University of Richmond Law Review

Volume 29 | Issue 4 Article 8

1995

Annual Survey of Virginia Law: Employment Law

Paul G. Beers

EMPLOYMENT LAW

*Paul G. Beers**

This article focuses upon Virginia employment law between June 1994 and May 1995.[1] Special topics, such as public sector employment and unemployment compensation, lie outside the scope of this article, as do developments under federal statutes.

In comparison with 1993 and the first half of 1994, when the Supreme Court of Virginia set off a fireworks display of far reaching decisions concerning employment relations,[2] the twelve-month period under review in this article was quiet. The Supreme Court of Virginia issued relatively few decisions concerning employment during this time frame. Lower courts and the General Assembly were more active, particularly in grappling with the supreme court's leading pronouncements on the remedies available in tort to employees who are wrongfully discharged, abused or defamed by their employers or co-workers.

During the twelve months under consideration, three seminal decisions from recent years by the Supreme Court of Virginia were repeatedly applied in actions brought by employees. In the area of contracts, the Supreme Court of Virginia's September 1992 opinion in *Progress Printing Co. v. Nichols*[3] continued to make it very difficult for an employee who lacks a formal, express contract to overcome the towering presumption that her

---

* Member, Glenn, Flippin, Feldmann & Darby, Roanoke, Virginia; B. A., 1980, Trinity College; M.I.A., 1983, Columbia University School of International Affairs; J. D., 1986, Washington & Lee University School of Law.

1. Workers' compensation is discussed elsewhere in this volume. *See*, Wood W. Lay and Bruin S. Richardson, III, *Annual Survey of Virginia Law: Workers' Compensation*, 29 U. RICH. L. REV. 1199 (1995).

2. For an analysis of developments in Virginia employment law during 1993 and the first half of 1994, see Paul G. Beers, *Annual Survey of Virginia Law: Employment Law*, 28 U. RICH. L. REV. 1007 (1994).

3. 244 Va. 337, 421 S.E.2d 428 (1992).

employment is governed by the at-will rule.[4] The absence of breach of contract actions among the cases analyzed in this article is largely attributable to *Progress Printing* and other decisions favorable to employers by the Supreme Court of Virginia since 1987 concerning the at-will rule and statute of frauds.[5]

While the law of employment contracts has undergone little change since *Progress Printing*, the opposite is true in the torts arena. The Supreme Court of Virginia's January 1994 landmark, *Lockhart v. Commonwealth Education Systems*,[6] dramatically expanded the state court remedies available in tort to at-will employees whose dismissals violate public policy. Much of the activity in Virginia employment law since the winter of

---

4. Under the at-will rule, employment is presumed to be terminable without cause. Nearly all jurisdictions in the United States recognize the at-will rule. The United States is unusual among advanced industrial nations for its lack of legislative protection against unjust dismissal from employment. Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 136-37 (1990); Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment-At-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583, 1625 n.248 (1994).

In Virginia, an employee may rebut the at-will presumption in at least two ways: by proving that the employer has agreed to retain him or her for a fixed period of time, or by establishing that the employer agreed unambiguously to fire the employee only for cause. *Progress Printing*, 244 Va. at 340-41, 421 S.E.2d at 429-30.

5. *See* Graham v. Central Fidelity Bank, 245 Va. 395, 428 S.E.2d 916 (1993); Falls v. Virginia State Bar, 240 Va. 416, 397 S.E.2d 671 (1990); Addison v. Amalgamated Clothing & Textile Workers Union, 236 Va. 233, 372 S.E.2d 403 (1988); Miller v. SEVAMP, Inc., 234 Va. 462, 362 S.E.2d 915 (1987).

Last year courts handed down a few decisions concerning efforts by employers to rebut the at-will rule. Like the employee in *Progress Printing*, these plaintiffs failed in their efforts to show that they had an implied contract with the employer protecting them against unjust dismissal. *See, e.g.*, Nguyen v. CNA Corp. 44 F.3d 234, 240 (4th Cir. 1995) (granting employer summary judgment on plaintiff's claim that personnel manual constituted implied contract); McBride v. City of Roanoke Redevelopment and Hous. Auth., 871 F. Supp. 885 (W.D. Va. 1994); Shepherd v. J.C. Penney Co., No. CIV. A. 3:94CV335, 1994 WL 791574 (E.D. Va. Oct. 25, 1994); Deasy v. Maryview Hosp., No. 92-846 (Portsmouth City Oct. 19, 1994). These decisions recite principles set forth in *Progress Printing* rather than break new ground. For an analysis of Virginia's position on the extent to which personnel handbooks may rebut the at-will rule, see Paul G. Beers, Progress Printing Co. v. Nichols: *The Fading Significance of Employee Handbooks as Implied Contracts*, 9 VA. B. ASS'N J., Spring 1993, at 7, 7-10.

6. 247 Va. 98, 439 S.E.2d 328 (1994). For a discussion of *Lockhart*, see Beers, *supra* note 2 at 1020-25.

1994 has come in the form of judicial and legislative responses to *Lockhart*.

Handed down within weeks of *Lockhart*, *Middlekauff v. Allstate Insurance Co.*[7] is the third Supreme Court of Virginia decision that strongly influenced the direction of Virginia employment law last year. As a result of *Middlekauff*, employees have succeeded in pursuing intentional tort claims in the same trial courts that before 1994 would have held these actions barred by the Virginia Workers' Compensation Act.[8]

I. THE PUBLIC POLICY EXCEPTION AFTER *LOCKHART*—THE JUDICIAL RESPONSE

Lockhart v. Commonwealth Education Systems[9] widened the public policy exception to the at-will rule. Ten years ago in *Bowman v. State Bank of Keysville*,[10] the Supreme Court of Virginia held that at-will employees fired in violation of public policy could sue their employers in tort for wrongful discharge. In *Lockhart*, the supreme court held that at-will employees fired because of their race or gender have a tort claim under the public policy exception first recognized in *Bowman*.[11]

Significantly, *Lockhart* applies regardless of the size of the employer or the federal remedies available to the employee. The *Lockhart* court acknowledged that victims of race and sex discrimination who work for companies with 15 or more persons on the payroll have a federal cause of action under Title VII of the Civil Rights Act of 1964.[12] The existence of overlapping or parallel statutory remedies, the court reasoned, does not deprive wrongfully discharged employees of a common law claim in state court, provided the employees can prove they were fired in contravention of an established public policy.[13]

---

7. 247 Va. 150, 439 S.E.2d 394 (1994).
8. VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 1995).
9. 247 Va. 98, 439 S.E.2d 328 (1994).
10. 229 Va. 534, 331 S.E.2d 797 (1985).
11. *Lockhart*, 247 Va. at 106, 439 S.E.2d at 332.
12. *Id.* at 105, 439 S.E.2d at 332 (citing 42 U.S.C. § 2000e-7 (1988)).
13. *Id.*

Most courts which applied *Bowman* and *Lockhart* in the months under consideration continued to construe the public policy exception to the at-will rule narrowly. In *Mannell v. American Tobacco Co.*,[14] Ginger Mannell claimed that she had been discharged in violation of public policies expressed in the Virginians with Disabilities Act ("VDA")[15] and the federal Rehabilitation Act of 1973.[16] Mannell, however, did not comply with the administrative filing requirements of either the Virginia statute or its federal counterpart.[17] The United States District Court for the Eastern District of Virginia granted the employer's motion for summary judgment.[18] The court concluded that the plaintiff could not bring a common law action under *Lockhart* because the VDA declares that "[t]he relief available for violations of this Chapter shall be limited to the relief set forth in this section."[19] The district court in *Mannell* acknowledged that the *Lockhart* court had permitted the employee to proceed with her common law claim for breach of public policy despite the availability of federal remedies under Title VII.[20] Mannell, in contrast, was relying upon a state statute that had its own remedies. The employee had to take the bitter with the sweet—she could not cite the VDA as the substantive basis for her tort claim without also following its remedial procedures.[21] The reasoning of the district court finds support in pre-*Lockhart* decisions by Virginia circuit courts, as well as in opinions from other jurisdictions which recognize a public policy exception to the at-will rule.[22]

---

14. 871 F. Supp. 854 (E.D. Va. 1994).

15. VA. CODE ANN. §§ 51.5-1 to -46 (Repl. Vol. 1994).

16. 29 U.S.C. §§ 701, *et seq.*

17. Both the VDA and the Federal Rehabilitation Act of 1973 have administrative prerequisites. The VDA mandates that a claimant's action "shall be forever barred unless such claimant or his agent, attorney or representative has commenced such action or has filed by registered mail a written statement of the nature of the claim with the potential defendant or defendants within 180 days of the occurrence of the alleged violation." VA. CODE ANN. § 51.5-46 (Repl. Vol. 1994). The Rehabilitation Act establishes administrative remedies for disability discrimination against employers who receive government assistance. 29 U.S.C. § 794a (1988). *See also* Khader v. Aspin, 1 F.3d 968, 971 (10th Cir. 1993) (discussing exhaustion requirement under the Rehabilitation Act.).

18. *Mannell*, 871 F. Supp. at 862.

19. VA. CODE ANN. § 51.5-46(D) (Repl. Vol. 1994); *Mannell*, 871 F. Supp. at 862.

20. *Mannell*, 871 F. Supp. at 862; *see Lockhart*, 247 Va. at 105, 439 S.E.2d at 332.

21. *Mannell*, 871 F. Supp. at 862.

22. Prior to *Lockhart*, a few courts in Virginia had held that a discharged em-

In granting the employer summary judgment, the court brushed aside the plaintiff's secondary contention that the VDA was inapplicable. Mannell argued that the VDA does not apply to employers, such as the American Tobacco Company, covered by the federal Rehabilitation Act of 1973.[23] "[I]f ATC is covered by the Rehabilitation Act," the court responded, "plaintiff's claim should have been brought under the Rehabilitation Act, and she cannot maintain a state common law wrongful discharge claim against ATC."[24]

Mannell at least arguably stands for the proposition that a federal statute cannot serve as the source of public policy on which to base a *Bowman* claim. The district court apparently read *Bowman* and *Lockhart* to mean that the plaintiff must locate an applicable *state* statute as the source of public policy. One federal court has interpreted *Bowman* and its progeny in this manner.[25] Other courts in Virginia[26] and elsewhere,[27]

---

ployee may not bring a *Bowman* claim if she has another statutory remedy. *See, e.g.*, Shields v. PC-Expanders, 31 Va. Cir. 90, 93 (Fairfax County 1993); Cauthorne v. King, 30 Va. Cir. 202, 204-05 (Richmond City 1993); Pruitt v. Johnson Memorial Hosp., 21 Va. Cir. 188, 188-89 (Washington County 1990). Outside Virginia, this issue has arisen with some frequency in the discrimination context. Most courts in other jurisdictions which have considered the issue have held that an employment discrimination claim under the public policy exception to the at-will rule is barred or preempted when relief is available under state anti-discrimination statutes. Brad R. Carson, Note, *Labor Law:* Tate v. Browning-Ferris Industries: *Oklahoma Creates a Common Law Cause of Action for Employment Discrimination*, 46 OKLA. L. REV. 557, 572 (1993) (collecting cases from various states for proposition that "most courts that have considered the applicability of the public policy exception to cases of employment discrimination have concluded that a claim under the exception should not be allowed where relief is also available under statutes").

23. *Mannell*, 871 F. Supp. at 862. *See also* VA. CODE ANN. § 51.5-41(F) (Repl. Vol. 1994) (stating that the VDA "shall not apply to employers covered by the federal Rehabilitation Act of 1973").

24. *Mannell*, 871 F. Supp. at 862.

25. Flinders v. Datasec Corp., 742 F. Supp. 929, 935 (E.D. Va. 1990) (remarking in dictum that *Bowman* "thus far has been correctly limited to public rights embodied in state statutes"); *see also* White v. Federal Express Corp., 729 F. Supp. 1536, 1550 (E.D. Va. 1990) (refusing to recognize a *Bowman* claim "based on the public policy codified in Title VII"), *aff'd*, 939 F.2d 157 (4th Cir. 1991).

26. In Fielder v. Southco, 699 F. Supp. 577 (W.D. Va. 1988), Judge Turk held that a plaintiff who alleged that her employer had discriminated against her because she was a woman could bring a breach of public policy claim under *Bowman*. The court pointed directly to Title VII, rather than the Virginia Human Rights Act, as the source of Virginia's public policy against sex discrimination. *Fielder*, 699 F. Supp. at 578. *See also* Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332, 1352 (E.D. Va. 1987) (holding that the plaintiff stated a claim under *Bowman* by alleging

however, have concluded that a discharged employee may bring a common law tort action in state court under the public policy exception to the at-will rule if the employee was fired in retaliation for exercising rights or discharging duties contained in federal statutes. The Supreme Court of Virginia has not signaled clearly whether an employee may rely upon a violation of federal law as the basis for a *Bowman* action.[28]

Like the district court in *Mannell*, the Circuit Court of Henry County was unconvinced by a plaintiff's argument that federal statutes can serve as the policy predicate for claims under *Bow-*

"he was discharged for his refusal to participate in an alleged illegal price-fixing scheme . . . in violation of established public policy as expressed in 15 U.S.C. § 1 *et seq.* and VA. CODE § 59.1-9.5").

27. Courts outside Virginia that have addressed this question have concluded that employees fired in violation of federal statutes or regulations may bring a breach of public policy claim against their former employers in state court, even when no corresponding state statutes are implicated. *See* Hutson v. Analytic Sciences Corp., 860 F. Supp. 6, 10 (D. Mass. 1994) (holding that under Massachusetts law federal statutes can serve as the source of public policy for purposes of an action for discharge in violation of public policy); Sorge v. Wright's Knitwear Corp., 832 F. Supp. 118, 120 (E.D. Pa. 1993) ("In Pennsylvania, public policies upon which wrongful discharge claims may be based can have their source in federal as well as state law"); Adler v. American Standard Corp., 538 F. Supp. 572, 578-79 (D. Md. 1982) (recognizing a tort claim under public policy exception by former employee discharged for threatening to expose company's violations of federal tax laws), *aff'd and rev'd in part on other grounds*, 830 F.2d 1303 (4th Cir. 1987); Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1336-37 (Cal. 1980) (allowing state law action based on violation of federal price fixing statutes); Carter Coal Co. v. Human Rights Comm'n, 633 N.E.2d 202, 212 (Ill. App. Ct. 1994) (confirming that "Illinois recognizes congressional acts as a source of public policy" that will support a wrongful discharge tort claim for employment discrimination), *cert. denied*, 642 N.E.2d 1275 (Ill. 1994); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571 (Minn. 1987) (recognizing the Federal Clean Air Act as an expression of state's public policy); D'Agostino v. Johnson & Johnson, Inc., 628 A.2d 305, 312 (N.J. 1993) (discussing the "decisions of this Court and other courts that have found a wrongful-discharge cause of action when based on a clearly articulated federal policy"); Velantzas v. Colgate-Palmolive Co., 536 A.2d 237, 238 (N.J. 1988) (finding mandate of public policy in federal employment discrimination law); Peterson v. Browning, 832 P.2d 1280, 1283 (Utah 1992) (holding that "a discharge resulting from an employee's refusal to violate [federal customs] laws is actionable under the public policy limitation").

28. Note, however, that in *Bowman*, 229 Va. at 540, 331 S.E.2d at 801, the plaintiffs cited their employer's breach of both Virginia statutes and federal securities laws as the basis for their claim that they had been discharged in contravention of public policy, a point underscored nine years later in *Lockhart*. *Lockhart*, 247 Va. at 105-06, 439 S.E.2d at 332 (observing that in *Bowman*, "the former employees specifically alleged, among other things, that the proxy statement the board of directors prepared and mailed to each stockholder of record was false and misleading in violation of federal securities laws and laws of Virginia").

man and *Lockhart*. In *Riddle v. Tultex Corporation*,[29] the plaintiff brought a *Lockhart* claim against Tultex Corporation in the Circuit Court of Henry County for gender and pregnancy discrimination after she was terminated while on maternity leave. The court, ruling upon the employer's demurrer, held that the plaintiff had stated a common law cause of action for sex discrimination under *Lockhart*, but dismissed the plaintiff's pregnancy discrimination count.[30] The Virginia Human Rights Act[31] renders "sex" discrimination a violation of the Commonwealth's public policy, without mentioning discrimination on the basis of pregnancy.[32] The plaintiff argued that Title VII, which expressly declares pregnancy discrimination to be a form of sex discrimination, could serve as the requisite declaration of public policy, even in the absence of a parallel Virginia statute.[33] The circuit court declined to accept the

29. Riddle v. Tultex Corp., Law No. CL94-284 (Henry County Cir. Ct. Feb. 7, 1995). The author was counsel for the plaintiff in *Riddle*, which ended in settlement.

30. *Id.* slip op. at 2.

31. VA. CODE ANN. §§ 2.1-715 to -725 (Repl. Vol. 1995).

32. *Id.* § 2.1-715.

33. Despite the circuit court's ruling, a strong statutory argument exists that pregnancy discrimination is unlawful under the Virginia Human Rights Act, which incorporates by reference Congress' prohibition against discrimination on the basis of pregnancy. Section 2.1-716 of the Virginia Code . . . which is part of the Virginia Human Rights Act, provides, "[c]onduct which violates Virginia or any federal statute or regulation governing discrimination on the basis of . . . sex . . . shall be an 'unlawful discriminatory practice' for the purposes of this chapter." VA. CODE ANN. § 2.1-716 (Repl. Vol. 1995). Since 1978, Congress has explicitly termed pregnancy discrimination a form of sex discrimination under Title VII. *See* 42 U.S.C. § 2000e(k) (codifying the Pregnancy Disability Act of 1978 and defining "on the basis of sex" to include pregnancy discrimination for purposes of Title VII).

Courts in other jurisdictions interpreting state human rights acts similar to Virginia's have determined that those statutes prohibit pregnancy-based discrimination. *See, e.g.*, Frank's Shoe Store v. West Virginia Human Rights Comm'n, 365 S.E.2d 251, 256 (W. Va. 1986) (holding that the West Virginia Human Rights Act's prohibition against sex discrimination prohibited pregnancy discrimination, despite its lack of a specific reference to "pregnancy"); Kerrigan v. Magnum Entertainment, 804 F. Supp. 733, 736 (D. Md. 1993) (holding that discharging an employee because of pregnancy is a violation of Maryland's public policy, as expressed in its state human rights act which prohibits sex discrimination); Gallo v. John Powell Chevrolet, 765 F.Supp. 198, 209 (M.D. Pa. 1991) (equating pregnancy discrimination with "sex" discrimination under Pennsylvania's human rights act); Merrell v. All Seasons Resorts, 720 F. Supp. 815, 819 (C.D. Cal. 1989); O'Laughlin v. Pinchback, 579 So. 2d 788, 792 (Fla. Dist. Ct. App. 1991); Broomfield v. Lundell, 767 P.2d 697, 705 (Ariz. Ct. App. 1989); Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1365 (Colo. 1988). *But see* Hughes v. Matthews, 986 F.2d 1168, 1170 (8th Cir. 1992) (holding that Arkansas would refuse to recognize a wrongful discharge action based on pregnancy

plaintiff's theory that a violation of a federal statute such as Title VII was a sufficient basis for a *Bowman-Lockhart* claim.[34]

Riddle is interesting also because the circuit court held that employees protected by contracts of employment may bring *Bowman* and *Lockhart* claims to the same extent as at-will employees.[35] In 1989, the Circuit Court of Fairfax County held that only at-will employees may bring *Bowman* claims, essentially because this tort was recognized as a narrow exception to the at-will rule.[36] Similarly, courts in a very few states, most notably Missouri, have agreed with employers that unionized workers and other contractual employees cannot bring tort claims for wrongful discharge in breach of public policy.[37] Contractual employees are limited to contract remedies in this minority view. Most of the small number of courts that have addressed this issue have agreed with the Circuit Court of Henry County in *Riddle* that no public policy is furthered by affording at-will employees the full panoply of damages recoverable in tort, while restricting employees who are not at-will to the more limited types of relief available in breach of contract actions.[38]

---

discrimination); Borden v. Johnson, 395 S.E.2d 628, 629-30 (Ga. Ct. App. 1990) (holding that the absence of Georgia statute prohibiting pregnancy discrimination precluded the court from recognizing a public policy exception to the at-will rule).

34. *Riddle*, slip op. at 2.

35. *Id.* slip op. at 3.

36. Gulledge v. Dyncorp, Inc., 24 Va. Cir. 538, 542 (Fairfax County 1989).

37. At least two decisions indicate that the Missouri public policy exception to the at-will rule does not afford a tort cause of action to contractual employees: Komm v. McFliker, 662 F. Supp. 924, 924-25 (W.D. Mo. 1987) and Luethans v. Washington University, 838 S.W.2d 117, 120 (Mo. Ct. App. 1992) (dictum). The United States Court of Appeals for the Eighth Circuit has both followed and criticized these decisions. Egan v. Wells Fargo Alarm Servs., 23 F.3d 1444, 1447 & n.3 (8th Cir. 1994); *see also* Willitts v. Roman Catholic Archbishop, 581 N.E.2d 475, 479 (Mass. 1991) (implying that only at-will employees can sue to recover for discharges in violation of public policy).

38. Retherford v. AT&T Communications, 844 P.2d 949, 960 (Utah 1992) (holding that "the tort of discharge in violation of public policy should be available to all employees, regardless of their contractual status"); *accord* Childers v. Chesapeake & Potomac Tel. Co., 881 F.2d 1259, 1264 (4th Cir. 1989) (applying Maryland law); Herring v. Prince Macaroni, Inc., 799 F.2d 120, 123-24 (3rd Cir. 1986); Norris v. Hawaiian Airlines, 842 P.2d 634, 645 (Haw. 1992) (rejecting employer's argument that "the state tort claim for discharge in violation of public policy is limited to at-will employees and does not extend to unionized employees who are protected by a 'mandatory grievance arbitration procedure and just cause standard for termination'"), *aff'd*, 114 S. Ct. 2239 (1994); Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280, 1283-84 (Ill. 1984) ("[T]here is no reason to afford a tort remedy to at-will employees but to limit

Virginia circuit courts also have differed with one another on whether an employee must be actually discharged before she has standing to assert *Bowman-Lockhart* claims. In *Jones v. Professional Hospitality Resources, Inc.*,[39] the plaintiff alleged that over a period of several weeks her general manager had touched her repeatedly and called her "honey." Although the general manager stopped these practices when the employee complained, the plaintiff's hours were reduced and her working conditions deteriorated.[40] Ultimately, the employee resigned and sued the employer for wrongful constructive discharge in breach of public policy.[41]

The Circuit Court of Virginia Beach awarded the employer summary judgment.[42] The court reasoned that the supreme court had whittled a slender exception to the at-will rule in *Bowman* to prevent employers from abusing their freedom to terminate employees. "It is only when the employer actually terminates the employee in violation of some established public policy that the narrow exception is applied," the circuit court wrote.[43] After reviewing *Bowman* and other decisions, the circuit court in *Jones* observed, "In no case did the employee resign and then pursue an action for wrongful discharge, as the Plaintiff in this case did."[44]

---

union members to contractual remedies under their collective bargaining agreements . . . . The public policy against retaliatory discharges applies with equal force in both situations") (citations omitted), *cert. denied* 474 U.S. 909 (1985); Ewing v. Koppers Co., 537 A.2d 1173, 1175 (Md. 1988) ("it would be illogical to deny the contract employee access to the courts equal to that afforded the at will employee"); K Mart Corp. v. Ponsock, 732 P.2d 1364, 1369 & n.5 (Nev. 1987); Lepore v. National Tool and Mfg. Co., 540 A.2d 1296, 1301 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 557 A.2d 1371 (N.J. 1989), *cert. denied*, 493 U.S. 954 (1989).

39. Jones v. Professional Hospitality Resources, Inc., 35 Va. Cir. 458 (Va. Beach 1995).

40. *Id.* at 458-59.

41. *Id.* at 459.

42. *Id.* at 464.

43. *Id.* at 460-61. *Accord* Reed v. Cardiolog Assocs., Law No. 93-1481 (Portsmouth City Cir. Ct. Nov. 8, 1994).

44. *Jones*, 35 Va. Cir. at 460-61. The circuit court proceeded to find that even if a plaintiff could bring a constructive discharge action under *Lockhart*, the plaintiff's allegations failed to satisfy the stringent test for constructive discharge applied by the United States Court of Appeals for the Fourth Circuit in Title VII actions. *Id.* at 460. This test for constructive discharge has two steps. First, a plaintiff must show that her working conditions have become intolerable. Second, the employer must have intended to force the employee to quit. Martin v. Cavalier Hotel Corp., 48 F.3d 1343,

The Circuit Court of Virginia Beach was probably incorrect in its ruling that constructively discharged employees cannot assert *Bowman-Lockhart* claims. *Wright v. Donnelly,*[45] which was consolidated on appeal with *Lockhart*, was a claim by an employee who resigned due to sexual harassment and then sued her employer on a constructive discharge theory for breach of public policy.[46] The Supreme Court of Virginia, without comment, treated Wright's suit as a wrongful discharge action on appeal.[47]

In *Ludwig v. T2 Medical*,[48] the employee, Ludwig, filed a *Lockhart* claim against her employer after she had resigned. The Circuit Court of Fairfax County remarked, "[t]he Court infers that Ludwig resigned but is claiming that the discharge meets the requirements of" *Bowman*.[49] Ludwig alleged that she had informed company officials that her immediate supervisor was embezzling funds.[50] In retaliation for this whistleblowing, the employer demoted Ludwig and told her to resign within two months in exchange for severance pay.[51] Overruling the defendant's demurrer, the court held that Ludwig had alleged a claim under *Bowman* and *Lockhart*.[52]

1350 (4th Cir. 1995); Paroline v. Unisys Corp. 879 F.2d 100, 108 (4th Cir. 1989); *dissenting opinion adopted en banc*, 900 F.2d 27 (4th Cir. 1990); Bristow v. Daily Press, 770 F.2d 1251, 1255 (4th Cir. 1985); Wilder v. Southeastern Pub. Serv. Auth., 869 F. Supp. 409, 414 (E.D. Va. 1994); Jolly v. Northern Telecom, 766 F. Supp. 480 (E.D. Va. 1991). The United States Court of Appeals for the Fourth Circuit recently held that an employee alleging the employer's sexual harassment led to a constructive discharge need not prove that the employer specifically and consciously intended to force a resignation. Instead, a plaintiff proceeding on a constructive discharge theory may satisfy the *Paroline* "intent to force a resignation" requirement by showing her resignation was a reasonably foreseeable consequence of the employer's sexual mistreatment. *Martin*, 48 F.3d at 1355; *see* Trout v. Charcoal Steak House, 835 F. Supp. 899, 902 (W.D. Va. 1993); Hukkanen v. International Union of Operating Engineers, 3 F.3d 281, 284 (8th Cir. 1993). *Martin* should prove helpful to plaintiffs in sexual harassment cases, since often an employer bent on harassing an employee may wish to retain the employee on the payroll so that the employer can continue to abuse the employee. *Martin*, 48 F.3d at 1343.

45. 247 Va. 98, 439 S.E.2d 328 (1994).

46. Wright v. Donnelly & Co., 28 Va. Cir. 185, 187 (Loudoun County 1992).

47. *Lockhart*, 247 Va. at 102, 439 S.E.2d at 330.

48. 34 Va. Cir. 65 (Fairfax County 1994).

49. *Id.* at 66.

50. *Id.*

51. *Id.*

52. *Id.* at 67.

In *Allen v. Jenkins*,[53] the employer argued that a federal statute immunized it against a plaintiff's *Lockhart* claim. Wallace Allen alleged that First Union National Bank of Virginia's president unjustly dismissed him as senior vice president because of his race and age.[54] First Union and its president demurred, asserting that Allen's *Lockhart* claim was barred by the National Bank Act of 1864.[55] Under this federal statute, a national bank is entitled to some measure of immunity[56] from a wrongful discharge action filed by an officer dismissed by the bank's board of directors. The question presented to the Circuit Court of the City of Roanoke was whether the immunity extended by the National Bank Act was sufficiently broad to shield First Union from liability to an officer whom it had fired in breach of Virginia's public policy.[57]

In a detailed letter opinion, Judge Weckstein ruled that the court need not resolve that issue.[58] The immunity granted by the National Bank Act never attached, the court concluded, because Allen was dismissed by First Union's president, rather

---

53. Allen v. Jenkins, No. CL94000650 (Cir. Ct. Roanoke City May 3, 1995).

54. *Id.* slip op. at 1.

55. 12 U.S.C. § 24 (1988) (cited in *Allen*, slip op. at 1).

56. Courts differ on the extent of this immunity. *See infra* note 60. The National Bank Act provides that national banks have the power to elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places. 12 U.S.C. § 24 (1988).

57. *Allen*, slip op. at 2.

58. *Id.* slip op. at 12. The "dismiss at pleasure" language of the National Bank Act is very similar to corresponding provisions in the Federal Reserve Act, 12 U.S.C. § 341 (1988), and the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a) (1988). Several courts have held that one or more of these three federal banking statutes preempt state law wrongful discharge claims, both in tort and contract. *See, e.g.*, Andrews v. Federal Home Loan Bank, 998 F.2d 214, 220 (4th Cir. 1993); Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 525-26 (9th Cir. 1989); Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 931 (6th Cir.), *cert. denied*, 484 U.S. 945 (1987), *reh'g denied*, 484 U.S. 1083 (1988); City Nat'l Bank v. Brown, 599 So. 2d 787, 790 (La. Ct. App. 1992); Alfano v. First Nat'l Bank, 490 N.Y.S.2d 56, 58 (N.Y. App. Div. 1985); Webber v. First Fed. Bank, 523 N.W.2d 720, 722 (S.D. 1994). Other courts, however, have held that these statutes and the regulations implementing them do not preempt state law wrongful discharge claims. *See, e.g.*, Hall v. Great W. Bank, 282 Cal. Rptr. 640, 645 (Cal. Ct. App. 1991); Cole v. Carteret Sav. Bank, 540 A.2d 923, 926 (N.J. Super. Ct. Law Div. 1988); Dynan v. Rocky Mountain Fed. Sav. & Loan, 792 P.2d 631, 638 (Wyo. 1990); *see also* Rohde v. First Deposit Nat'l Bank, 497 A.2d 1214, 1216 (N.H. 1985).

than by the bank's board of directors.[59] Overruling First Union's demurrer, Judge Weckstein predicted that the Supreme Court of Virginia would side with those courts which have concluded that the National Bank Act provides immunity only when the board of directors discharges the officer.[60]

II. THE PUBLIC POLICY EXCEPTION AFTER *LOCKHART*—THE LEGISLATIVE RESPONSE

Following a full-throttle lobbying campaign by the Virginia Chamber of Commerce and other business groups seeking to have *Lockhart* overruled legislatively, the General Assembly adopted Senate Bill No. 1025 during its 1995 legislative session.[61] The bill, which amends section 2.1-725 of the Virginia Human Rights Act, creates a statutory cause of action in state court for certain employees "discharged on the basis of race, color, religion, national origin or sex, or age if the employee is forty years or older."[62] Discharges on the basis of disability are not actionable.[63]

---

59. *Allen*, slip op. at 2.

60. *Allen*, slip op. at 6. The court acknowledged that "there is something of a conflict among the authorities about whether the shield of the National Bank Act is available to a bank when an officer is terminated by another officer, rather than by action of the board of directors." *Id.* In deciding that the immunity of the bank's board of directors is nondelegable, the court relied upon decisions such as Wells Fargo Bank v. Superior Court, 811 P.2d 1025, 1032 (Cal. 1991), and Sargent v. Central Nat'l Bank & Trust Co., 809 P.2d 1298, 1305 (Okla. 1991), and rejected competing case law, such as Mahoney v. Crocker Nat'l Bank, 571 F. Supp. 287, 292 (N.D. Cal. 1983).

61. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995). Besides S.B. 1025, only two other bills fall within the scope of this article. The General Assembly amended and reenacted §§ 40.1-1 and 40.1-51.1 of the Virginia Code to require employers to "report to the Virginia Department of Labor and Industry within eight hours any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons." VA. CODE ANN. § 40.1-51.1(D) (Cum. Supp. 1995). Prior to this amendment, the statutes mandated that employers report within 48 hours any accident resulting in a fatality or hospitalization of five or more persons. VA. CODE ANN. §§ 40.1, 40.1-51.1 (Repl. Vol. 1994). The legislature also amended and reenacted § 32.1-36 to permit the commissioner of health to reveal, to the extent permitted by law, the name and disease of a person to his or her employer, provided the employee's job duties meet certain criteria. VA. CODE ANN. § 32.1-36(D) (Cum. Supp. 1995). The bill provides for penalties against any employer who makes an unauthorized disclosure of this information concerning the employee. *Id.*

62. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995).

63. The Virginia Human Rights Act refers to discrimination on the bases of dis-

Although section 2.1-725 establishes a cause of action directly under the Virginia Human Rights Act, this legislation is designed to restrict *Lockhart* in at least two respects. First, the new cause of action is available only if the employer has more than five but fewer than fifteen employees.[64] Under *Lockhart*, all employers, regardless of size, are subject to liability in tort if they discharge an employee because of her race, gender or other protected status.[65] The apparent purpose of this statutory amendment is to immunize all employers, other than firms which have at least six but no more than fourteen employees, from discrimination actions under the public policy exception to the at-will rule.[66]

A second restriction built into section 2.1-725 concerns the relief plaintiffs may seek for discriminatory discharges. Recoverable damages are limited to "up to twelve months' back pay," plus interest.[67] While the court may order that up to twenty-

---

ability and marital status as unlawful discriminatory practices, but provides no remedy for these forms of discrimination. *Id.* Section 2.1-725 provides a cause of action only to employees who are *discharged* on the basis of their race, gender or other protected status. The statute does not refer to discrimination in hiring or promotion practices. Virginia courts have neither recognized nor rejected a *Bowman-Lockhart* claim for discriminatory failure to hire or promote.

Whether the amended statute prevents public employees or employees of government contractors fired on the basis of their race or gender from bringing *Lockhart* claims is not clear. The Virginia Constitution and several statutes prohibit government employers, regardless of size, from discriminating on the basis of sex or race. *See, e.g.*, VA. CONST. art. 1, § 11 (declaring "that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged"); VA. CODE ANN. § 15.1-48.1 (Repl. Vol. 1989) (prohibiting constitutional officers from discriminating in employment); VA. CODE ANN. § 2.1-116.10 (Repl. Vol. 1995) (declaring that the public policy of the Commonwealth is "to provide equal employment opportunity to applicants and employees of the Commonwealth . . . without regard to race, color . . . sex or age"). Government employees may argue that they can base a *Lockhart* claim on the public policies framed in these statutes rather than the Virginia Human Rights Act. Employees of firms that secure contracts with state or local governments also can point to laws other than the Virginia Human Rights Act which express the Commonwealth's public policy against employment discrimination. *See* VA. CODE ANN. § 11-51 (Repl. Vol. 1993).

64. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995).

65. *Id.* § 2.1-725.

66. *Id.* § 2.1-725(B). The legislation does not declare that *Lockhart* is disapproved or overruled. Still, the amended statute provides that "[c]auses of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances." *Id.* § 2.1-725(D).

67. *Id.* § 2.1-725(C). However, the amended statute also provides that "if the

five percent of the judgment be paid to the plaintiff's lawyer as attorney's fees, any fees must be deducted from the back pay awarded to the lawyer's client.[68] The amended statute disallows all other types of compensatory damages recoverable in many intentional tort actions, such as front pay and compensation for emotional suffering.[69] Punitive damages and reinstate-

---

court finds that either party engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii) award back pay to the date of judgment without regard to the twelve-month limitation." *Id.*

68. *Id.*

69. *Id. Bowman* remains very much alive despite this statutory amendment. Whether the amendment eviscerates *Lockhart* is open to question, particularly with respect to plaintiffs who work for companies that have more than fourteen employees or less than six. When the Supreme Court of Virginia issued *Lockhart* the statute already provided that,

> Nothing in this chapter creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions. Nor shall the policies or provisions of this chapter be construed to allow tort actions to be instituted instead of or in addition to the current statutory actions for unlawful discrimination.

VA. CODE ANN. § 2.1-725 (Repl. Vol. 1987).

Despite this language, the Supreme Court of Virginia in *Lockhart* held that employees discharged on account of their race or gender could bring causes of action under the public policy exception to the at-will rule. "Here, we do not rely upon the Virginia Human Rights Act to create new causes of action. Rather, we rely *solely* on the narrow exception that we recognized in 1985 in *Bowman*, decided two years before the enactment of the Virginia Human Rights Act." *Lockhart*, 247 Va. at 105, 439 S.E.2d at 331. (emphasis added).

The General Assembly's amendment of the Virginia Human Rights Act may have failed to curtail *Lockhart* because the Supreme Court of Virginia did not rely specifically upon the Act when it held that race and sex discrimination is inimical to public policy. This assessment of *Lockhart* finds support in a few jurisdictions outside Virginia which have recognized that at-will employees fired in violation of fundamental, widely recognized norms may sue their former employers in tort even in the absence of any state statute which directly expresses that public policy. *See, e.g.*, Verduzco v. General Dynamics Co., 742 F. Supp. 559, 560 (S.D. Cal. 1990) (recognizing "a public policy that is not based on or derived from a statute"); Painter v. Graley, 639 N.E.2d 51, 56 (Ohio 1994); Banaitis v. Mitsubishi Bank Ltd., 879 P.2d 1288, 1294 (Or. Ct. App. 1994); Payne v. Rozendaal, 520 A.2d 586, 589 (Vt. 1986) (age discrimination). A small number of other courts have recognized a common law action for discriminatory discharge even though the state has a human rights act purporting to define the remedies available to terminated employees. Much like the Supreme Court of Virginia in *Lockhart*, some of these courts point out that the public policy against discrimination preceded passage of the state's human rights act. *See, e.g.*, Bernstein v. Aetna Life & Casualty, 843 F.2d 359, 365 (9th Cir. 1988); Broomfield v. Lundell, 767 P.2d 697, 705 (Ariz. Ct. App. 1988); Holmes v. Haughton Elevator Co., 272 N.W.2d 550, 551 (Mich. 1978); Goldsborough v. Eagle Crest Partners, 805 P.2d 723, 725 (Or. Ct. App. 1991); Bennett v. Hardy, 784 P.2d 1258, 1262 (Wash. 1990). *But see, e.g.*, Lapinad v. Pacific Oldsmobile-GMC, 679 F. Supp. 991, 993 (D. Haw. 1988); Rouse v. Farmers State Bank, 866 F. Supp. 1191, 1212

ment also are excluded.[70] Thus the relief available to the select class of employees afforded a cause of action under section 2.1-725 is far more restricted than the full range of tort remedies extended to all plaintiffs by *Bowman* and *Lockhart.*

III. IN *MIDDLEKAUFF'S* WAKE—INTENTIONAL TORT CLAIMS BY EMPLOYEES AGAINST THEIR EMPLOYERS OR FELLOW EMPLOYEES

The Supreme Court of Virginia and lower courts recently have issued a number of opinions involving intentional tort claims by employees in addition to wrongful discharge actions. For several years defendants have avoided common law liability for intentional torts by successfully asserting that the plaintiff's sole recourse is under the Virginia Workers' Compensation Act.[71] Recent decisions, however, suggest that the once formidable exclusivity provision of the Virginia Workers' Compensation Act is losing force as a defense to intentional tort claims.

The exclusivity rule establishes the Workers' Compensation Act as the only source of compensation for employees whose workplace injuries have three characteristics.[72] First, the Workers' Compensation Commission has exclusive jurisdiction over injuries that occur by "accident."[73] Second, this accidental

---

(N.D. Iowa 1994); Greene v. Union Mut. Life Ins. Co., 623 F. Supp. 295, 299 (D. Me. 1985); Wehr v. Burrough, 438 F. Supp. 1052, 1055 (E.D. Pa. 1977), *aff'd*, 619 F.2d 276 (3d Cir. 1980); Melley v. Gillette Corp., 475 N.E.2d 1227, 1229 (Mass. Ct. App. 1985).

70. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995).

71. VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 1995). The leading case supporting the employer's position on this jurisdictional point was Haddon v. Metropolitan Life Insurance Co., 239 Va. 397, 389 S.E.2d 712 (1990), *overruled by* Lichtman v. Knouf, 248 Va. 139, 445 S.E.2d 114 (1994).

72. VA. CODE ANN. § 65.2-307 (Repl. Vol. 1995). *See* VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995) (defining "injury" for purposes of the Workers' Compensation Act as an "injury by accident arising out of and in the course of the employment"). This statute must be read together with § 65.2-307, which provides that,

> The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

VA. CODE ANN. § 65.2-307 (Repl. Vol. 1995).

73. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995).

injury must have arisen "in the course of . . . employment."[74] Third, the injury must have arisen "out of employment."[75] Although a plaintiff whose injury fails to satisfy one or more of these three elements is not entitled to receive workers' compensation benefits, she is free to pursue a common law action against the employer or other tortfeasor.

The erosion of the exclusivity provision as an absolute defense to intentional tort actions advanced in January 1994 with *Middlekauff v. Allstate Insurance Co.*,[76] which focused upon the injury "by accident" prong of the three-part jurisdictional test set out above. In *Middlekauff*, a plurality of justices on the Supreme Court of Virginia overruled *Haddon v. Metropolitan Life Insurance*.[77] The supreme court in *Haddon* had held that the Workers' Compensation Act contained the exclusive remedy for claims of intentional infliction of emotional distress.[78] In

---

74. *Id.*

75. *Id.* The failure to prove any one of these three factors defeats coverage under the Workers' Compensation Act. Snead v. Harbaugh, 241 Va. 524, 526, 404 S.E.2d 53, 54 (1991). The "arising out of" element is distinct from the requirement that the injury also occur "in the course of" the employment. "Arising out of" employment pertains to the etiology of the injury. The "in the course of" employment language refers to the time, place and circumstances under which the injury occurred. Briley v. Farm Fresh, Inc., 240 Va. 194, 197, 396 S.E.2d 835, 836 (1990). *Compare* Metcalf v. A.M. Express Moving, 230 Va. 464, 468, 339 S.E.2d 177, 180 (1986) (observing that an injury occurs in the course of employment when it takes place "within the period of employment, at a place where the employee may reasonably be expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incidental thereto") *with* R & T Investments v. Johns, 228 Va. 249, 252, 321 S.E.2d 287, 289 (1984) (explaining that causal connection between injury and the employment is necessary for the injury to have arisen out of the employment).

76. 247 Va. 150, 439 S.E.2d 394 (1994). Prior to *Middlekauff*, the Supreme Court of Virginia in *Snead* had arguably modified *Haddon* by holding that a "condition causing disability or pain will not be considered an 'injury' for purposes of the Act unless accompanied by a 'sudden obvious mechanical or structural change' in the body." 241 Va. at 528, 404 S.E.2d at 55. The *Snead* court held that the plaintiff's claim that his reputation had been damaged by the employer's defamatory remarks was not barred by the Workers' Compensation Act. *Id. See also* Merillat Indus. v. Parks, 246 Va. 429, 433, 436 S.E.2d 600, 602 (1993) (holding that an employee suffering from torn rotator cuff muscle due to cumulative, repetitive trauma is not entitled to workers' compensation benefits because his condition resulted from neither an injury by accident nor compensable disease within the meaning of the Workers' Compensation Act).

77. 239 Va. 397, 389 S.E.2d 712 (1990), *overruled by* Lichtman v. Knouf, 248 Va. 139, 445 S.E.2d 114 (1994).

78. *Id.* at 399, 389 S.E.2d at 713-14.

Middlekauff, the supreme court stood *Haddon* on its head by holding that emotional distress gradually inflicted upon an employee by her employer's verbal abuse over a period of many months did not amount to an "injury by accident" within the meaning of the Workers' Compensation Act.[79] The statutory terms "injury by accident" require a sudden, precipitating event causing immediate harm.[80] The *Middlekauff* plurality reasoned that the trial court had erred when it sustained the employer's plea of the exclusivity provision as a bar to the plaintiff's suit for intentional infliction of emotional distress.[81]

In *Lichtman v. Knouf*,[82] a majority on the supreme court confirmed the *Middlekauff* plurality's decision to "overrule *Haddon* to the extent that it placed gradually incurred injuries within the definition of 'injury by accident.'"[83] *Lichtman* was an action for intentional infliction of emotional distress by an employee against two fellow employees.[84] In an opinion issued six months after *Middlekauff*, the court ruled that the plaintiff's motion for judgment was not barred by the Workers' Compensation Act.[85]

The supreme court revisited the "injury by accident" portion of the three-part test for exclusive jurisdiction under the Workers' Compensation Act in *Williams v. Garraghty*,[86] a decision rendered in March 1995. David Garraghty, a prison warden for the Virginia Department of Corrections, sued a subordinate, Gloria Williams, in the Circuit Court for Nottoway County for intentional and negligent infliction of emotional distress, as well as defamation.[87] Garraghty alleged that he suffered mental and emotional injuries, lost income and other damages because Williams wrote a memorandum falsely accusing him of

79. *Middlekauff*, 247 Va. at 154, 439 S.E.2d at 397.
80. *Id.* at 153, 439 S.E.2d at 396.
81. *Id.* at 154, 439 S.E.2d at 397.
82. 248 Va. 138, 445 S.E.2d 114 (1994).
83. *Id.* at 140, 445 S.E.2d at 115.
84. *Id.* at 138, 445 S.E.2d at 114.
85. *Id.* At least one circuit court has rejected an employer's claim that *Middlekauff* and *Lichtman* should be applied prospectively to causes of action which arise only after the date of the supreme court's opinion in *Middlekauff*. Fox v. Rich Products Corp., 34 Va. Cir. 403, 406 (Winchester City 1994).
86. 249 Va. 224, 455 S.E.2d 209 (1995).
87. *Id.* at 227, 455 S.E.2d at 212.

sexual harassment.[88] The trial court allowed Garraghty to proceed with his defamation count, but sustained Williams' demurrer to all claims for emotional and mental distress damages.[89] A jury awarded Garraghty compensatory and punitive damages against Williams for defamation.[90] The trial court, however, remitted much of the punitive award.[91] Both parties appealed.[92]

The question presented by Garraghty's appeal was whether the trial court had erred in ruling that the exclusivity provision of the Workers' Compensation Act barred him from proceeding with his emotional distress claims. "The answer to this question turns on whether Garraghty sustained an 'injury by accident,'" Justice Stephenson wrote for the majority.[93]

---

88. *Id.* at 229, 455 S.E.2d at 213. Garraghty sought to recover for his mental and emotional suffering under two theories. First, Garraghty sought to prove that the defendant was liable for intentional infliction of emotional distress. Second, he claimed damages for mental and emotional injuries he sustained as a direct result of the defendant's defamation of him. *Id.* A defendant who commits an intentional tort such as fraud or defamation may be liable for the plaintiff's mental and emotional injuries even if the plaintiff fails to prove the elements of the independent tort of intentional infliction of emotional distress. Cartensen v. Chrisland Corp., 247 Va. 433, 446, 442 S.E.2d 660, 667-68 (1994) ("The criteria for sustaining a cause of action for intentional infliction of emotional distress are not the same as those applied to recovery of emotional distress damages flowing from an independent tort."); Sea-Land Serv. v. O'Neal, 224 Va. 343, 354, 297 S.E.2d 647, 653 (1982).

89. *Williams*, 249 Va. at 227, 455 S.E.2d at 212.

90. *Id.* at 228, 445 S.E.2d at 212.

91. *Id.* at 237, 445 S.E.2d at 217.

92. *Id.* at 228, 445 S.E.2d at 212.

93. *Id.* at 238, 455 S.E.2d at 218.

In her separate appeal, Williams challenged the jury's awards of compensatory and punitive damages against her on Garraghty's defamation and insulting words counts. The supreme court held that the trial court had correctly instructed the jury that Williams' memorandum was entitled to a qualified privilege because it was a communication made in the context of an employment relationship. *Id.* at 234, 455 S.E.2d at 216. The trial court also accurately informed jurors that they must determine whether Williams lost the privilege by acting with common law malice. *Id.* at 236, 455 S.E.2d at 216-17.

A qualified privilege, such as that which protects communications made in connection with an employment relationship, is lost if the plaintiff proves by clear and convincing evidence that the defendant spoke the defamatory words with common-law malice. To establish common-law malice, the plaintiff must prove the defendant acted out of spite or ill-will. Southeastern Tidewater Opportunity Project v. Bade, 246 Va. 273, 276, 435 S.E.2d 131, 132 (1993) (reversing jury's verdict that the discharged employee had proven that his former employer had acted with common-law malice in writing a dismissal letter which accused him of deficient performance and implied that he had engaged in illegal activities); Smalls v. Wright, 241 Va. 52, 55, 399 S.E.2d 805, 808 (1991); Great Coastal Express v. Ellington, 230 Va. 142, 154,

The supreme court answered this question in the negative. Citing *Middlekauff*, the court declared, "Generally, the damages that flow from an action for intentional or negligent infliction of emotional distress are not the result of an injury by accident . . . ."[94] Similarly, the mental and emotional damages Garraghty suffered as a result of Williams' defamatory memorandum did not constitute injuries by accident.[95]

Common to *Middlekauff, Lichtman* and *Garraghty* was a determination by the Supreme Court of Virginia in each case that the employee's alleged injuries did not arise "by accident" within the contemplation of the Workers' Compensation Act exclusivity provision. In *Richmond Newspapers v. Hazelwood*,[96] the supreme court shifted its focus to whether the plaintiff's injuries at the hands of a co-worker satisfied the "arising out of . . . employment" requirement of the exclusivity rule.[97] Ricky Hazelwood filed suit against his employer, Richmond Newspapers, for assault and battery after a fellow employee "goosed" him on a series of occasions.[98] The Circuit Court for the City of Richmond overruled Richmond Newspapers' plea that the action was barred by section 65.2-307, the exclusivity

---

334 S.E.2d 846, 854 (1985); The Gazette v. Harris, 229 Va. 1, 18, 325 S.E.2d 713, 727, *cert. denied sub nom.* Fleming v. Moore, 472 U.S. 1032 (1985); Preston v. Land, 220 Va. 118, 120-21, 255 S.E.2d 509, 511 (1979); Crawford & Co. v. Graves, 199 Va. 495, 499, 100 S.E.2d 714, 717 (1957); Taylor v. Grace, 166 Va. 138, 144, 184 S.E. 211, 213 (1936); Chesapeake Ferry Co. v. Hudgins, 155 Va. 874, 903, 156 S.E. 429, 439 (1931).

The Supreme Court of Virginia in *Williams* upheld the jury's finding that because the defendant had acted with malice, her memorandum was not privileged. *Williams*, 249 Va. at 237, 455 S.E.2d at 217. This finding by the jury also served to support its award of punitive damages to Garraghty, since punitive damages are justified when the tortfeasor acts with actual malice. *Id.* The supreme court, however, rejected Garraghty's argument that the trial court had erred in remitting a large portion of the punitive award. Giving "substantial weight" to the trial court's action, the supreme court held that Williams' modest salary and financial assets rendered the punitive award excessive and subject to remittitur. *Id.*

94. *Williams*, 249 Va. at 238, 455 S.E.2d at 218.

95. *Id.* at 239, 455 S.E.2d at 218. In his cross-appeal, Garraghty sought a new trial only on his claims for mental and emotional suffering. Garraghty did not wish to retry his defamation and insulting words counts, since he had prevailed on those aspects of his suit. Refusing to grant Garraghty "such piecemeal relief," the supreme court affirmed the trial court's judgment without ordering a new trial. *Id.* at 238-39, 455 S.E.2d at 218.

96. 249 Va. 369, 457 S.E.2d 56 (1995).

97. VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995).

98. *Hazelwood*, 249 Va. at 371, 457 S.E.2d at 57.

provision.[99] Hazelwood received a jury verdict against the employer for $140,000, which the trial court declined to set aside.[100]

The Supreme Court of Virginia affirmed.[101] The court assumed, "without deciding," that Hazelwood's injury was the result of an "accident" within the scope of the Workers' Compensation Act.[102] Both parties conceded, moreover, that the injury arose in the "course of the employment."[103] Accordingly, Hazelwood's claim was barred by the Workers' Compensation Act if his injury also arose "*out* of employment," the third prong of the three-part jurisdictional test under the Workers' Compensation Act.[104]

The supreme court held that the goosings did not arise out of Hazelwood's employment because they hardly furthered the employer's business.[105] Goosings are personal assaults, directed against the employee as an individual rather than as an employee. Thus, even if the goosings were deemed injuries arising by accident in the "course" of employment, the trial court had properly overruled the employer's plea of the Workers' Compensation Act exclusivity provision. Because the goosings did not also arise "out" of his employment, Hazelwood could pursue a common law action against Richmond Newspapers.[106]

IV. Other Intentional Tort Claims by Employees

The judicial opinions discussed in the foregoing sections of this article apply, and in some instances extend, tort principles articulated by the Supreme Court of Virginia in its two watershed opinions from 1994, *Lockhart* and *Middlekauff*. During the year under review, state and federal courts in Virginia also de-

---

99. *Id.* at 375, 457 S.E.2d at 59.
100. *Id.* at 371, 457 S.E.2d at 57.
101. *Id.* at 375, 457 S.E.2d at 59.
102. *Id.* at 372, 457 S.E.2d at 58.
103. *Id.*
104. *Id.* This narrow reading of the "arising out of employment" requirement is also reflected in other decisions handed down last year by the Supreme Court of Virginia. Lipsey v. Case, 248 Va. 59, 61-62, 445 S.E.2d 105, 107 (1994); Taylor v. Mobile Corp., 248 Va. 101, 107, 444 S.E.2d 705, 708 (1994).
105. *Hazelwood,* 249 Va. at 375, 457 S.E.2d at 59.
106. *Id.*

livered decisions concerning employment torts that did not directly implicate either *Lockhart* or *Middlekauff*. Several of these opinions provide guidance on the statute of limitations applicable to tort claims for wrongful discharge.

In *McBride v. Roanoke Redevelopment & Housing Authority*,[107] the United States District Court for the Western District of Virginia concluded that a defamation action is governed by Virginia's one-year statute of limitations. Herbert McBride had served as director of Roanoke's housing authority for several years before he was fired.[108] McBride then filed suit against the housing authority and its chairman on a number of theories, including defamation.[109] McBride alleged that the employer had defamed him on a series of occasions over the course of two years.[110] This campaign to sully McBride's name culminated with his dismissal, when the defendants announced publicly that McBride's termination was "based on unsatisfactory job performance."[111]

The court granted the defendants' summary judgment.[112] Any cause of action for defamation based on statements made more than one year prior to the date McBride filed suit were time-barred, the court held.[113] To the extent that McBride's

---

107. 871 F. Supp. 885 (W.D. Va. 1994).

108. *Id.* at 887.

109. *Id.* at 888. McBride also brought claims for deprivation of procedural due process, First Amendment violations and breach of contract, all of which were dismissed on summary judgment.

110. *Id.* at 888.

111. *Id.* at 891.

112. *Id.* at 892.

113. *Id.* at 891. Other recent opinions reinforce the conventional wisdom that employees should bring defamation actions within one year of the date they are harmed. Purcell v. Tidewater Constr. Corp. 250 Va. 93, 95, 458 S.E.2d 291, 292 (1995) (dictum); Tenant v. American Home Products, 34 Va. Cir. 256, 259 (Richmond City 1994); *see* Morrissey v. William Morrow Co., 739 F.2d 962, 967 (4th Cir. 1984), *cert. denied* 469 U.S. 1216 (1985) ("[T]he Virginia Supreme Court has consistently applied the one-year statute of limitations in VA. CODE ANN. § 8.01-248 to defamation actions"). Although two circuit courts have held that the two year statute of limitations applies to defamation actions, Massie v. Home Interiors, 27 Va. Cir. 492, 493-94 (Roanoke County 1987), and Via v. O'Donnell, 27 Va.Cir. 433, 445 (Roanoke City 1982), the clear majority of Virginia trial courts have held that the one-year statute governs. *See, e.g.*, Welch v. Kennedy Piggly Wiggly Stores, 63 Bankr. 888, 897 (W.D. Va. 1986); Moore v. Allied Chemical Corp., 480 F. Supp. 364, 376 (E.D. Va. 1979); Brown v. Holland, 17 Va. Cir. 298, 299 (Fairfax County 1989); Ellison v. St. Mary's Hosp., 8 Va. Cir. 330, 334 (Henrico County 1987); Marshall v. Medical Facilities of Am., 6

action was based on the housing authority's public announcement of his departure, it was timely but meritless. The authority's statement that McBride's termination was "based on unsatisfactory job performance" was not defamatory, the court held.[114] No evidence suggested the statement was false and truth is an absolute defense. Moreover, allegations of unsatisfactory performance in employment are insufficiently harmful to one's reputation to constitute defamation, the court declared.[115]

The catch-all statute of limitations also figured in *Singer v. Dungan*.[116] In *Singer*, the plaintiff was president of a corporation in which he also owned stock.[117] The plaintiff won a jury verdict on his claim that the corporation's directors had breached their fiduciary duties by diluting his stock.[118] The United States Court of Appeals for the Fourth Circuit reversed on the ground that the plaintiff's breach of fiduciary claim was barred by the one year catch-all limitations period contained in section 8.01-248.[119]

Va.Cir. 410, 410 (Lynchburg City 1986); Reinforced Earth Co. v. Ashcraft & Gerel, 3 Va. Cir. 143, 144 (Alexandria City 1983); Beasley v. Kayo Oil Co., 3 Va. Cir. 119, 119 (Chesterfield County 1983); Moon v. CBS, 7 Va. Cir. 68, 70 (Richmond City 1981); Gaines v. Safeway Stores, 7 Va. Cir. 468, 469 (Richmond City 1977).

In any event, the General Assembly during its 1995 legislative session made clear that actions which accrue on or after July 1, 1995, for defamation, libel, slander and insulting words are governed by a one year limitations period. VA. CODE ANN. §§ 8.01-247.1, -248 (Cum. Supp. 1995). In the same bill, the General Assembly increased from one to two years the catch-all statute of limitations codified at VA. CODE ANN. § 8.01-248, at least for causes of action which accrue on or after July 1, 1995. *Id.*

114. 871 F. Supp. at 892.

115. *Id.* at 891.

116. 45 F.3d 823 (4th Cir. 1995).

117. *Id.* at 824.

118. *Id.* at 826.

119. *Id.* at 827. *Singer* is consistent with other decisions of the United States Court of Appeals for the Fourth Circuit in recent years concerning the statute of limitations applicable to breach of fiduciary duty claims. *See* RTC v. Everhart, 37 F.3d 151, 155 (4th Cir. 1994); FDIC v. Cocke, 7 F.3d 396, 401-02 (4th Cir. 1993), *cert. denied* 115 S. Ct. 53 (1994); LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n, 830 F.2d 522, 527 (4th Cir. 1987), *cert. denied* 484 U.S. 1065 (1988). Similarly, several courts have concluded that the catch-all statute of limitations applies to wrongful discharge claims of various kinds. Purcell v. Tidewater Constr. Corp. 250 Va. 93, 96, 458 S.E.2d 291, 293 (1995) (holding that one-year catch-all statute applies to suits by employees alleging that they were wrongfully discharged in retaliation for filing workers compensation act claims); Guiden v. Southeastern Public Serv. Auth., 760 F. Supp. 1171, 1179 (E.D. Va. 1991), *aff'd*, 946 F.2d 885 (4th Cir. 1991); Deasy v.

In *Saliba v. Exxon Corp.*,[120] the plaintiff, Saliba, had been in-house counsel to Hunt Oil Company and its Yemeni subsidiary, Yemen Hunt. Saliba entered into a confidentiality agreement with Yemen Hunt stating that he would avoid economic activities contrary to the employer's interests for two years after termination of his employment.[121] During Saliba's two-year tenure with Yemen Hunt, the oil company formed a partnership with a Yemen-based subsidiary of Exxon Corp.[122] The purpose of the Hunt-Exxon partnership was oil exploration in Yemen.[123]

After Hunt fired him, Saliba was retained by the Government of Yemen under a three-month employment agreement.[124] Saliba's job entailed advising the Yemeni government on matters related to the oil explorations of the Hunt-Exxon partnership.[125] Hunt protested to Yemeni officials that Saliba's representation of the government conflicted with his confidentiality agreement.[126] Hunt also informed government representatives that it was embroiled in a declaratory judgment action in Texas state court against Saliba over the lawfulness of his termination as in-house counsel.[127] Yemen elected not to renew its legal services contract with Saliba at the end of the initial, three month term.[128]

In a suit filed in the United States District Court for the Western District of Virginia, Saliba alleged that Hunt and Exxon had conspired against him and tortiously interfered with his employment contract with the Yemeni government.[129] The court, however, granted the oil firms summary judgment on

---

Maryview Hosp., Law No. 92-846, Oct. 19, 1994 (Portsmouth City 1994); Wright v. Buchanan Pump & Serv. Co., 22 Va. Cir. 396, 396 (Wise County 1991); Crowder v. Chap Stick Co., 6 Va. Cir. 115, 115 (Lynchburg City 1984). Effective July 1, 1995, the catch-all statute will provide a two year limitations period for these actions. VA. CODE ANN. § 8.01-247.1, -248 (Cum. Supp. 1995); *see* discussion *supra* note 113.

120. 865 F. Supp. 306 (W.D. Va. 1994).
121. *Id.* at 308.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 309.
127. *Id.*
128. *Id.*
129. *Id.* Saliba also alleged that the oil companies had violated antitrust statutes.

both counts.[130] Saliba's tortious interference with contract theory failed for two reasons. First, Saliba could not show that the defendants used "improper methods" when they allegedly interfered with his employment contract with the Yemeni government.[131] Proof that the defendants' interference was improper as well as intentional was necessary because Saliba's continued employment relationship with the Yemeni government beyond the original three-month term was merely prospective.[132] As a second, alternative ground for its rejection of Saliba's tortious interference count, the court held that any intrusion by the defendants was justified or privileged.[133] The financial stake of Hunt and Exxon in their Yemeni oil venture rendered privileged the oil companies' complaints to Yemen's government.[134]

The court also articulated two bases for its dismissal of Saliba's statutory conspiracy claim under section 18.2-499 of the Virginia Code.[135] As a threshold matter, the court held that

---

130. *Id.* at 314. Applying Texas law, the court held that a release executed by Saliba which relieved the Hunt-Exxon partnership from liability arising out of the Texas litigation also released the general partners from liability. Although this conclusion was dispositive, the court proceeded to reject Saliba's claims for relief on other grounds as well. *Id.* at 311.

131. *Id.* at 312.

132. *Id.* The tort of intentional interference with an at-will contract has four elements: (1) the existence of a valid contractual relationship; (2) knowledge on the part of the interferer of that contractual relationship; (3) use of improper methods in the intentional interference causing a termination of the contract; and (4) resultant damage to the party whose contract has been disrupted. Hilb, Rogal & Hamilton Co. v. DePew, 247 Va. 240, 245-46, 440 S.E.2d 918, 921 (1994); *see also* Allen Realty Corp. v. Holbert, 227 Va. 441, 449, 318 S.E.2d 592, 597 (1984). This same test almost certainly applies to claims for intentional interference with a prospective contract. Duggin v. Adams, 234 Va. 221, 226-27, 360 S.E.2d 832, 836 (1987) (citing *Allen Realty* for the proposition that a "cause of action for intentional interference with prospective contract arises when interference [is] both intentional and improper"). *But see* Krantz v. Air Line Pilots Ass'n, 245 Va. 202, 209, 427 S.E.2d 326, 330 (1993) (discussing elements of intentional interference with a prospective contract but failing to mention improper methods requirement).

133. *Saliba*, 865 F. Supp. at 312-13.

134. *Id.*

135. *Id.* at 313-14. VA. CODE ANN. § 18.2-499(A) (Cum. Supp. 1995) provides in part,

> Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally

Saliba had failed to establish "a combination of two or more persons," a requisite element under the civil conspiracy statutes.[136] Exxon and Hunt were incapable of conspiring with one another because they were general partners in the Yemeni oil partnership. "Where the alleged co-conspirators are the two general partners in a partnership, acting within the scope of partnership affairs, only one entity exists—the Partnership."[137] Even if Saliba had established the requisite combination of two or more persons, the court continued, no evidence suggested that the defendants had acted for the purpose of maliciously injuring Saliba in his business.[138] To satisfy the malicious intent requirement, the court observed, the defendants' conduct "must be directly aimed toward damaging" the plaintiff's business, reputation, or profession.[139]

V. CONCLUSION

Two decisions by the Supreme Court of Virginia in early 1994, *Middlekauff* and *Lockhart*, continued to dominate Virginia employment law between June of that year and spring 1995. Trial courts struggled in the past year to apply the public policy exception to the at-will rule after *Lockhart*, the most important employment discrimination decision by the Supreme Court of Virginia this century. The General Assembly responded to *Lockhart* with a new piece of legislation that represents an attempt to limit the decision severely.

Another noteworthy development in the year under study was the continued weakening of the Workers' Compensation Act exclusivity provision. In the relatively brief period since it

---

guilty of Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

136. *Saliba*, 865 F. Supp. at 313.

137. *Id.*

138. *Id.*

139. *Id.* at 314. The district court probably imposed an undue burden upon Saliba when it required him to prove that the defendants acted with actual, pointed malice. In Commercial Business Systems, Inc. v. Bellsouth Services, the Supreme Court of Virginia, interpreting VA. CODE ANN. § 18.2-499 (Cum. Supp. 1994), declared, "[W]e do not think that, as a general proposition, the conspiracy statutes require proof that a conspirator's primary and overriding purpose is to injure another in his trade or business. The statutes do not so provide, and such a requirement would place an unreasonable burden on a plaintiff." 249 Va. 39, 47, 453 S.E.2d 261, 267 (1993).

handed down *Middlekauff*, the Supreme Court of Virginia has on a series of occasions held that intentional tort actions by employees are not barred by the Workers' Compensation Act.

Virginia courts during the twelve months under review did not hand down any decisions that approach in significance *Lockhart* or *Middlekauff*. Still, the opinions surveyed here confirm that the direction of workplace litigation in Virginia is toward intentional tort claims and away from contract theories of recovery.