NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 6, 2011

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Re: *William M. Johnson, et al. v. Versar, Inc., et al.*, CL-2011-4600

Dear Counsel:

This matter came before the Court for hearing on Defendant's Demurrer on September 9, 2011. At the conclusion of the hearing, the Court took the matter under advisement. The issue before the Court is whether the Plaintiffs have stated causes of action for breach of their individual employment contracts, the determination of which requires the Court to decide whether, as a matter of law, the employment was at-will or for a definite term.

BACKGROUND

Plaintiffs, William Johnson, Alexis Kayanan, and Davy Jon Daniels, sued their former employer Defendant, Versar, Inc. (Versar), for breach of contract arising out of their respective resignation and terminations. Versar is a government contractor headquartered in Springfield, Virginia. (Compl. ¶¶ 2, 8.) Versar has an international subsidiary headquartered in Manila called VIAP that was improperly named in the original Complaint. Plaintiffs filed an Amended

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Complaint addressing the misnomer, and the Amended Complaint is hereafter referred to and cited as the Complaint.

Various documents were attached to and incorporated into the Complaint including: Plaintiff Johnson's Offer Letter (Compl. Ex. B), a memoranda (Compl. Ex. A), and letter to him (Compl. Ex. C), as well as Plaintiff Daniels' Offer Letter (Compl. Ex. E). By agreement of the parties, an order was entered on June 27, 2011 (Consent Order) making various documents part of the Complaint including: Versar's By-laws (Consent Order Attach. 1), Plaintiff Kayanan's Offer Letter (Consent Order Attach. 2), and Plaintiff Johnson's letter of resignation (Consent Order Attach. 3).

Plaintiff Johnson

By letter dated November 16, 2005, Versar offered Johnson the position of Vice President serving as Senior Program Director of International Operations. (Compl. ¶ 10, Ex. B.) The Offer Letter shows that Johnson signed it November 18, 2005. (Compl. Ex. B.) The Offer Letter contained information related to Plaintiff's start date, supervisor, starting salary, bonus, leave, available insurance, and 401(k) plan. (Compl. Ex. B.) Nowhere does the Offer Letter reference the Versar By-laws. (*See* Compl. Ex. B.)

On November 16, 2005 the same date as the Offer Letter, a Memorandum was written explaining to Plaintiff that he was appointed as a Vice President with "an officer-like title." (Compl. Ex. A.) The complete text of the Memorandum states:

> Your title as Vice President reflects a key position of authority within Versar. The Board of Directors has determined that we will follow a specific procedure each time an officer-like title is granted an individual.
>
> In accordance with the By-Laws of Versar, Inc., you are hereby appointed Vice President. Any signature authority that you have as Vice President must be specified in a separate Delegation of Authority memorandum. The title must be used in its entirety. It applies to the position you currently hold. If your assignment changes to one which does not carry an "officer-like" title, this title would no longer apply.
>
> The potential for creating apparent or implied authority problems described in the attachment must be avoided. Read and forward one signed copy to the General Counsel, James Dobbs.
>
> You are a key member of Versar's Management team and your appointment as Vice President reflects the confidence that I have in you to represent Versar with the utmost integrity and professionalism.

Then in November 2007, Johnson was made a Senior Vice President by board resolution. (Compl. ¶ 35, Ex. C.) The letter to Johnson, dated November 20, 2007, states in part: "Elected Vice Presidents have certain powers under the Bylaws of the Company and consequently operate under a higher level of fiduciary duty. I have asked Jamie Dobbs to review these matters with you during your next visit to our corporate headquarters." (Compl. Ex. C.)

Among other tasks, Johnson worked to set up a subsidiary office in the United Arab Emirates (UAE), but there was friction with Versar senior management. (*See* Compl. ¶¶ 21-71.)

Johnson used some of his personal funds to support the office (Compl. ¶ 50) and allegedly loaned the UAE operation $60,000 for startup capital (Compl. ¶ 56). Johnson also authorized an employee to independently begin setting up the UAE office contrary to Versar directions. (Compl. ¶ 53.) Johnson finished the setup process, but it was not done in the manner approved by Versar, which caused internal friction. (Compl. ¶¶ 62-64, 70.)

On April 11, 2008, Johnson returned to the US for a meeting at which he received a letter from the Versar CEO terminating his employment and a letter of resignation as well as a severance agreement. (Compl. ¶¶ 72-73.) Johnson was given thirty minutes to read the documents and decide what to do. (Compl. ¶ 74.) Johnson signed the letter of resignation because he was told he would receive a favorable severance package, but he did not review or sign the severance agreement. (Compl. ¶ 75.) It appears that he was never given a severance package.

Plaintiff Kayanan

In December 2007, Kayanan became Vice President of International Operations for Support and worked under Plaintiff Johnson. (Compl. ¶ 17; Consent Order Attach. 2.) Kayanan was offered employment by letter dated December 12, 2007, and the Offer Letter contained information related to Plaintiff's start date, supervisor, starting salary, bonus, leave, available insurance, and 401(k) plan. (Consent Order Attach. 2.) Nowhere does the Offer Letter reference the Versar By-laws. (*See* Consent Order Attach. 2.)

Kayanan was also involved in the UAE project with Johnson, and Kayanan loaned the UAE operation $60,000 for startup capital. (Compl. ¶ 56.) On April 12, 2008, a day after Johnson's termination, Kayanan was placed on 30-day administrative leave because of his "professional and personal relationship" with Johnson. (Compl. ¶ 79.) On May 16, 2008, Kayanan was told he would be terminated without severance pay or he could resign and receive three months' severance pay. (Compl. ¶ 84.) However, Kayanan was not allowed to see the severance package before signing the resignation. (Compl. ¶ 85.) Kayanan refused to sign the letter of resignation and was terminated. (Compl. ¶ 85.)

Plaintiff Daniels

In January 2008, Daniels became Versar's Vice President of International Operations for Federal Programs in the Middle East. (Compl. ¶ 19, Ex. E.) Daniels was offered employment by letter dated January 2, 2008, and the Offer Letter contained information related to Plaintiff's start date, supervisor, starting salary, bonus, leave, available insurance, and 401(k) plan. (Compl. Ex. E.) Nowhere does the Offer Letter reference the Versar By-laws. (*See* Compl. Ex. E.)

Daniels was also involved in the UAE project with Johnson, and Daniels also loaned the UAE operation $60,000 for startup capital. (Compl. ¶ 56.) On April 11, 2008, the day of Johnson's termination, Daniels was placed on 30-day administrative leave because of his "professional and personal relationship" with Johnson. (Compl. ¶ 78.) On May 15, 2008,

Daniels was terminated because of the contribution of startup capital, and he was also told he had to sign a letter of resignation before being allowed to review the severance package. (Compl. ¶¶ 81-83.) Daniels chose to be terminated instead of signing a resignation letter. (Compl. ¶ 83.)

By-Laws

As noted above, the Plaintiffs were made Vice Presidents of Versar. Pursuant to Article III Section 1 of the Versar By-laws, "the directors shall elect . . . one or more Vice Presidents, and may elect or appoint such other officers and agents as are desired." (Consent Order Attach. 1.) Article III also states the term for which each officer holds office, the method of resignation, and the method of removal. With regard to removal, Article III Section 4 states: "Officers may be removed at any time, with or without cause, by the affirmative vote of a majority of the Board of Directors." (Consent Order Attach. 1.)

Alleged Cause of Action

Because they were Vice Presidents, Plaintiffs allege that they could only be removed by resolution of the Versar board, and a resolution was never prepared. (Compl. ¶¶ 86-90.) Thus, the Plaintiffs sued alleging that the executed offer letters and Versar By-laws form an employment agreement that was breached when Plaintiffs were not terminated by board vote. (Compl. ¶¶ 95-106.) Plaintiffs allege they were not at-will employees but rather contract employees with a definite term of employment.

ARGUMENTS

Versar argues that the Plaintiffs' case rests on an allegation that Versar acted *ultra vires*—outside its powers—when it fired Plaintiffs. Under this view of the case, Defendant argues that Plaintiffs do not have standing to raise such a claim in light of Delaware Code Title 8, Section 124 regarding standing to bring an *ultra vires* claim. Second, Defendant argues that the Plaintiffs were at-will employees and a breach of contract cannot be based on the offer letters or By-laws. Third, Defendants argue that the By-laws were not breached.

In response, Plaintiffs restate their theory of the case and argue that the offer letters making each Plaintiff a Versar corporate officer incorporate the By-laws by reference. The By-laws in turn state the method by which corporate officers may be removed. Thus, Plaintiffs contend that the By-law terms make their employment contracts for a definite term and not at-will. Plaintiffs also point out that the offer letters are silent regarding whether the employment was at-will and further contend that whether the contract is for a definite term or at-will is a factual question, which should be resolved by a jury.

ANALYSIS

A demurrer tests the legal sufficiency of the claims stated in the pleading challenged. *Dray v. New Mkt. Poultry Prods., Inc.*, 258 Va. 187, 189, 518 S.E.2d 312, 312 (1999). The sole question to be decided by the court is whether the facts pleaded, implied, and

fairly and justly inferred are legally sufficient to state a cause of action against Defendant. *Thompson v. Skate Am., Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 126-27 (2001).

I. Employment Contracts

The complaint alleges and the parties appear to agree that the executed Offer Letters are employment agreements. The issue then becomes the terms of the contracts, specifically whether the By-laws are part of the employment contracts and whether the By-law provisions remove the employment from at-will status and make the employment for a definite term.

A. Law

"Virginia strongly adheres to the common law employment-at-will doctrine." *County of Giles v. Wines*, 262 Va. 68, 72, 546 S.E.2d 721, 723 (2001) (*quoting Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 123, 480 S.E.2d 502, 503 (1997); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 96, 465 S.E.2d 806, 808 (1996)). The employment relationship is generally presumed to be at-will. *Id.* (citations omitted); *Progress Printing Co. v. Nichols*, 244 Va. 337, 340, 421 S.E.2d 428, 429 (1992) (*citing Miller v. SEVAMP Inc.*, 234 Va. 462, 465, 362 S.E.2d 915, 916-917 (1987); *Stonega Coal & Coke Co. v. Louisville & Nashville R.R.*, 106 Va. 223, 55 S.E. 551, 552 (1906)). The presumption may be rebutted with sufficient evidence to show that the employment is for a definite term. *Id.*

Pursuant to standard rules of contract interpretation, the Virginia Supreme Court has stated that "the function of the court is to construe the contract made by the parties, not to make a contract for them." *Cave Hill Corp. v. Hiers*, 264 Va. 640, 646, 570 S.E.2d 790, 793 (2002) (*citing Wilson v. Holyfield*, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984)). Thus, contracts are "construed as written, without adding terms that were not included by the parties." *PMA Capital Ins. v. US Airways, Inc.*, 271 Va. 352, 358, 626 S.E.2d 369, 372 (2006) (citation omitted). Further, "[w]hen the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning." *Id.* (citation omitted).

The Court has held that "an employment condition which allows termination only for cause sets a definite term for the duration of the employment. . . . [A] termination for cause provision used to overcome the presumption of employment at will must be in an employee manual or other document which complies with the statute of frauds." *Progress Printing*, 224 Va. at 341, 421 S.E.2d at 430.

The Court has also said: "Writings referred to in a contract are construed as a part of the contract for the purpose and extent indicated." *W.D. Nelson & Co. v. Taylor Heights Dev. Corp.*, 207 Va. 386, 391, 150 S.E.2d 142, 146 (1966) (citations omitted) (finding that a lease agreement validly incorporated commission rates set by the Real Estate Board of Richmond); *see also Condo. Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 571, 709 S.E.2d 163, 169 (2011).

Therefore, in order to incorporate the provisions of another document into the employment contract, the plain language of the employment contract must clearly reference and incorporate the terms of the document being incorporated. *See Condominium Services*, 281 Va. at 571, 709 S.E.2d at 169 (finding that a reference to By-laws in a Management Agreement and the agent's written acknowledgment that it had read the By-laws were not sufficient to incorporate the By-laws into the agreement); *Progress Printing*, 224 Va. at 342, 421 S.E.2d at 430 ("The plain language of this form does not incorporate the provisions of the Handbook; it only acknowledges its receipt by Nichols and sets forth his promise to abide by the provisions of the Handbook."); *Stonega Coal & Coke*, 106 Va. at 223, 55 S.E. at 552 ("While the court, in construing a contract, may take into view the circumstances under which it was made, yet when a breach of it is averred its language must determine to what the parties to it have bound themselves. Courts are not authorized to make contracts for them or to add any stipulation which they have not seen proper to insert.").

In *Progress Printing*, the employee handbook stated that the employer would not discharge or suspend an employee without just cause, but the employee also signed a form stating that his employment was at-will and could be terminated at any time. 244 Va. at 339, 421 S.E.2d at 429. The Court noted that "employee handbooks generally do not have the characteristics of bilateral contractual documents" but can be binding on the employer when the "provisions are communicated to the employee in a sufficiently specific manner." *Id.* at 341, 421 S.E.2d at 430. However, the Court did not have to squarely address the issue of how the handbook was incorporated into the employment agreement and the requirements for incorporation because the Court found that the form executed by the employee stating that his employment was at-will superseded the handbook provisions and made the employment at-will. *Id.*

While this Court has not been directed to any authority directly addressing the standards for incorporating documents into the employment contract, this Court finds *Condominium Services* instructive. There, the Owners' Association entered a Management Agreement with Condominium Services, which could be terminated upon ninety days written notice without cause or upon thirty days written notice with cause by the Owners' Association. 281 Va. at 567, 709 S.E.2d at 167. Section Two of the Management Agreement listed the documents "governing" the agreement and included the By-laws along with the Virginia Condominium Act, the Owners' Association Declaration, Rules and Regulations, and Board of Director Resolutions. *Id.* at 568, 709 S.E.2d at 167. A provision of the By-laws stated that the Owners' Association shall employ a management organization and included that the management organization could only be changed by affirmative vote of three-fourths of the members. *Id.* at 569, 709 S.E.2d at 168. The Owners' Association demurred to Condominium Services' counterclaim and the trial court sustained the demurrer with prejudice. *Id.*

On appeal, Condominium Services argued that it was invalidly terminated because the Management Agreement incorporated the By-Laws, and therefore, the Owners' Association did not obtain the votes required under the By-laws for terminating the management organization. *Id.* at 571, 709 S.E.2d at 169. The Supreme Court stated that "because the Management Agreement references a separate writing, the Bylaws are construed as part of the Management

Agreement for the purpose indicated." *Id.* The Court went on to point out that in the Management Agreement, Condominium Services stated that it had read and was familiar with the By-laws. *Id.* at 572, 709 S.E.2d at 169. The Court also noted that these were the only two mentions of the By-laws in the Management Agreement. *Id.* at 572, 709 S.E.2d at 170. The Court found that these references to the By-laws were not designed to incorporate the By-law terms regarding termination of the management organization into the Management Agreement, but instead, "to identify documents [Condominium Services], as the management agent, needed to be aware of and comply with in performing its duties and responsibilities under the Management Agreement." *Id.* The Supreme Court determined that the trial court was correct and the demurrer was properly sustained. *Id.* at 573, 709 S.E.2d at 170.

B. Plaintiff Johnson

With this above analytical frame work in mind, the Court now turns to the case at bar and begins with the facts related to Plaintiff Johnson's allegations.

i. Offer Letter Dated November 16, 2005

The Offer Letter signed by Johnson contains various terms of employment, but it does not refer to or mention the By-laws. (*See* Compl. Ex. B.) While writings referred to in the contract may be incorporated into it, *W.D. Nelson*, 207 Va. at 391, 150 S.E.2d at 146, there is no basis for incorporating a document when that document is not even mentioned in the contract. There is no actual or intended reference to the By-Laws in the Offer Letter, and therefore, the Court finds that the By-laws were not and cannot be incorporated into the Offer Letter.

ii. Memorandum Dated November 16, 2005

The Memorandum to Johnson dated the same day as the Offer Letter does state that Johnson was appointed Vice president in accordance with the By-laws. (Compl. Ex. C.) Thus, the document references the By-laws. Assuming without deciding that this Memorandum would be part of the employment agreement,[1] the reference to the By-laws does not seek to incorporate the provisions of the By-laws into the employment agreement. The Memorandum simply states that the action is being taken in accordance with the By-laws. There is no expression of intent to incorporate, and the reference is made merely in passing and is merely stating the authority by which action to hire is made.

In *Condominium Services*, the Management Agreement stated that it was governed by the By-laws. 281 Va. at 568, 709 S.E.2d at 167. Here, there is not even an indication that the By-laws govern Johnson's employment. A simple reference to the By-laws is insufficient to incorporate them into the employment contract.

[1] The parties did not address the issue of whether a separate Memorandum dated the same date as the Offer Letter would be included as part of the employment contract.

Furthermore, even if the reference was sufficient to incorporate the By-laws, they would only be construed as part of the employment agreement "for the purpose indicated." *See Condominium Services*, 281 Va. at 571, 709 S.E.2d at 169. The Memorandum states no purpose for incorporating the By-laws. The Memorandum's reference to the By-laws is merely to indicate that the Board of Directors followed the rules of the By-Laws. The plain language of the Memorandum shows no intent to incorporate the By-laws.

iii. Letter Dated November 20, 2007

The letter dated November 20, 2007 making Johnson a Senior Vice President states that he has certain powers under the By-laws and a higher level of fiduciary duty. (Compl. Ex. C.) Assuming without deciding that this letter would be part of the employment agreement,[2] the reference to the By-laws does not show an intent to incorporate the By-laws nor is it designed to do so. The reference to the By-laws simply states where a Vice President's powers are set forth and notes that heightened power results in heightened fiduciary duties. The letter does not show any intent to incorporate the By-laws.

Even if the language in the letter did incorporate the By-laws, they would only be construed "for the purpose indicated." *See Condominium Services*, 281 Va. at 571, 709 S.E.2d at 169. The letter only mentions the Senior Vice President's powers and fiduciary duties. Thus, only the By-law provisions related to the powers and fiduciary duties would be relevant based on the language and intent of the letter.

iv. Conclusion

Just as in *Condominium Services*, the references to the By-laws in the Memorandum and the letter making Johnson a Senior Vice President were merely informational and not "designed to incorporate the By-law terms regarding termination." *See* 281 Va. at 572, 709 S.E.2d at 170. Therefore, Johnson was an at-will employee under the plain language of his Offer Letter, and there is no basis for him to overcome the presumption of at-will employment.

C. Plaintiffs Kayanan and Daniels

Plaintiffs Kayanan and Daniels received Offer Letters, but neither Offer Letter made any type of reference to the By-laws. (*See* Consent Order Attach. 2; Compl. Ex. E.) Since neither Offer Letter made any reference to the By-laws, there is no basis for incorporating them into the employment agreement. Simply being named a Vice President is not sufficient to incorporate the By-laws into an employment contract. Plaintiffs Kayanan and Daniels were at-will employees, and there is no basis in the Complaint and incorporated documents to rebut the at-will presumption.

[2] The parties did not address the issue of whether a Memorandum written nearly two years after the Offer Letter would be included as part of the employment agreement.

D. Conclusion

Because the Plaintiffs' employment contracts do not incorporate the By-law provisions, the Plaintiffs were merely at-will employees.

II. The By-Law Language

Addressing Plaintiffs' theory of the case, they argue the By-laws were incorporated into their employment contracts partly because their employment and officer positions were inextricably linked.[3] However, assuming this is true, the language of the By-laws is insufficient, as a matter of law, to alter their at-will employment status.

In the *Wines* case, the Giles County Board of Supervisors fired Wines, a recreation area manager. 262 Va. at 70, 546 S.E.2d at 721. Wines argued he could only be fired for just cause under the Giles County Personnel Policy, which read in part: "An employee may be discharged for inefficiency, insubordination, misconduct or other just cause." *Id.* at 71, 546 S.E.2d at 721 (emphasis added). The County argued that Wines was an at-will employee and the Personnel Policy did not indicate that he could only be fired for just cause. *Id.* at 71-72, 546 S.E.2d at 723. The Virginia Supreme Court held that the Personnel Policy was not "sufficient to rebut the strong presumption in favor of the at-will employment relationship in this Commonwealth." *Id.* at 73, 546 S.E.2d at 723. The Court focused on the word "may" and indicated that the Personnel Policy's list of grounds for discharge was not exhaustive. *Id.* Further, the Personnel Policy did not state "that an employee *shall only* be discharged" on the listed grounds or "that an employee will not be discharged without just cause." *Id.*

Even if the Court assumes that the Plaintiffs' contentions are correct and their employment and Board positions were inextricably linked and the offer letters incorporated the By-laws, the Complaint does not state a cause of action. In the instant case, Article III, Section 4 of the By-laws states: "Officers may be removed at any time, with or without cause, by the affirmative vote of a majority of the Board of Directors." (Order dated Attachment 1; (emphasis added)). Thus, an officer "may" be removed in a certain way, but the By-laws do not indicate that this is the exclusive manner for removal or discharge. In fact, Article III of the By-laws contemplates other scenarios including appointment of a successor as well as resignation. (Consent Order Attachment 1.)

The language of the By-law is similar to that of the Personnel Policy at issue in *Wines*. Both use the permissive word "may." Just as the Personnel Policy did not state the exclusive bases for termination, so the By-law clause does not state the exclusive bases for termination. Thus, neither clause is sufficient to show that the at-will employment relationship has been abrogated. Therefore, even if the Court assumes Plaintiffs' contentions are correct, the Complaint does not state a cause of action.

[3] The Defendant never addressed the issue of whether the employment and Board positions were inextricably linked as Plaintiffs argue, and thus, the Court accepts the contention for purposes of this demurrer.

III. Standing to Challenge Termination

Defendant Versar characterizes this case as an attempt by the Plaintiffs to challenge their termination as officers because it was *ultra vires*—outside the board's powers. The Court, however, views this matter as a breach of employment contract and not as a challenge to the Board's actions and failure to follow Versar's By-laws. However, to the extent that the Plaintiffs allege a claim based on the Board's failure to follow the By-laws, Plaintiffs would not have standing to bring the claim.

Where the controversy relates to the internal affairs of a Delaware corporation, Delaware law applies. *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 613 (2005) ("It is undisputed that because the controversy involves the internal affairs of the corporation, the laws of Delaware, the state of incorporation, apply."). Delaware Code Title 8, Section 124 provides that no act of a corporation "shall be invalid by reason of the fact that the corporation was without capacity or power to do such act," but the lack of power may be asserted by a stockholder, by the corporation, or by the Attorney General.

In the instant suit, Plaintiffs have not alleged that they are stockholders, represent the corporation, or are the Attorney General. Thus, Plaintiffs do not have standing to challenge any acts of the Versar Board as *ultra vires*.

CONCLUSION

Because the Plaintiffs' employment was only at-will, their claims cannot survive demurrer. The demurrer is sustained with prejudice.

Ms. Jackson is directed to prepare an order consistent with this opinion and forward it to Mr. Chew for endorsement and subsequent forwarding to the Court for entry, or the parties shall appear before the Court to present the order on October 28, 2011.

Very truly,

Bruce D. White