement. It was a promise in return for services which the plaintiff performed and which furnished sufficient consideration for a binding contract. In such a case the doctrine of mutuality is inapplicable.

It is true that the contract of employment in Norfolk Southern R.R. Co. v. Harris, supra, was a written contract of employment. However, the result is nevertheless the same. Where an employer assures an employee that the employee will only be terminated "for cause" a definite time is fixed for the duration of the employment. The employment, by the terms of such contract, is to continue until the plaintiff gives to the defendant just cause to end or terminate it.

In addition, an employer in Virginia can unilaterally issue policies, or promises, to its employees which are binding on the employer. These promises by the employer are valid contractual provisions, the consideration for which is the employees continued loyalty and service on behalf of the employer.

In Hercules Powder Co. v. Brookfield, 189 Va. 531, 53 S.E.2d 804 (1949), the employer promised to its workers a severance bonus if they would continue working in the face of what seemed to be almost certain layoffs to induce or encourage the employees to remain until the plant shut down, rather than looking for other jobs immediately. Although the court found that the employer had reserved the right to discontinue its severance-pay policy, "it could not deprive the plaintiff of benefits of dismissal salary already earned as of the date of the discontinuance." 53 S.E.2d 804 at 809.

With regard to the employer's argument that its workers were "at-will" and that similarly any benefits promised them could be revoked, the court in Hercules held that the severance pay provision was not "a mere promise of a gratuity revokable at will," but rather the employee's continued performance in reliance upon the severance pay policy constituted a full and complete acceptance of the employer's offer. The court reasoned that "ample authority sustains the view that such a promise amounts to an offer, which, if accepted by performance of the service, fulfills the legal requirements of a contract." 53 S.E.2d at 808.

The holding in Hercules was forcefully affirmed by the Virginia Supreme Court in Dulany Foods, Inc. v. Ayers, 220 Va. 502, 260 S.E. 196 (1979). Whether written or oral policies concerning job security can become enforceable terms of an employment agreement has not been considered by the Virginia Supreme Court. Many other jurisdictions, however, have directly

addressed the matter. Of those jurisdictions, the great majority have held that such policies can be enforced as contractual provisions under certain circumstances. See, Appendix A, attached hereto. The courts in those jurisdictions have emphasized that the employment at-will doctrine has been eroded and that fairness precludes an employer who offers alluring inducements or statements to an employee, including job security, from summarily withholding those benefits.

Although this issue has not been addressed by the Virginia Supreme Court, various federal district courts, applying Virginia law, uniformly have permitted the plaintiff to proceed under a contractual theory, under factual circumstances similar to those alleged in the instant case. See, e.g., Thompson v. Kings Entertainment Co., Civil Action No. 86-0572-R (J. Merhige, 2/28/87); Thompson v. American Motor Inns, Inc., 623 F.Supp. 413 (W.D. Va. 1985); Barger v. General Electric Co., 599 F.Supp. 1154 (W.D. Va. 1984); Frazier v. Colonial Williamsburg Foundation, 574 F.Supp. 318 (E.D. Va. 1983).

Several of the circuit courts in Virginia have reached similar results with their interpretation of Virginia law. See, eg, Emil Seitz, Jr. v. Philip Morris, Inc., Circuit Court, Richmond, Virginia, Case No. LK 848-1, October 3, 1986, J. Melvin Hughes, Jr.; Smith v. Arthur H. Fulton, Inc., Law No. 4333, Circuit Court, Frederick County, Virginia, December 12, 1984, reported in 4 Va. Cir. Ct. Ops. 244, J. Robert K. Woltz; and Rilee v. Newport News Shipbuilding & Dry Dock Co., Law No. 8894-S, Circuit Court, Newport News, October 15-16, 1985.

For example, in Rilee v. Newport News Shipbuilding & Dry Dock Co., the Honorable Douglas Smith permitted an employment case to go to the jury where the evidence showed that plaintiff was told that after successful completion of a six month probationary period, plaintiff would only be terminated for just cause. Another factually similar case was decided by the Honorable Robert K. Woltz in Smith v. Arthur H. Fulton, Inc., where the plaintiff alleged that he was hired under an oral agreement. Plaintiff alleged that after completion of a six-month probationary period, he was to be employed for so long as he satisfactorily performed his duties. Judge Woltz, as did Judge Smith, found that these factual circumstances take the case out of the "at-will" rule. Accordingly, the plaintiff were allowed to proceed on their breach of contract theory.

The cases in support of plaintiff's position in this case are legion, and, in any event, too numerous to review in this Memorandum of Law. See, Appendix A. While it is true the federal cases are not binding on this court, four different federal court judges have reached similar interpretations of Virginia law. These cases are at least persuasive authority as to how the Virginia Supreme Court would rule, if it were faced with the identical question. In addition, as noted above, several of our circuit courts have been inclined to give legal effect to various oral and written assurances given by an employer to an employee concerning job security. It is only fair and right that the courts enforce these binding obligations.

Defendants next contend that plaintiff gave just cause

to the defendants to terminate her employment, when she arranged to have her friend take the polygraph examination in her stead. Defendants characterize this behavior on the part of plaintiff as "deceit" and "trickery". However, taking plaintiff's allegations, as we must, as being true, she was confronted with a "catch-22" situation: if she refused to take the polygraph examination, she was told that she would be fired; but, if she took the polygraph examination, she knew that she would fail the polygraph examination, and be fired. Therefore, defendants completely frustrated plaintiff's ability to perform her contract. No matter what plaintiff did, her contract of employment would have been terminated. It is axiomatic in contract law that when one party frustrates another party's ability to perform his contract, then there has been a breach of contract. 4B Mich. Jur. Contracts, Section 74, page 130 (Repl. Vol. 1986). Plaintiff's conduct, therefore, under the circumstances of this case, did not furnish to the defendants just cause to terminate her employment.

Plaintiff's factual allegations, which must be taken as true at this stage of the proceedings, lay out all the necessary elements of a contract under which plaintiff was entitled to the benefit of defendant's policies regarding warnings, redress and terminability only for cause. The question of the existence of such contractual provisions, and whether the terms of the contract were breached, as plaintiff alleges, is clearly one for the jury.

In addition, Virginia's common law requires that, in

every contract of employment, the parties are bound by a contractual provision, implied in law, that they deal with each other fairly and in good faith. In Forsberg v. Zehm, 150 Va. 756, 143 S.E. 285 (1928), the Virginia Supreme Court found that in an employment contract for a music director of a church, there was implied in law a covenant of good faith and fair dealing, and that the employee could not be discharged arbitrarily or in bad faith. See also, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (Mass. 1977), where the court held that a salesman's employment contract, even though one "at-will" could not be terminated in bad faith, in that case to avoid paying the salesman bonuses.

Clearly, the defendants' conduct in this case, as alleged by the plaintiff, rises to the level of "bad faith" and the defendants' wilfully and maliciously schemed with an outside party, Franklin Security Systems, Inc., to induce a breach of plaintiff's contract of employment.

For these reasons, the defendants' Demurrer, as to Count I, must be overruled.

COUNT II--WRONGFUL DISCHARGE

Plaintiff's Motion for Judgment alleges that plaintiff was wrongfully discharged in violation of public policy, and that the defendants are liable in tort because of their actions. Specifically, plaintiff alleges defendants breached the long-standing policy of this Commonwealth, recognized both in the case law and by statute, against fraud, as well as the statutory prohibition against conspiracy to interfere with one's trade or

occupation. See, e.g., Virginia Code Sections 18.2-499 and -500, as amended.

Virginia, in Bowman v. State Bank of Keysville, 229 Va. 534, 331 S.E.2 797 (1985), joined the majority of states in recognizing the tort of wrongful discharge, holding that such an action will lie where the defendant violates an expressed statutory provision or where the discharge contravenes a firmly established public policy.

In the case at bar, defendant John Myers induced plaintiff to change her mind about refusing to take the polygraph examination. The plaintiff, had the right to assume that the polygraph examination offered to her by Myers, would be conducted in a fair manner, as had been presumably done with the five polygraph examinations which plaintiff had taken, and passed, prior to that time.

In reliance upon defendant Myers' assurance that plaintiff could return to work, if she took the polygraph examination, plaintiff retracted her resignation from employment, and her refusal to take the polygraph examination. Plaintiff gave up something very valuable in reliance upon Myers' assurances: plaintiff gave up her right to voluntarily resign from her employment, without adverse consequences, and placed herself in a situation where she could be terminated.

Since defendant John Myers had not accepted plaintiff's letter of resignation, she was, at that point, subject to being terminated. In other words, John Myers induced plaintiff to remain in the employ of defendant long enough so that Myers would

have an opportunity to terminate plaintiff's employment, rather than permitting her to resign without the consequences and stigma of being terminated for failing a polygraph examination. Once plaintiff committed herself to taking the polygraph examination, she was forced into one of two options: (1) refuse again to take the polygraph examination, and be discharged; or (2) take the polygraph examination, fail it and be discharged.

Therefore, contrary to defendants' assertions, plaintiff can show the essential element of reliance and inducement. The reliance and inducement occurred when plaintiff changed her position, and agreed to take the polygraph examination, based upon Myers' representations that she could return to work after having done so. When defendant Myers offered the polygraph examination to plaintiff, there was an implied representation that this test would be no different from the other which plaintiff had taken in the past, and, in any event, would not be a "sham" in order to create cause for plaintiff's discharge. Here, defendant Myers' concealment of a material fact from plaintiff (i.e., that the polygraph examination had been "set up" for her fail it) and Myers knowing that plaintiff was acting on the assumption that the test would be fairly administered at the time she agreed to be examined, constituted actionable fraud. See, e.g., Clay v. Butler, 132 Va. 464, 474, 112 S.E. 697, 700 (1922) cited in, Allen Realty Corp. v. Holbert, 227 Va. 441, 450, 318 S.E.2d 592 (1984). The principle is that concealment of a material fact by one who knows that the other party is acting upon an assumption that the fact does not exist constitutes actionable fraud.

The fact that plaintiff did not actually take the test, and sent someone else in her stead, does not change the result. When offered the test by Myers, plaintiff was entitled to believe and understand that such a test would be fair, and in reliance thereon, was induced to change her position about the polygraph test, and, in so doing, placed herself in a position where her employment was in jeopardy.

As a second public policy which has been breached by the defendants, to support her claim for wrongful discharge, plaintiff alleges that the defendants conspired with outside third parties, i.e., Don Pope and Franklin Security Systems, Inc., to induce a breach of her contract of employment. Public policy prohibits conspiracy to induce a breach of contract and intentional interference with contractual relationships. This conduct is expressly prohibited by Virginia Code Sections 18.2-499 and -500 as well as case law in this commonwealth.

An action in tort will lie against those who conspire to induce a breach of contract and this rule will be applied to hold one liable for conspiring to breach his own contract. Worrie v. Boze, 198 Va. 533, 540-41 (1956).

For the foregoing reasons, defendants' Demurrer as to Count II must be overruled.

COUNT III--FRAUD

Plaintiff's cause of action for fraud under Count III has already been discussed in connection with plaintiff's cause of action for wrongful discharge under Count II. Therefore, no further discussion is needed at this point. Plaintiff has laid

out the necessary factual allegations to support a cause of action for fraud and defendants' Demurrer thereto should be overruled.

COUNT IV--INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff's Motion for Judgment, taken as a whole, lays out facts that amply support the elements needed to plead a cause of action for intentional infliction of emotional distress. In Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974), the elements were laid out simply, and are applicable here:

- (1) intentional or reckless conduct by defendant;
- (2) that is outrageous and offends against generally accepted standards of decency and morality;
- (3) which defendant knew or should have known would proximately cause severe emotional distress in the plaintiff; and
- (4) severe emotional distress is sustained by the plaintiff.

Plaintiff has alleged each of these elements and the factual circumstances which support them. Defendants' only argument is that they believe that their conduct was not sufficiently "outrageous" to satisfy the test under Womack. As compared with other cases, defendants contend that plaintiff's factual allegations appear "trivial".

Defendants overlook several factual allegations which are crucial to plaintiff's claim. First, she was forewarned that she was going to be "set up" in a polygraph examination, where the questions asked of her included:

- (1) "Since your last test did you steal any money from

Little Sue?" and

(2) "Since your last test did you steal any merchandise from Little Sue?" See, page 7, paragraph 22. In short, plaintiff was being forced into a polygraph examination where she would be tested as being dishonest in response to these questions. Thus, her allegations are not simply based upon distress caused by the discharge, nor the fact that defendants terminated her because of the alleged polygraph test results. The emotional distress and outrage likewise stems from the fact that defendants were charging her with serious criminal offenses, in the form of a polygraph examination she was destined to fail. In addition, plaintiff alleges that after her discharge, defendant John Myers told customers at the store that she was terminated because she failed to pass a polygraph examination. This statement, made to customers of the store, was a source of great embarrassment and humiliation to the plaintiff. Such a statement imputed to the plaintiff a lack of integrity and dishonesty in the performance of her job as a store manager.

The manner in which defendants brought about the termination of the plaintiff was outrageous and intolerable. If the plaintiff was an "at-will" employee, as defendants claim, then their entire course of conduct was entirely unnecessary. Defendant John Myers was determined to humiliate and damage plaintiff's personal and professional reputation and did so in a manner that was outrageous and offended against generally accepted standards of decency and morality.

The stigma of having been terminated by the defendants

for failing the polygraph test, is a matter which plaintiff must now explain to potential employers, in seeking alternate employment to mitigate her damages and losses. In addition, defendant Myers' indiscriminate comments to customers or the general public about the plaintiff's discharge constitutes reckless and intentional conduct for which a tort action should lie.

Therefore, the outrageousness of the defendants' conduct in this case is a matter which should be left to the sound discretion of the jury. Defendants' Demurrer to Count IV should be overruled.

COUNT V--NEGLIGENCE

Defendants claim that plaintiff has failed to allege an actionable duty running from the defendants to the plaintiff which would support a cause of action for negligence. Plaintiff has alleged that she could only be dismissed for just cause after a series of warnings, designed to allow plaintiff to improve any alleged shortcomings, were given to her. In addition, the defendants were negligent in failing to properly evaluate her inventory problem at the store, and to allow plaintiff the opportunity to demonstrate that the perceived inventory shortage was the result of erroneous paperwork. Instead, defendants negligently assumed that the nature of the inventory problem was plaintiff's personal theft and dishonesty.

The negligent manner in which defendants' agents, servants and employees inventoried the plaintiff's store, and their failure to allow plaintiff an opportunity to explain the shortage in inventory, constitutes actionable negligence on their

part. Additionally, subjecting plaintiff to the requirement of a polygraph test, without giving the plaintiff an opportunity to review the paperwork at corporate headquarters, as she requested, was negligent.

Here, plaintiff has alleged that she was given no opportunity to evaluate the records held at defendants' Belle Haven office, despite her request, to determine why the inventory shortage was reported at her store and to determine where the problem existed. In contrast, other store managers were encouraged --and paid-- to do so under Shore Stop's custom and practice. The defendant employer was negligent in failing to allow Mrs. Elliott the simple opportunity to review the records on her store to see if she could not explain the inventory problem. Instead, defendants forced the plaintiff into a situation where her honesty was falsely impugned and used as a basis for discharging her.

In this case, the defendant employer undertook the responsibility of investigating the inventory shortage problem at the plaintiff's store. In so doing, it also undertook the responsibility to handle the investigation, and their evaluation of plaintiff's performance as it related thereto, with reasonable care.

A defendant employer has no legal obligation to evaluate its employees' performance. However, once an employer gratuitously or affirmatively assumes an undertaking to evaluate an employee's performance, it must discharge that undertaking with reasonable care. Schipani v. Ford Motor Co., 102 Mich. App.

606 (1981); Chamberlain v. Bissell, Inc., 547 F.Supp. 1067 (W.D. Mo. 1982) (holding that an employer who does not use reasonable care in evaluating an employee's performance is guilty of negligence).

The law generally recognizes that there is a duty to use reasonable care in the performance of an obligation, even a gratuitous one. Where performance clearly has begun, there is no doubt that there is a duty of care. Prosser, Law of Torts, Section 56 at page 346 (4th Ed. 1971).

COUNT VI--TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

Virginia Code Sections 18.2-499 and 18.2-500 provide prohibitions against and remedy for conspiracy or interference with contractual relationships. This principle, recognized by Virginia common law, was applied in the landmark case of Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956).

In Hechler Chevrolet, Inc. v. GMC, 230 Va. 396 (1985), the court held that tortious interference with contractual relations stops short of "redressing interference with contracts terminable at will provided no improper methods are used". The Hechler case has no application to the instant case for two reasons:

(1) the plaintiff in Hechler did not plead improper methods or unlawful conduct, as the plaintiff has in the case at bar; and

(2) plaintiff has provided ample argument, allegations and legal authorities to support her position that her employment contract was not "at-will".

In Hechler Chevrolet, an automobile manufacturer, GMC, legitimately discontinued a product line which resulted in the termination of plaintiff's franchise. This was not improper or unlawful conduct on the part of the defendant. In contrast, the plaintiff in this case has alleged that the defendants improperly and unlawfully "fixed" her polygraph examination so that she could not pass it. Most importantly, however, are plaintiff's allegations that her contract of employment was terminable only for cause, not at-will. Therefore, Hechler Chevrolet, supra, is not dispositive.

Even assuming that plaintiff's contract of employment was terminable "at will" as defendants claim, plaintiff and her attorneys would argue, in good faith, for a modification and/or reversal of the court's holding in Hechler Chevrolet. That decision is clearly against the weight of authority in other jurisdictions. Prosser states that the overwhelming majority of the cases have held that interference with employments or other contracts terminable at will is nevertheless actionable, since until it is terminated, the contract is a subsisting relation, of value to the plaintiff, and presumably to continue in effect. Prosser, Law of Torts, Section 129, pages 932-33 (4th Ed. 1971). See, e.g., Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282, 79 ALR 3d 651 (1976) (tort of wrongful interference with contractual relationship applies to contracts terminable at will). See also, Restatement (2d) of Torts, Section 766, comment (g) (1979) (tort of intentional interference with contractual relations applies to contracts terminable at will); Bomar v.

Keyes, 162 F.2d 136, 139 (2d Cir. 1947) (discharged probationary teacher stated cause of action for intentional interference with contractual relationship).

Even if defendant Shore Stop had the right to terminate plaintiff's employment "at will", such that plaintiff had no enforceable right to continued employment, this should not preclude plaintiff's cause of action against a non-party to the contractual relationship which has been damaged, i.e., defendants Franklin Security Systems, Inc. and Don Pope. Most courts follow the reasoning succinctly stated by the Supreme Court in Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915); "the fact that the employment is at the will of the parties, respectively, does not make it one at the will of others." 239 U.S. at 38.

COUNT VII--DEFAMATION AND INSULTING WORDS

Defendants Shore Stop, Inc. and Kishlar have agreed not to pursue their Demurrer, as to Count VII, alleging causes of defamation and insulting words, at the present time. Accordingly, argument on this Count has been deferred, and the court need not rule on the legal sufficiency of this Count at the present time.

COUNT VIII--PUNITIVE DAMAGES

Defendants are correct that this Count merely sets out plaintiff's plea for punitive damages in this lawsuit. It does not purport to be a cause of action in and of itself.

However, the Count merely alerts defendants and places them on notice that plaintiff does seek punitive damages in this case, based upon the independent and intentional torts set forth

APPENDIX A

The following cases, in jurisdictions outside of Virginia, hold that employment handbooks, personnel policies, oral assurances and custom and practice regarding job security may be enforceable or used to rebut the "at-will" presumption:

Toussaint vs. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980).

Cleary v. American Airlines, Inc., 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980).

Terrio v. Millenocket Hosp., 379 A.2d 135 (Me. 1977).

Bennett v. Eastern Rebuilders, 52 N.C.App. 579, 279 S.E.2d 46 (1981).

Brewster v. Martin Marrietta Aluminum Sales, Inc., 378 N.W.2d 558 (Mich.App. 1985).

Pine River State Bank v. Metille, 333 N.W.2d 622 (Minn. 1983).

Morris v. Lutheran Medical Cent., 215 Neb. 677, 340 N.W.2d 388 (1983).

Weiner v. McGraw-Hill, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

Forrester v. Parker, 93 N.M. 781, 606 P.2d 191 (1980).

Arie v. Intertherm, Inc., 648 S.W.2d 142 (Mo. App. 1983).

Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 576 P.2d 356 (1978).

Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983).

Leikvold v. Valley View Community Hosp., 688 P.2d 170 (Ariz. 1984)

Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984).

Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo.App. 1984)

Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359 (N.D. 1984)

Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983)

Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985).

Finley v. Aetna Life & Cas. Co., 5 Conn. App. 394, 499 A.2d 64 (1985).

Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985)

Sherman v. Rutland Hosp., 500 A.2d 230 (Vt. 1985).

Wiskotoni v. Michigan Nat'l Bank - West, 716 F.2d 378 (6th Cir. 1983) (Applying Michigan law).

Ohanian v. Avis Rent-A-Car, 779 F.2d 101 (2d Cir. 1985) (Applying New York law).

in plaintiff's Motion for Judgment. Thus, if any of plaintiff's intentional torts are deemed sufficient by this court, then plaintiff's claim for punitive damages is proper.

WANDA BROWN ELLIOTT

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Counsel for Plaintiff

CERTIFICATE

I hereby certify that a true copy of the foregoing Plaintiff's Memorandum in Opposition to Demurrer Filed on Behalf of Defendants Shore Stop, Inc. and Ray Kishlar was mailed, postage prepaid, to all counsel of record this 27th day of March, 1987.

James M. McCauley

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

LAW NO. L-86-2537

SHORE STOP, INC., t/a
LITTLE SUE FOOD STORES, INC.,
RAY KISHLAR,
JOHN MYERS,
FRANKLIN SECURITY SYSTEMS,
INC.
and
DON POPE,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEMURRERS
OF DEFENDANTS FRANKLIN SECURITY SYSTEMS, INC. AND DON POPE

Preliminary Statement

At oral argument on the defendants' Demurrers on February 20, 1987, the court requested that all the parties file briefs concerning the issues raised by defendants in their respective Demurrers. This Memorandum of Law is in response to the Memorandum of Law filed on behalf of defendants Franklin Security Systems, Inc. ("Franklin") and Don Pope ("Pope") on March 16, 1987. At the hearing on the Demurrers on February 20, 1987, counsel for plaintiff agreed to dismiss all counts against defendants Franklin and Pope, except Count V (negligence) and Count VI (tortious interference with contractual relations). Since Counts V and VI are the only causes of action now remaining against defendants Franklin and Pope, this Memorandum of Law will only address those two counts. A separate Memorandum of Law will

be filed addressing the other claims or counts remaining against the other defendants in this case, Shore Stop, Inc., Ray Kishlar and John Myers.

Operative Facts

Plaintiff contends, in Count VI of her Motion for Judgment, that defendants Franklin and Pope conspired with the remaining defendants in this action--Shore Stop, Inc., John Myers and Ray Kishlar--to induce a termination of plaintiff's contract of employment with Shore Stop, Inc., or, alternatively, that said defendants acted in concert to tortiously interfere with plaintiff's employment contract. See Motion for Judgment, page 14, paragraph 36.

There are ample factual allegations set forth through out plaintiff's Motion for Judgment to support her cause of action for intentional interference with contractual relations, a tort action which is cognizable in Virginia under the authority of Worrie v. Boze, 198 Va. 533 (1956). See also, Chaves v. Johnson, 230 Va. 112 (1985).

Defendants Franklin and Pope, in their Memorandum of Law dated March 16, 1987, do not appear to question that the conduct of the defendants, as alleged by plaintiff in her Motion for Judgment, rises to the level of a conspiracy on the part of the defendants to induce a breach of plaintiff's contract of employment. In their Demurrer filed February 12, 1987 defendants Franklin and Pope merely asserted that:

"Count VI fails to state a cause of action against these defendants, since plaintiff's employment was terminable at

will." See, Demurrer filed on behalf of defendants Franklin Security systems, Inc. and Don Pope, February 12, 1987.

However, in their Memorandum of Law filed on March 16, 1987, defendants Franklin and Pope address an entirely new and incredible issue, i.e., that defendant Franklin Security Systems, Inc. was acting in its capacity as an agent for Shore Stops, Inc., and therefore did not interfere, as an independent third party, with plaintiff's contract of employment. This argument is an apparent afterthought and a sad red herring. Before addressing defendants' "at will" argument and their "agency" argument, plaintiff would like to identify the operative facts which support her claim for intentional interference with contractual relations.

First of all, plaintiff alleges in her Motion for Judgment that she had in fact taken and passed five (5) polygraph examinations since her date of hire in April of 1984. See, Motion for Judgment, page 4, paragraph 9.

Plaintiff further alleged that her supervisor, John Myers, was determined to terminate her contract of employment anyway he could. See, Motion for Judgment, paragraphs 9 and 28(a).

Plaintiff further alleges in her Motion for Judgment that her supervisor, John Myers, would not accept plaintiff's initial refusal to take the polygraph test in question, and refused her initial resignation, and in fact encouraged plaintiff to change her mind. Motion for Judgment, paragraphs 9, 10 and 12.

In the morning on the day that plaintiff was scheduled to take the polygraph test in question, she received a telephone call which apparently originated from her employer's corporate office. The caller informed plaintiff: "I overheard John Myers say that you would not pass the polygraph. You've been set up. Good luck." Motion for Judgment, page 6, paragraph 16.

After plaintiff realized that she was being "set up" she sent a friend, Kathy Cagle, to the offices of defendant Franklin to take the polygraph examination in her place. Motion for Judgment, page 6, paragraph 17.

Defendant Franklin, by and through their employee, Don Pope, did in fact give a polygraph examination to Ms. Cagle, from whom he requested no form of identification whatsoever, and who apparently answered correctly, without reported signs of deception, questions which presumably only the plaintiff, Wanda Brown, could answer truthfully, i.e., name, birthdate, birth place, and social security number. Motion for Judgment, page 6, paragraph 18. Ironically, Ms. Cagle, an admitted impostor, was able to satisfy defendant Pope that she was in fact Wanda Brown but at the same time showed signs of deception when key questions related to employee theft and dishonesty were put to her.

While Ms. Cagle was still at the Norfolk office of Franklin Security, defendant John Myers placed a telephone call to defendant Don Pope. Motion for Judgment, page 7, paragraph 21.

None of the defendants knew at that time that plaintiff herself had not taken the polygraph test and had in fact substituted an impostor. Their assumption was that plaintiff had

in fact taken the polygraph test and failed it. For that reason, plaintiff's employment was terminated. See, Motion for Judgment, page 8, paragraph 23.

The function of a Demurrer is to test whether the lawsuit states a cause of action upon which relief can be granted and a Demurrer admits as true all allegations of material facts which are well pleaded. Penick v. Dekker, 228 Va. 161, 319 S.E.2d 760 (1984). Therefore, plaintiff is entitled to have the foregoing factual allegations deemed admitted and she is entitled to whatever proper inferences can be drawn therefrom.

It is apparent, based upon these factual circumstances, that John Myers and Don Pope intended to have plaintiff fail the polygraph test, and that both of them thought plaintiff had in fact taken the test. Whether plaintiff had actually taken the test or not made no difference because these defendants assumed that she did, and plaintiff's employer terminated her employment based upon the results of the test.

The trier of fact could infer from this set of factual circumstances that these events could not have occurred unless defendants Pope and Myers conspired together to have plaintiff fail the polygraph test and plaintiff's contract of employment was terminated or interfered with as a result of their conspiracy.

ARGUMENT

I. Defendants' Argument That They Were Merely the "Agent" of Shore Stop, Inc., in Administering the Polygraph Examination, Is an Improper Argument to Raise on a Demurrer

Because It Is Based Upon Factual Matters Not Raised in Plaintiff's Motion for Judgment.

Defendants Franklin and Pope contend, and plaintiff does not disagree, that in order to state a cause of action for intentional interference with a contractual relationship, there must be a third party, who is not a party to the contract at issue, who is guilty of intentional and improper interference. In other words, there must be intentional tortious conduct by someone not a party to the contractual relations damaged. See, e.g., Smith v. Ford Motor Co., 281 N.C. 71, 221 S.E.2d 282, 79 ALR 3d 651, 665 (1976) (outside third party connotes one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof).

Defendants contend that:

"An agency relationship existed between Franklin and Shore Stop, and, in that regard, the role of Franklin and Pope does not fit that of a third-party tortfeasor who has intentionally interfered with the contractual relations of another." Defendants' Memorandum of Law, March 16, 1987, at page 2.

However, nowhere in plaintiff's Motion for Judgment does she allege the existence of any agency relationship by and between Shore Stop, Inc. and Franklin Security Systems, Inc. Nor does plaintiff even allege in her lawsuit that these defendants had any sort of contractual relationship. The mere fact that plaintiff has alleged in her Motion for Judgment that her employer, Shore Stop, Inc., sent her to defendants Franklin and

Pope for a polygraph examination, does not make defendants Franklin and Pope "agents" or "employees" of defendant Shore Stop, Inc.

Defendants Franklin and Pope may assert an affirmative defense based upon some kind of "agency" relationship with her employer, Shore Stop, Inc. However, for purposes of a Demurrer, defendants Franklin and Pope must find factual allegations in plaintiff's Motion for Judgment to raise this argument on a Demurrer. Even in their Demurrer, defendants Pope and Franklin do not raise the issue that they were acting in an agency capacity for defendant Shore Stop, Inc. However, only plaintiff's Motion for Judgment should be considered at this stage.

A basic rule concerning Demurrers is that a Demurrer properly lies for only such defects as are apparent upon the face of the pleading. It cannot allege matters foreign to the pleading. Thus, if a defect is not apparent in the Motion for Judgment, the defendant should show his objection by plea or answer. A Demurrer can never be based upon matters collateral to the pleading and must, as a general rule, be decided without reference to extraneous matter. 6A Mich. Jur. Demurrers, Section 8 (Repl. Vol. 1985). See, e.g., Anderson v. Anderson, 189 Va. 793, 55 S.E.2d 1 (1949).

Plaintiff's Motion for Judgment clearly regards defendants Franklin and Pope as independent third-parties. She does not allege the existence of any agency or contractual relationship by and between her former employer and these

defendants. Accordingly, the argument that defendants Franklin and Pope were not independent third-parties must be raised by those defendants in an answer or grounds of defense and is a matter upon which they have the burden of proof. Accordingly, their Demurrer must be overruled on that basis.

II. Even Assuming that Defendants "Agency" Defense Is A Proper Argument On A Demurrer, Defendants Pope and Franklin Have Failed to Demonstrate That Such An Agency Relationship Existed.

Obviously, the burden of proving an agency relationship rests upon the person who is seeking to establish it. 1A Mich. Jur. Agency, Section 111, page 618 (Repl. Vol. 1980); Nuckols v. Nickols, 228 Va. 25, 320 S.E.2d 734 (1984). In Virginia, two factors are necessary in order for an agency relationship to be established:

(1) The alleged agent must be subject to the principal's control, with regard to the work to be done and the manner of performing it; and

(2) The work has to be done on the business of the principal or for the principal's benefit.

United States v. Rapoca Energy Co., 613 F.Supp. 1161 (W.D. Va. 1985). See, e.g., Whitfield v. Whittaker Mem. Hospital, 210 Va. 176, 181, 169 S.E.2d 563, 567 (1969); Smith-Johnson Motor Corp. v. Hoffman Motors Corp., 411 F.Supp. 670 (E.D. Va. 1975).

Moreover, the mere fact that a contract exists between the parties does not establish that an agency relationship exists. 2A C.J.S. Agency, Section 12, page 570 (1972). Such a

contract must reserve to one party the right to regulate or control the activities or conduct of the other party in order to create an agency relationship. Murphy v. Holiday Inns, Inc., 216 Va. 490, 219 S.E.2d 874, 81 ALR 3d 756 (1975) (license agreement and typical franchise contract did not create a principal-agent or master-servant relationship between the contracting parties).

In defendants' Brief, at page 2, Franklin and Pope concede that they were not "employees" of defendant Shore Stop, Inc. However, defendants Pope and Franklin blanketly assert that they are somehow "agents" of defendant Shore Stop, Inc. but offer nothing to support this blanket assertion. For example, they do not state that Shore Stop, Inc. had the right to exercise any control over the manner in which defendants Franklin and Pope administered polygraph examinations. They have not produced a copy of any alleged contract by and between Franklin Security Systems, Inc. and Shore Stop, Inc. Defendants Franklin and Pope could just as easily be "independent contractors" rather than "agents" but there is nothing before the court at this time to enable it to draw such a distinction.

Accordingly, defendants' Demurrer on this basis must be overruled.

III. Even Assuming That Defendants Franklin and Pope Were In Fact "Agents" of Defendant Shore Stop, Inc. This Would Not Relief Them of Their Liability, As Agents, For Their Own Intentional Torts.

The mere fact that an agency relationship might have existed between plaintiff's former employer, Shore Stop, Inc. and

defendants Franklin and Pope does not furnish these defendants with any sort of defense for their tortious conduct. Defendants Franklin and Pope, in support of their argument, cite the case of Brown v. Loudoun Golf & Country Club, Inc., 573 F.Supp. 399 (E.D. Va. 1983). In that case, three white members of a golf club were playing golf with their black guest. An employee of the defendant country club had them ejected from the golf course. Suit was brought primarily in the form of a civil rights action. In that case, there was obviously no outside third party interfering with the contractual rights of the members of the country club, inasmuch as the party responsible for ejecting the golfers was an employee of the country club. For that reason, a cause of action for intentional interference with contractual relations could not lie. The result would be no different in this case, for example, if plaintiff's former supervisor, John Myers, terminated her employment without regard or reference to any polygraph examination. Plaintiff would not be able to claim that her supervisor John Myers and the company, Shore Stop, Inc., conspired together to bring about a breach of her employment contract. See, e.g., Bowman v. State Bank of Keysville, 229 Va. 534, 540-41 (1985) (plaintiff did not sufficiently allege conspiracy to procure breach of employment contract because no third party induced the bank directors to terminate plaintiff's employment).

However, the facts alleged by plaintiff in this case are that defendant John Myers and defendant Don Pope conspired to terminate plaintiff's employment with a contrived polygraph

examination which they conspired to ensure that plaintiff would not pass. Defendant Don Pope was an employee of an entirely different corporate defendant in this case. Therefore, an independent third party was involved in inducing the breach of plaintiff's contract of employment. Moreover, defendants Pope and Franklin were not parties to the contractual relationship damaged, i.e., plaintiff's employment with Store Stop, Inc.

Even assuming that Don Pope and Franklin Security were "agents" of Shore Stop, Inc. in their limited capacity of performing polygraph examinations for or on behalf of plaintiff's former employer, defendants Pope and Franklin are nevertheless responsible for their own tortious conduct. If tortious conduct is committed by an agent, the agent is responsible for such conduct as an independent party, and not as agent of his principal. Wood v. Standard Products Co., Inc., 456 F.Supp. 1098 (E.D. Va. 1978). An agent can be individually liable for his own tortious act whether acting by command of his principal or not. Whitlock v. PKW Supply Co., 154 Ga. App. 573, 269 S.E.2d 36 (1980). An agent who assists his principal in committing a tort is himself liable as a joint tortfeasor. Dillon v. AFBIC Development Corp., 597 F.2d 556 (5th Cir. 1979). See also, 3 Am.Jur. 2d Agency, Section 309, pp. 813-15 (2d Ed. 1986).

Therefore, since the existence of an agency relationship does not provide any defense for defendants Franklin and Pope, their Demurrer on this basis must be overruled.

IV. Plaintiff's Contract of Employment With Defendant Shore Stop, Inc. Was Not Terminable At Will, But Was Terminable

Only For Cause, And, Therefore, Tortious Interference With Said Contract of Employment Is Actionable.

Defendants Franklin and Pope, in their Demurrer filed on February 12, 1987 take the position that Count VI fails to state a cause of action against them, asserting that plaintiff's employment was terminable at will. They have not raised or discussed this argument in their Memorandum of Law dated March 16, 1987. However, the remaining defendants in this case have raised this issue in a separate brief.

Plaintiff has sufficiently alleged in Count I (breach of contract) facts which would rebut the presumption that her employment was terminable "at will". Admittedly, the Virginia Supreme Court has not yet decided a case where oral assurances, personnel policies, handbooks, and other statements of job security were relied upon to support an action for breach of contract. However, as will be discussed in a separate brief, the overwhelming majority of courts have enforced oral assurances, personnel policies, handbook provisions, and the like, where the employer's termination of the plaintiff was in violation of such policies, practices or procedures.

Therefore, if this court, in ruling on Count I, finds that plaintiff's contract of employment was not terminable "at will" then plaintiff's cause of action in Count VI for intentional interference with contractual relations states a cause of action against these defendants and their Demurrer must be overruled.

V. Even If Plaintiff's Contract of Employment Was

Terminable "At Will", Count VI Alleging Tortious Interference With Contractual Relations States a Valid Cause of Action.

Defendants' reliance upon Hechler Chevrolet v. General Motors Corp., 230 Va. 396 (1985) is misplaced or they read the case too broadly. Defendants read the case to mean that if the contractual relationship allegedly damages was terminable "at will", then there can be no action for tortious interference with said "at will" contract. However, this was not the holding in Hechler Chevrolet and the defendants have taken the case out of context.

The complete statement of the law in Hechler Chevrolet is:

The cause of action for interference with the contract rights of others stops short of redressing interference with contracts terminated at will provided no improper methods are used, See, Chaves v. Johnson, 230 Va. 112, 121 335 S.E.2d 97, 103 (1985)... Hechler Chevrolet, supra, 230 Va. at 402 (emphasis added).

In Hechler Chevrolet, the court found that the defendant, General Motors, had not engaged in any improper act nor that they had wrongfully terminated the plaintiff-dealership's franchise "because General Motors merely exercised its contractual prerogative of discontinuing a product line." 230 Va. at 400. In short, the automobile manufacturer merely exercised a right expressly reserved to it in the franchise agreement. The court noted further that "Hechler's Motion for Judgment does not allege that wrongful means were used to entice its employees to leave, or that its employees contracts were for a fixed term." 230 Va. at 403 (emphasis added).

With regard to the co-defendant, Capitol, the Hechler Chevrolet opinion notes: "There are no allegations of unlawful conduct or unlawful purposes on Capitol's part at all." 230 Va. at 402.

Hechler Chevrolet, in plaintiff's view, is not dispositive because, in the instant case, plaintiff has alleged that her contract rights were terminated by an unlawful means and that the polygraph examination was used for an unlawful purpose.

In Chaves v. Johnson, 230 Va. 112, 121, 335 S.E.2d 97, 103 (1985), the Supreme Court again stated:

Some jurisdictions have held that a competitor is justified by economic self-interest in causing a third person not to enter into a prospective business relationship with another competitor, or not to continue an existing contract terminable at will, provided no "intentional, improper interference" is used. (emphasis added)

Therefore, a proper reading of Hechler Chevrolet is that a demurrer will be sustained as to a claim of tortious interference with a contractual relationship where the plaintiff's contract was "at will" and provided no intentional improper interference is used. Thus, it is not enough for defendants to show that the plaintiff's contract was terminable "at will". They must also show that plaintiff has failed to allege that improper or unlawful means were used to induce the breach of contract. This interpretation of Hechler Chevrolet is consonant with, and places Virginia in line with, the clear weight of authority that contracts terminable at will, under

certain circumstances, are protected from tortious interference by outside third parties.

It has been generally held, by the overwhelming weight of authority, that the fact that the employment is for no stipulated period but is terminable at the will of the parties is not of consequence, and the fact that the contract may be ended at the will of the employer or employee does not render such employment subject to the will of outside third parties. 79 ALR 3d 672, 679-80 (1977); Prosser, Law of Torts, Section 129, pp. 932-33 (4th Ed. 1971); Restatement (2d) of Torts, Section 766, Comment (g)(1979).

As Mr. Justice Hughes, later Chief Justice, said in Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915): "The fact that the employment is at will of the parties, respectively, does not make it one at the will of others." 239 U.S. at 38. Accord, Smith v. Ford Motor Co., 281 N.C. 71, 221 S.E. 2d 282 (1976); Evans v. Swaim, 245 Ala. 641, 18 So.2d 400 (1944); London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 69 N.E. 526 (1903); 45 Am.Jur. 2d Interference, Section 24.


Since plaintiff has clearly alleged that tortious, intentional and improper means were used to induce the termination of her employment, her contract of employment, whether terminable at will or not, is entitled to protection from such tortious interference by defendants Franklin and Pope.

Therefore, the Demurrer, as to Count VII, must be overruled.

CONCLUSION

Defendants Franklin Security and Don Pope have failed to properly place before this court any issue concerning an agency relationship with plaintiff's former employer, defendant Shore Stop, Inc. Their argument is outside the scope of a Demurrer and is properly raised as an affirmative defense. They have furnished no evidence or support for this defense at this time. Even if an agency relationship existed, defendants Franklin Security and Don Pope are separately and independently liable, as joint tort feasons, for intentionally interfering with plaintiff's contract of employment. Since plaintiff has alleged sufficient facts that her employment was not terminable at will, but could only be terminated for cause, the case of Hechler Chevrolet v. General Motors Corp., 230 Va. 396 (1985) does not apply. Therefore, the Demurrer of defendants Franklin and Pope, as to Count VI, must be overruled.

WANDA BROWN ELLIOTT


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CERTIFICATE

I hereby certify that a true copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Demurrers of Defendants Franklin Security Systems, Inc. and Don Pope were mailed, postage prepaid, to all counsel of record this 27th day of March, 1987.

A handwritten signature in cursive script, reading "James M. McCauley", is written over a horizontal line.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

Law No. L-86-2537

SHORE STOP, INC., t/a
LITTLE SUE FOOD STORES, INC.,
RAY KISHLAR,
JOHN MYERS,
FRANKLIN SECURITY SYSTEMS, INC.,
and DON POPE,

Defendants.

**REPLY TO PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEMURRERS OF DEFENDANTS
FRANKLIN SECURITY SYSTEMS, INC., AND DON POPE**

The defendants, Franklin Security Systems, Inc. (hereinafter Franklin) and Don Pope (hereinafter Pope) addressed their demurrers to Counts V and VI to the Motion for Judgment in their initial Memorandum of Law. The plaintiff addresses only Count VI in her response Memorandum of Law dated March 27, 1987, and therefore this Memorandum is a reply to her response to the Memorandum in Support of the Demurrer to Count VI.

Although outside the scope of the demurrer to Count VI, Franklin and Pope will address the issue raised in the plaintiff's Memorandum of Law where it is asserted that there are "ample factual allegations to support her cause of action for intentional interference with contractual relations..." (p. 2, Plaintiff's Memorandum of Law) and that "the Defendants, Franklin and Pope do not appear to question the fact that the conduct of the defendants... rises to the level of conspiracy..." The factual

allegations against these defendants are tenuous and virtually non-existent. Plaintiff relies upon the ambiguous contents of a brief and anonymous telephone call in which the caller simply stated that she overheard John Myers say that she (the plaintiff) would not pass the polygraph, followed with the declarative statement that the plaintiff had been set up. Plaintiff apparently contends that this call together with John Myers' call to Franklin immediately following the imposter's polygraph exam, creates some factual assumption that Franklin and Pope conspired with the other defendants to cause the plaintiff to lose her job. The plaintiff also apparently draws the conclusion that the imposter's performance on a scientific test creates some factual basis by which she can allege wrongdoing on the part of Franklin and Pope.

If this issue is to be considered in ruling on the demurrers, then these defendants maintain that the motion for judgment lacks sufficient factual allegations to support the claim that Franklin and Pope unlawfully conspired and interfered with the plaintiff's contractual relations with her employer. The plaintiff alleges this claim through mere inferences she has drawn and not through allegations of any specific facts. The facts necessary to institute the cause of action should be directly and distinctly stated and not inferentially alleged in the plaintiff's initial pleading. 14B Michie's Jurisprudence Pleading §34 (1978). In the case at bar, the plaintiff has merely drawn some weak inferences from certain other facts (her interpretations of the telephone calls) and has not stated specific facts setting forth a cause of action against

these defendants. It has been noted that the test of the sufficiency of a pleading is whether it states facts in a manner that can be understood by the defendant. E. I. DuPont, etc., Co. v. Snead's Adm'r., 124 Va. 177 (1919). Because the plaintiff has made only inferences and has stated no operative facts to support her claim against these defendants for intentional interference with contractual relations, and has stated no operative facts to support her claim that the defendants were part of a conspiracy to cause her to lose her job, the allegations are insufficient and Count VI should be dismissed.

Even barring this argument, if it is determined that the plaintiff's relation with her employer was terminable at will, Count VI should be dismissed on the defendants' demurrer that a cause of action for tortious interference with contract does not lie in instances involving employment contracts terminable at will. The plaintiff correctly cites that Chaves v. Johnson, 230 Va. 112 (1985), and Hechler Chevrolet v. General Motors Corp., 230 Va. 396 (1985), stand, in part, for the proposition that the cause of action for interference with the contract rights of others is inapplicable to contracts terminable at will "provided no improper methods are used." In her memorandum of law, plaintiff notes that the Hechler case is different from the case at bar because the motion for judgment in Hechler does not allege that "wrongful means were used to entice its employees to leave, or that its employees' contracts were for a fixed term." Plaintiff's Memorandum, p.13; Hechler, p. 403. She further states that "the plaintiff has alleged that her contract rights were terminated by an unlawful means and that

the polygraph was used for an unlawful purpose," (p.14) and that "the plaintiff has clearly alleged that tortious, intentional, and improper means were used to induce the termination of her employment" (p.15). However, as previously stated herein, the plaintiff has made no specific factual allegations of wrongdoing on the part of these defendants and has instead relied on three basic inferences in making her blanket allegations in Count VI. The plaintiff has broadly alleged that the defendants conspired and interfered with her contractual relations with her employer but states no facts showing any improper means. Unless some facts can be alleged to support the allegations of conspiracy and intentional interference, the defendants' demurrer should be sustained on the theory that this action does not lie where a contract is terminable at will.

Although the argument raised by the defendants in their initial memorandum of law, that no cause of action for tortious interference of contract exists absent an independent third party, is outside the scope of the original demurrer, the plaintiff responded to this argument in her memorandum of law. The plaintiff argues that, because the motion for judgment does not allege an agency or employment relation between Franklin and Shore Stop, there are insufficient factual allegations for the defendants to raise this issue. The plaintiff also states that the motion for judgment "clearly regards defendants Franklin and Pope as independent third parties," (p.7) and further states in her memorandum under the authority of Penick v. Dekker, 228 Va. 161 (1984), that the "plaintiff is entitled to have the foregoing factual allegations deemed admitted and she is entitled to whatever proper inferences

can be drawn therefrom." (p.5.) The allegations do not specifically state the existence of an agency or employment relationship, but the inference that can be drawn from the facts is that the involvement of these defendants is derived solely from their relationship with Shore Stop. In fact, the stated facts more clearly support this inference than do they support any inference that Franklin and Pope acted as independent third parties. Other than the blanket allegations contained in Count VI, there is apparently nothing in the motion for judgment to support this inference. There are no facts alleged to the effect that Franklin and Pope acted on behalf of any entity or person other than Shore Stop in performing the polygraph exam, and no acts to support the allegations that the defendants were parties to a conspiracy.

Much of the plaintiff's argument is directed in establishing that there are insufficient allegations to establish an agency relationship between Franklin and Shore Stop. The crucial point of the defendants' argument is that the cause of action cannot stand where there is no independent third party. Whether Franklin is an agent, employee, independent contractor, or even if it stands in a relationship not classically identifiable as any of these, the crucial point is whether Franklin and Pope acted independently of the interests of Shore Stop. Again, the allegations more readily support the inference that Franklin and Pope acted on behalf of Shore Stop, and had no independent interest or involvement in this case.

The defendants would also agree with the plaintiff's position that an agent can be held liable for his independent tortious acts,

but as before there are no facts in the motion for judgment to support such an action.

Based on the foregoing, the court should sustain the demurrer to Count VI. If consideration is given to the arguments made outside the scope of the demurrer, the court should dismiss Count VI based on the reasons set forth in the defendants' initial memorandum of law and in this reply.

FRANKLIN SECURITY SYSTEMS, INC.,
and DON POPE,

By Jay McFadden
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I hereby certify that a true copy of the foregoing Reply was mailed to all counsel of record this 6th day of April, 1987.

Jay McFadden

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

WANDA BROWN ELLIOTT,

Plaintiff,

v.

AT LAW NO. L-86-2537

SHORE STOP, INC.

RAY KISHLAR
and JOHN MYERS

FRANKLIN SECURITY SYSTEMS, INC.,

and

DON POPE,

Defendants.

**REPLY MEMORANDUM IN SUPPORT OF DEMURRER OF
DEFENDANTS SHORE STOP, INC. AND RAY KISHLAR**

By way of reply to the memorandum filed by the plaintiff in opposition to these defendants' Demurrer, we offer the following. It should also be noted that the authorities and principles in support of defendants' Demurrer are set forth in our opening memorandum and are not repeated here.

A. Count I: Breach of Contract

As detailed in the opening memorandum, these defendants demurred to plaintiff's breach of contract claim based upon the fact that plaintiff's employment was not for a specified duration and accordingly, was terminable at-will. Plaintiff seeks to rely on a number of cases from the federal courts

to imply a contract of employment. However, in over nine pages in her memorandum plaintiff sets out an interesting discussion of various state and federal court cases only to concede the fact that there has been no Virginia Supreme Court decision which has implied such conditions as plaintiff suggests into a contract. Contrary to plaintiff's suggestion that Virginia has recognized "numerous exceptions" to the at-will doctrine, the Virginia Supreme Court has recognized a single "narrow exception to the employment at will rule," while staunchly adhering to the doctrine of employment at-will. Bowman v. State Bank of Keysville, 229 Va. 534, 540 (1985).

Plaintiff next contends defendants in some manner were in breach of contract because defendants acted in "bad faith", relying on the decision of Farsberg v. Zehm, 150 Va. 756 (1928). Such a position cannot prevail for two reasons. First, it is beyond challenge that a party's motive, good or bad, is immaterial in a case involving an alleged breach of contract. Kamlar Corp. v. Haley, 224 Va. 699 (1983).

Second, plaintiff's reliance of Farsberg is misplaced. That case concerned a one-year written contract of employment. The Court did not, as plaintiff suggests, imply a covenant of good faith and fair dealing in an at-will employment contract. That decision involved the issue of whether the employer's personal dissatisfaction with the employee's job performance was sufficient to terminate a written agreement which called

statute relates not to one's person but to one's business. Buschi v. Kirven, 775 F.2d 1240, 1259 (4th Cir. 1985). Simply stated, the statutes are aimed at conduct which injures a "business" and it is to be construed to exclude employment from its scope. Id.

C. Count III: Fraud

As noted in the opening brief in support of the Demurrer, plaintiff has failed to allege the necessary element of reliance crucial to a proper claim for fraud. Plaintiff's Motion for Judgment states no comprehensible allegation of reliance.

Plaintiff's brief now suggests the element of reliance can be found in plaintiff's forbearance to resign when she was asked to take a polygraph examination. Plaintiff states she relied on defendant's assurance that if she took the test, she could return to work.

However, plaintiff never took the examination. Moreover, once plaintiff "learned" that the test was going to be "fixed" she neither resigned nor took the examination. Plaintiff cannot be heard to argue she relied on defendant's promises which according to her allegations she knew to be false.

D. Count IV: Intentional Infliction of Emotional Distress

Plaintiff suggests she was the victim of the intentional infliction of emotional distress because she was going to be asked questions regarding stealing money or merchandise from her employer in the proposed polygraph examination. Suffice

it to note, however, that plaintiff never took the test. To suggest plaintiff was distressed because of questions that were going to be asked but were not is not actionable.

The type of conduct necessary to support a claim under this theory in fact is addressed in these defendants' opening memorandum and is a far cry from plaintiff's complaint.

E. Count IV: Negligence

As noted in the opening brief, plaintiff's allegations suggest no common law duty running from these defendants to the plaintiff such as would support a claim for the negligent breach of same. Plaintiff's suggestion that the existence of an employment relationship gives rise to common law duties in tort is simply not the law of Virginia.

F. Count VI: Tortious Interference with Contract

Plaintiff suggests her claims for tortious interference with contract arise from the Virginia civil conspiracy statute and that the decision relied upon by the defendants be reversed. However, as noted in response to Count II above, Code Sections 18.2-499 and 18.2-500 do not support any claims arising from an employment relationship. Buschi, supra.

Moreover, plaintiff's suggestion that this Court reverse the Virginia Supreme Court's decision in Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396 (1985), relied upon by these defendants in support of their demurrer to this count is insufficient authority to sustain the position.

H. Count VIII: Punitive Damages

Plaintiff has conceded that there is no separate cause of action for punitive damages and for the reasons set forth in our opening brief this Count plaintiff's claims for punitive damages must be dismissed.

CONCLUSION

Accordingly, for the reasons set forth above and in the opening Memorandum in Support of Demurrer of Defendants Shore Stop, Inc. and Ray Kishlar, these defendants' Demurrer to Counts I, II, III, IV, V, VI, and VIII should be sustained.

SHORE STOP, INC.
RAY KISHLAR

By: 
Of Counsel

Wm. E. Rachels, Jr., Esq.
Bruce A. Kayuha, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 7th day of April, 1987, to W. Vinton Hoyle, Jr., Esquire, and James M. McCauley, Esquire, HOYLE, CORBETT, HUBBARD AND SMITH, 11048 Warwick Boulevard, Suite 201, Newport News, Virginia 23601, and to Joseph T. McFadden, HEILIG, MCKENRY, FRAIM & LOLLAR, 700 Newtown Road, Suite 15, Norfolk, Virginia 23502.



JUL 13 1987



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

THOMAS R. MCNAMARA
Judge

100 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

July 10, 1987

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Norfolk, Virginia 23502

Re: Wanda Brown Elliott
v. Shore Stop, Inc., Ray Kishlar,
John Meyers, Franklin Security Systems, Inc.
and Don Pope
At Law No. L-86-2537

Gentlemen:

Plaintiff's motion for judgment asserts that "there existed a valid contractual employment agreement . . . which constituted an express and/or implied-in-fact agreement on the part of the Defendant not to terminate Plaintiff so long as her job performance was satisfactory . . .".

It then alleges that plaintiff, having been required by her employer to take a polygraph test as a condition of continued employment, a requirement she does not challenge, came to suspect her supervisor's motives and decided to deceive him and the defendant, her employer. She therefore arranged to have a friend "go in and take the polygraph examination in Plaintiff's place". (Par. 17 Mot. for Jdgmt.). This was done. The friend, at plaintiff's instance, took the test and "signed and dated [the same] as 'Wanda Brown'". (Plaintiff) (Par. 20 Mot. for Jdgmt.). She admits she "had Ms. Cagle take the polygraph examination in her stead". (Par. 30 Mot. for Jdgmt.).

James M. McCauley, Esquire
William E. Rachels, Jr., Esquire
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July 10, 1987

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Plaintiff was then discharged according to her allegations on the stated grounds that "she had 'failed the polygraph'".

In this action upon the foregoing allegations she seeks recovery of money damages from her corporate employer and her supervisors as well as the agency which administered the polygraph and its employee. These defendants have demurred to every count in the motion for judgment.

The demurrers of Defendants Shore Stop, Inc. and Ray Kishlar will be sustained. As to Count I (Breach of Contract), the plaintiff has admitted that she failed to take a legitimately required polygraph test and attempted to deceive her employer by having the test taken by an impersonator. Whether or not her contract was terminable at will, her admissions of the above conduct establish non-compliance, dishonesty and deceit which is unsatisfactory job performance, and therefore sufficient grounds for termination under the contract she alleges as a matter of law.

As to Count II (Wrongful Discharge), the foregoing also applies in that her allegations disclose on their face that her termination violated no public policy.

As to Counts III, IV, V, VI and VIII, it is sufficient to say that by her admitted deceit, plaintiff has forfeited any standing to complain of the manner in which the polygraph test was administered or evaluated, and furthermore does not allege any misrepresentation of existing fact, but a mere promise for the future. Similarly she has admitted that her discharge did not result from any negligence, intentional infliction of emotional distress or tortious interference, but as a result of a faked polygraph test which she did not take as required while conspiring with others to deceive the company in this respect.

As to Count VII, argument was deferred.

The demurrers of Defendants Franklin Security Systems, Inc. and Don Pope as to all counts except V and VI were disposed of by order dismissing those counts against these defendants by agreement on April 14, 1987.

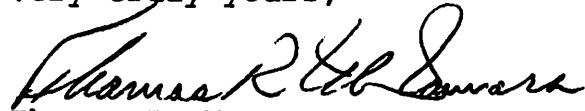
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As to Counts V and VI, the demurrers are sustained for the reasons set forth above.

This action will in any event continue pending disposition of Count VII, but leave to amend the counts above disposed of is not granted at this time. If such leave is desired an appropriate motion should be filed along with any proposed amended pleading.

Very truly yours,


Thomas R. McNamara
Judge

TRMcN:se

Counts V and VI is SUSTAINED, without leave to amend being granted to plaintiff. Plaintiff's exceptions to the Court's rulings on the demurrers is noted.

AND IT IS FURTHER ADJUDGED, ORDERED and DECREED that Count VII of the plaintiff's Motion for Judgment, the sole remaining cause of action in this lawsuit, be dismissed without prejudice, pursuant to plaintiff's request for a non-suit in accordance with Section 8.01-380 of the Code of Virginia, as amended.

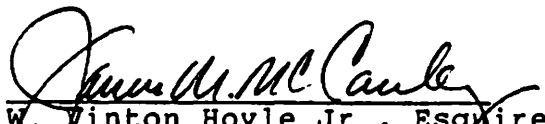
There being nothing further to be done, this case shall be stricken from the trial docket and placed among the ended causes.

11 AUG 1987


Thomas R. McNamara, Judge

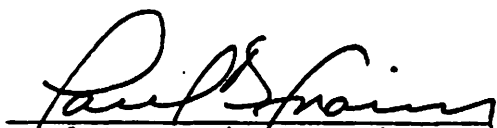
THOMAS R. McNAMARA
CIRCUIT COURT JUDGE

SEEN AND OBJECTED TO:


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A COPY, TESTE: WILLIAM T. RYAN, CLERK

BY:  D.C.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it sustained the Defendants' demurrers to Petitioner's causes of action for breach of contract, conspiracy to induce breach of contract and fraud.

2. The trial court erred in ruling that Petitioner's conduct constituted just cause for her dismissal and supported a defense of equitable estoppel fatal to Petitioner's claims.