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Annual Survey of Virginia Law: Employment Law

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EMPLOYMENT LAW

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"It was the best of times, it was the worst of times."[1] For both Virginia employers and employees alike, this sentiment rang true over the past year in the employment law arena, with both camps winning and losing battles as they litigated various employment law matters. This article discusses three principal areas where there was substantial activity in Virginia's courts: public policy wrongful discharge claims; negligent hiring, retention, and supervision claims; and the enforcement of noncompetition agreements. Beyond the scope of this article are decisions rendered in other areas of law affecting the employment relationship, including the areas of workers' compensation,[2] unemployment,[3] public sector employment,[4]

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1. CHARLES DICKENS, A TALE OF TWO CITIES 13 (New American Library of World Literature, Inc. 1964) (1859).

2. *See, e.g.*, Granados v. Windson Dev. Corp., 257 Va. 103, 108-09, 509 S.E.2d 290, 293 (1999) (affirming the denial of benefits to an illegal alien because he was not a lawful "employee" within the meaning of the Workers' Compensation Act); Prince William County Serv. Auth. v. Harper, 256 Va. 277, 280, 504 S.E.2d 616, 617 (1998) (holding that an employee's misrepresentation on her employment application did not prohibit her from receiving workers' compensation benefits because her misrepresentation was not causally related to her injury); Clegg v. Local 149 UAW, 46 Va. Cir. 192, 197 (Winchester City 1998) (ruling that the Workers' Compensation statute does not bar an employee's ability to recover under Virginia's Right to Work Act, VA. CODE ANN. § 40.1-67 (Repl. Vol. 1994)).

3. *See, e.g.*, Virginia Employment Comm'n v. Davenport, 29 Va. App. 26, 29-30, 509 S.E.2d 522, 524 (Ct. App. 1999) (holding that the term "during thirty days" denotes a number of days, not hours to total 30 days, that an employee must actually work to receive unemployment benefits); Yard Bird, Inc. v. Virginia Employment Comm'n, 28 Va. App. 215, 225, 503 S.E.2d 246, 251 (Ct. App. 1998) (affirming that for purposes of unemployment compensation, exotic dancers were employees of club rather than independent contractors because of the control and direction club asserted over dancers); Baker v. Virginia Employment Comm'n, No. 98-8, 1998 WL 972284, at *8 (Va. Cir. Ct. Winchester City July 23, 1998) (unreported decision) (finding employee's failure to immediately report work-related injury was not a willful violation of a company rule); Saulnier v. Virginia Employment Comm'n, 45 Va. Cir. 290, 291 (Arlington County 1998) (upholding Virginia Employment Commission's denial of benefits for employee's failure to appeal within 21-day period mandated by section 60.2-620(B) of the Virginia Code); Powell v. United States Postal Serv., 45 Va. Cir. 149, 150-51 (Loudoun County 1998) (holding that a decision of the Virginia Employment Commission may be based on hearsay evidence and courts must defer to hearing examiner with regard to credibility of witnesses).

4. *See, e.g.*, Virginia Dep't of Envtl. Quality v. Wright, 256 Va. 236, 241-42, 504 S.E.2d 862, 864-65 (1998) (ruling that the circuit court overstepped its authority either to implement or refuse to implement the hearing officer's decision under section 2.1-116.07(D) of the

and tort actions based on defamation[5] and infliction of emotional distress.[6]

I. CLAIMS OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Virginia, like many states, traditionally has adhered to the principle of employment-at-will.[7] As the Supreme Court of Virginia explained in *Lawrence Chrysler Plymouth Corp. v. Brooks*:[8]

> Virginia strongly adheres to the common law employment-at-will doctrine. We have repeatedly stated: "Virginia adheres to the common-law rule that when the intended duration of a contract for the rendition of services cannot be determined by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will . . . ."[9]

Virginia Code, when it ordered reinstatement of the employee); Bohannon v. Commonwealth, 46 Va. Cir. 411, 411-12 (Richmond City 1998) (holding that the refusal of a state agency to allow an employee to withdraw her resignation in order to extend the 30-day deadline for filing grievances was not a grievable matter); Runnels v. O'Neill, 46 Va. Cir. 208, 210 (Fairfax County 1998) ("When an employee asserts, in good faith, a grievance which presents an objectively reasonable allegation of a violation of applicable policies, procedures, rules, or regulations, the complaint is grievable and is subject to a merits determination by the Civil Service Commission."); County of Fairfax v. Fairfax County Civil Serv. Comm'n, No. 153630 (Va. Cir. Ct. Fairfax County June 12, 1998) (holding that Virginia Code section 15.2-1507 prohibits judicial review of a county Civil Service Commission's findings).

5. *See, e.g.*, Doran v. Sigmon, No. 97-0023-D, 1998 U.S. Dist. LEXIS 6219, at *30 (W.D. Va. Mar. 23, 1998) (unreported decision) (holding that a private healthcare agency could be liable for allegedly defamatory comments made about an ex-employee by its office manager); Eslami v. Global One Communications, Inc., No. 174096, 1999 WL 51864, at *5-6 (Va. Cir. Ct. Fairfax County Jan. 11, 1999) (unreported decision) (overruling the defendant's demurrer to a defamation claim by holding that statements that an employee "did not fit in" and "lost his temper" could constitute the basis of a defamation claim).

6. *See, e.g.*, Blake v. Timber Truss Hous. Sys., Inc., No. 97-00097-C, 1998 WL 213699, at *4 (W.D. Va. Apr. 14, 1998) (unreported decision) (dismissing the claim of a former employee for intentional infliction of emotional distress allegedly caused by the outrageous comments of her employer because the comments did not rise to a sufficient level of outrageousness); Flayhart v. Interocean Ugland Management Corp., 45 Va. Cir. 542, 545 (Norfolk City 1998) (sustaining a demurrer to a count of intentional infliction of emotional distress because plaintiff's distress was not so severe that a reasonable person could not endure it); Shifflett v. Food Lion, Inc., 45 Va. Cir. 475, 478 (Albemarle County 1998) (holding that a supermarket could be sued for emotional distress by two women who alleged that a "Peeping Tom" employee spied on them while they used the restroom).

7. *See, e.g.*, Hoffman Specialty Co. v. Pelouze, 158 Va. 586, 594, 164 S.E. 397, 399 (1932).

8. 251 Va. 94, 465 S.E.2d 806 (1996).

9. *Id.* at 96-97, 465 S.E.2d at 808 (quoting Lockhart v. Commonwealth Educ. Sys. Corp., 247 Va. 98, 102, 439 S.E.2d 328, 330 (1994)).

Thus, where no specific time period is fixed for the duration of employment, there is a presumption that employment is at-will, terminable at any time by either party for any reason, with or without cause.[10] The employment-at-will doctrine ordinarily precludes terminated at-will employees from asserting common-law causes of action for wrongful discharge or wrongful termination of employment.[11]

In the seminal case of *Bowman v. State Bank of Keysville*,[12] the Supreme Court of Virginia recognized a "narrow exception" to the employment-at-will doctrine for the first time.[13] The *Bowman* court found that at-will employees may have an actionable claim for wrongful discharge if the employee can identify a public policy that was violated by the termination of his or her employment.[14] The plaintiffs, who were employees and shareholders of the bank, opposed a proposed merger of the bank with another corporation.[15] Under threat of termination, the plaintiffs voted their shares in favor of the merger.[16] When the plaintiffs later rescinded their favorable votes, the merger was aborted and, shortly thereafter, the bank discharged the plaintiffs.[17] The plaintiffs filed suit seeking compensatory and punitive damages for "improper discharge."[18] The lower court sustained a demurrer to the claim, relying on the employment-at-will doctrine and the absence of any evidence of a contract of employment for a definite period of time.[19]

On appeal, the defendant bank and individual directors contended that any change to the employment-at-will doctrine should be made by the legislature and not by the court.[20] The plaintiffs argued that "their discharges were premised solely upon the proper exercise of their protected rights as shareholders."[21] The issue before the supreme court was "whether [an] employer can, with absolute immunity, discharge these employees in retaliation for the proper

10. *See, e.g., id.*; Bowman v. State Bank of Keysville, 229 Va. 534, 535, 331 S.E.2d 797, 798 (1985).
11. *See Lawrence*, 251 Va. at 96-97; 465 S.E.2d at 808.
12. 229 Va. 534, 331 S.E.2d 797 (1985).
13. *See id.* at 539, 331 S.E.2d at 801.
14. *See id.*
15. *See id.* at 537, 331 S.E.2d at 799.
16. *See id.*
17. *See id.*
18. *See id.* at 538, 331 S.E.2d at 800.
19. *See id.*
20. *See id.*
21. *Id.* at 539, 331 S.E.2d at 800.

exercise of [their] rights as stockholders, a reason which has nothing to do with the employees' job performances."[22]

The court began its discussion by reaffirming Virginia's adherence to

> the common-law rule that when a contract calls for the rendition of services, but the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate the contract at will upon giving reasonable notice of intention to terminate.[23]

The court nonetheless explained that the doctrine has its limits:

> Virginia has not deviated from the common-law doctrine of employment-at-will set forth in the *Stonega Coal* case . . . . And we do not alter the traditional rule today. Nonetheless, the rule is not absolute. The unique facts of these [two] cases require us to apply one of the recognized exceptions to the rule of terminability.[24]

The court explained that the purpose of section 13.1-32 of the Virginia Code, which confers upon each shareholder the right to one vote for each outstanding share of stock, would be frustrated if a shareholder, who also happens to be an employee, could not exercise that statutory right without fear of reprisal from corporate management.[25] Pointing to the decisions of twenty other states that recognized public policy exceptions to the strict application of the at-will doctrine, the court for the first time recognized "a narrow exception to the employment at-will rule."[26] The supreme court held that "the plaintiffs have stated a cause of action in tort against the Bank and the named directors for improper discharge from employment."[27]

Two years after *Bowman*, the Supreme Court of Virginia again addressed the availability of wrongful discharge claims in *Miller v. SEVAMP, Inc.*[28] In *Miller*, the plaintiff alleged that her discharge "was malicious, wrongful, and tortious, done in retaliation for her

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22. *Id.*

23. *Id.* at 535, 331 S.E.2d at 798 (citing Stonega Coal & Coke Co. v. Louisville & Nashville R.R. Co., 106 Va. 223, 226, 55 S.E. 551, 552 (1906)).

24. *Id.* at 539, 331 S.E.2d at 800-01 (citing Wards Co. v. Lewis & Dobrow, Inc., 210 Va. 751, 756, 173 S.E.2d 861, 865 (1970); Plaskitt v. Black Diamond Trailer Co., 209 Va. 460, 164 S.E.2d 645 (1968); Title Ins. Co. v. Howell, 158 Va. 713, 718, 164 S.E. 387, 389 (1932)).

25. *See id.* at 540, 331 S.E.2d at 801.

26. *Id.*

27. *Id.*

28. 234 Va. 462, 362 S.E.2d 915 (1987).

appearance as a witness at [a] fellow-employee's grievance hearing."[29] The lower court sustained the employer's demurrer, citing the at-will rule.[30] On appeal, the issue before the court was "whether the tort of 'retaliatory discharge' is generally actionable in Virginia."[31]

In analyzing the claim, the Supreme Court of Virginia explained that in *Bowman* the employee's discharge was tortious because it "violated the public policy underlying Virginia's securities and corporation laws."[32] The court emphasized the limited nature of its holding, and stated that "*Bowman* applied a 'narrow exception to the employment-at-will rule,' but it fell far short of recognizing a generalized cause of action for the tort of 'retaliatory discharge.'"[33] Instead, the court explained that "*Bowman* recognized an exception to the employment-at-will doctrine limited to discharges which violate *public* policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general."[34]

The public policy exception recognized in *Bowman* was "not so broad as to make actionable those discharges of at-will employees which violate only private rights or interests."[35] The supreme court emphasized in this regard that:

> The employment-at-will doctrine is a settled part of the law of Virginia. Parties negotiating contracts for the rendition of services are entitled to rely on its continued stability. Serious policy considerations, affecting countless business relationships, are involved in any change that may be contemplated. *We therefore think it wise to leave to the deliberative processes of the General Assembly any substantial alteration of the doctrine.*[36]

Turning to the facts in the case before it, the court noted that the plaintiff was allegedly discharged in retaliation for exercising her right under the employer's personnel policies to testify freely before grievance review panels.[37] The court rejected the availability of the

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29. *Id.* at 464, 362 S.E.2d at 916.
30. *See id.*
31. *Id.* at 463, 362 S.E.2d at 916.
32. *Id.* at 467, 362 S.E.2d at 918.
33. *Id.* at 467-68, 362 S.E.2d at 918 (citing *Bowman*, 229 Va. at 540, 331 S.E.2d at 801).
34. *Id.* at 468, 362 S.E.2d at 918 (emphasis added).
35. *Id.*
36. *Id.* at 468, 362 S.E.2d at 919 (emphasis added).
37. *See id.*

plaintiff's discharge claim, explaining that her discharge implicated only *private* rights established by the employer's internal regulations, and "would have no impact upon any *public* policy established by existing laws for the protection of the public generally."[38]

One issue that practitioners have grappled with since the court's decisions in *Bowman* and *Miller* is what sources provide an actionable foundation for public policy claims. Courts and commentators express varying views of where the courts may find expressions of the "public policy" that is necessary to support wrongful discharge claims. The plaintiffs' bar has argued that county and city ordinances, the Virginia Constitution, and even federal statutes should all be seen as a basis for the "public policy" of the Commonwealth of Virginia. The Supreme Court of Virginia provided guidance on this issue in *Lawrence Chrysler Plymouth Corp. v. Brooks*.[39] In that case, an employee alleged that he was fired because he refused to perform certain repairs on an automobile.[40] The plaintiff contended:

> [T]o repair a car in such a manner as was requested in this case is an obvious violation of both statutory and common law duties, including duties under the Consumer Protection laws, the Automobile Salvage laws (Virginia Code §§ 46.2-1600 to [-1610]), and common law duties of the dealership concerning the exercise of due care.[41]

The court disagreed, stating, "[w]e simply find no language in Code §§ 46.2-1600 through -1610 (which govern salvage, nonrepairable, and rebuilt vehicles) that supports Brooks' position."[42] In a passage that counsel for employers have emphasized as a critical aspect of the decision, the supreme court explained:

> More telling, Brooks does not specify what precise statute that Lawrence Chrysler purportedly contravened. In *Bowman* and *Lockhart*, the plaintiffs, who were permitted to pursue causes of action against their former employers, identified specific Virginia statutes in which the General Assembly had established public policies that the former employers had contravened. *Unlike the plaintiffs in* Bowman *and* Lockhart, *Brooks does not have a cause of action for wrongful discharge because he is unable to identify any Virginia statute establishing a public policy that Lawrence Chrysler violated. We also reject Brooks'*

38. *Id.* (emphasis added).
39. 251 Va. 94, 465 S.E.2d 806 (1996).
40. *See id.* at 95-96, 465 S.E.2d at 807-08.
41. *Id.* at 98, 465 S.E.2d at 809.
42. *Id.*

> *attempt to expand the narrow exception we recognized in* Bowman *by relying upon so-called "common law duties of the dealership."*[43]

Thus, after *Brooks*, a compelling argument is available that public policy claims must be grounded in an expression of policy embodied in a Virginia statute.[44]

Over the past year, the courts of Virginia continued to evaluate which expressions of policy provide an actionable foundation for the common-law tort of wrongful discharge. Creative plaintiffs' attorneys have roamed the legislative landscape in attempts to navigate claimants around the employment-at-will doctrine. What follows is a discussion of the various sources of public policy and theories of recovery upon which plaintiffs have attempted to rely in establishing viable claims.

A. *The Virginia Human Rights Act / Discriminatory Discharge Claims*

By far the most active area of litigation addressing the common-law tort of wrongful discharge concerns alleged violations of the public policy against discrimination in employment as articulated in the Virginia Human Rights Act ("VHRA"),[45] as well as other provisions of Virginia and federal law. The body of law generated by these decisions culminated in what arguably was the most significant state employment law decision of the past several years, *Conner v. National Pest Control Ass'n*.[46] *Conner* appears to have resolved an ongoing debate in the courts, the legislature, and the news media for the last half of this decade over whether the common law of Virginia provides a cause of action for discriminatory discharges.

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43. *Id.* at 98-99, 465 S.E.2d at 809 (emphasis added); *see also* Dray v. New Market Poultry Prod., Inc., No. 981767, 1999 WL 731399, at *2 (Va. Sept. 17, 1999) (rejecting a public policy wrongful discharge claim because the Virginia statute cited by the plaintiff "affords plaintiff no express statutory right . . . that is in specific furtherance of the state's public policy").

44. In a later case, the Supreme Court of Virginia indicated that the *Brooks* decision created a "requirement" for "identifying a statutory embodiment of the public policy of the Commonwealth." Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 126, 480 S.E.2d 502, 505 (1997); *see also* Wenig v. Hecht Co., 47 Va. Cir. 290, 293 (Fairfax County 1998) ("Wenig argues that a federal statute can serve as the basis for her wrongful termination action. This argument fails in that Wenig is obliged to cite a Virginia statute to support her claim.").

45. VA. CODE ANN. §§ 2.1-714 to -725 (Cum. Supp. 1999).

46. 257 Va. 286, 513 S.E.2d 398 (1999).

1. Origins of the Discriminatory Discharge Claim

In 1994, the Supreme Court of Virginia, in a four to three decision, ruled that employees could maintain wrongful discharge actions for racial and gender discrimination based on the public policies underlying the VHRA.[47] At that time, the VHRA provided, in pertinent part:

> It is the policy of the Commonwealth of Virginia:
>
> 1. To safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, age, marital status or disability . . . in employment . . . .[48]
>
> . . .
>
> 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.[49]

Lockhart decided the consolidated cases of two employees. Lawanda Lockhart alleged that Commonwealth Education Systems discharged her due to her opposition to racially discriminatory practices.[50] Nancy Wright asserted that her employer fired her because she rejected the sexual advances of her employer.[51] In both cases, the lower courts refused to allow the actions to proceed on the ground that the VHRA did not create a basis for private suits.[52]

On appeal, the supreme court held that a plaintiff could assert a claim for wrongful discharge in violation of the public policy against gender or race discrimination expressed in the VHRA.[53] The court reasoned that since the VHRA prohibits employment discrimination based on race and sex, employees discharged on the basis of such protected characteristics could challenge their discharge in a state

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47. *See* Lockhart v. Commonwealth Educ. Sys. Corp., 247 Va. 98, 106, 439 S.E.2d 328, 332 (1994).
48. VA. CODE ANN. § 2.1-715 (Cum. Supp. 1994).
49. *Id.* § 2.1-725. (Cum. Supp. 1994).
50. *See Lockhart*, 247 Va. at 100-01, 439 S.E.2d at 329.
51. *See id.* at 101-02, 439 S.E.2d at 329-30.
52. *See id.*
53. *See id.* at 106, 439 S.E.2d at 332.

tort action under the narrow public policy exception to employment-at-will announced in *Bowman*.[54] The majority in *Lockhart* held that the public policy contained in the VHRA supported a public policy discriminatory discharge claim, despite what appeared to be clear language foreclosing causes of action based on the policies expressed in the Act.[55] The opinion exposed employers to potential claims not contemplated by the federal antidiscrimination statutes.[56] As a result, plaintiffs' lawyers began to file wrongful discharge tort claims in addition to, and in some cases instead of, discriminatory discharge claims under federal law.[57]

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54. *See id.* at 105-06, 439 S.E.2d at 331-32.

55. *See id.* at 106, 439 S.E.2d at 332. In *Bradick v. Grumman Data Sys. Corp.*, 254 Va. 156, 486 S.E.2d 545 (1997), the Supreme Court of Virginia held

> based on the public policy expressed in the VDA and VHRA at the time of Grumman Data's alleged act of discrimination, the common law of Virginia provides a wrongful discharge remedy to an employee, such as Bradick, of an employer covered by the federal Rehabilitation Act of 1973 where the employee is discharged on account of his disability or the employer's perception of his disability under the narrow exception recognized in *Bowman*.

Id. at 160-61, 486 S.E.2d at 547; *see also* Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 125, 480 S.E.2d 502, 505 (1997) (reaffirming availability of wrongful discharge in violation of the public policy against gender discrimination as expressed in VHRA); Clark v. Manheim Serv. Corp., 38 Va. Cir. 479, 479 (Va. 1996) (per curiam) (holding age discrimination actionable under public policy theory).

56. Public policy discriminatory discharge actions differed from federal actions in a number of critical ways. For example, while Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1994), applies to employers with at least 15 employees, wrongful discharge actions based on the public policies underlying the Virginia Human Rights Act contained no such restriction. Also, Title VII provides federal caps on compensatory and punitive damages ranging from $50,000 to $300,000 depending on the size of the employer. *See* 42 U.S.C. §§ 1981a(3) (1994). Although Virginia caps punitive damages at $350,000, there is no compensatory damage ceiling. *See* VA. CODE ANN. § 8.01-38.1 (Repl. Vol. 1992). Thus, after *Lockhart*, the smallest Virginia employer was exposed to potentially unlimited damages while the largest non-Virginia employer had compensatory and punitive damages capped under Title VII at $300,000. *See* 42 U.S.C. § 1981a(3)(D) (1994). Moreover, Title VII claims require the filing of an administrative charge, an agency investigation and attempts at voluntary resolution before a lawsuit may be filed, *see* 42 U.S.C. § 2000e-5, while *Lockhart* actions presented no such prerequisites to suit. Finally, although federal administrative charges must be filed within 300 days, a longer statute of limitations applied to wrongful discharge cases. *See* VA. CODE ANN. § 8.01-248 (Cum. Supp. 1999) (applicable to wrongful discharge claims); Purcell v. Tidewater Constr. Corp., 250 Va. 93, 95, 458 S.E.2d 291, 293 (1995).

57. While the popularity of state law claims rose dramatically, it was unclear to what extent, if any, the federal burden of proof standards would be applicable to the state law claims. On February 28, 1997, the Supreme Court of Virginia considered and resolved that issue in *Jordan v. Clay's Rest Home, Inc.*, 253 Va. 185, 483 S.E.2d 203 (1997). In *Jordan*, the plaintiff alleged, inter alia, that she was discharged "'because of her race in violation of the public policy of Virginia . . . prohibiting race discrimination in employment.'" *Id.* at 187, 483 S.E.2d at 204 (quoting plaintiff's allegation as stated in her complaint). The fundamental issue before the supreme court was "whether to adopt an indirect, burden shifting method of proof [utilized under Title VII of the Civil Rights Act] in wrongful discharge cases." *Id.* For cases illustrating the burden shifting under Title VII, see *St. Mary's Honor Center v. Hicks*,

2. The Legislature Responds to *Lockhart*

In response to *Lockhart*, the Virginia General Assembly promptly amended the VHRA in an apparent effort to preclude the availability of public policy claims based on the policies set forth in the Act.[58] After the 1995 amendments, the VHRA provided:

> A. Nothing in this chapter creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions, except as specifically provided in subsections B and C of this section.
>
> B. No employer employing more than five but less than fifteen persons shall discharge any such employee on the basis of race, color, religion, national origin or sex, or of age if the employee is forty years or older.
>
> C. The employee may bring an action in a general district or circuit court having jurisdiction over the employer who allegedly discharged the employee in violation of this section. Any such action shall be brought within 180 days from the date of the discharge. The court may award up to twelve months' back pay with interest at the judgment rate as provided in § 6.1-330.54. However, if the 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.
>
> In any case where the employee prevails, the court shall award attorney's fees from the amount recovered, not to exceed twenty-five percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.
>
> D. *Causes 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.* Nothing in this section or § 2.1-715 shall be deemed to alter, supersede, or otherwise modify the authority of the

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509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Supreme Court of Virginia declined the plaintiff's invitation to adopt the federal burden-shifting standard due to "the Commonwealth's strong commitment to the employment-at-will doctrine, and because we conclude that Virginia's procedural and evidentiary framework for establishing a prima facie case is entirely appropriate for trial of wrongful discharge cases." *Jordan*, 253 Va. at 192, 483 S.E.2d at 207. Moreover, the court noted that "in trial of civil actions generally, and in the trial of wrongful discharge cases specifically, a plaintiff may prove a prima facie case by circumstantial as well as direct evidence." *Id.* The court then applied traditional standards in rejecting the plaintiff's claim on the grounds that there was insufficient circumstantial evidence to establish the race discrimination claim. *See id.* at 193, 483 S.E.2d at 207-08. Thus, after *Jordan*, traditional state law burdens of proof were applied in evaluating the sufficiency of public policy discriminatory discharge claims.

58. *See* VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995).

> Council on Human Rights or of any local human rights or human relations commissions . . . .[59]

While there is little or no legislative history in Virginia, the legislature's intent in enacting the "*Lockhart*-Amendments" appeared to be plain: to reverse *Lockhart*.

In *Doss v. Jamco, Inc.*,[60] the Supreme Court of Virginia addressed the continuing availability of *Lockhart* claims after the 1995 amendments to the VHRA.[61] In that case, the supreme court held that the amendments plainly manifested the General Assembly's intent to alter the common law and to limit actions based on violations of the policies reflected in the VHRA to applicable statutory causes of action and remedies.[62] The supreme court concluded that permitting the plaintiff to maintain her public policy claim based on alleged violations of the policy stated in the VHRA would circumvent and render meaningless the mandate of the amendments that the actions for violations of such policies be "exclusively limited" to statutory causes of action.[63] Thus, the supreme court decided that the 1995 amendments preclude plaintiffs from relying on the policies reflected in the VHRA as the basis for a common-law claim for wrongful discharge.[64]

In response to *Doss*, plaintiffs began asserting public policy claims with mixed success in reliance on policies expressed elsewhere in the Virginia Code, the Constitution of Virginia, local ordinances, and even federal statutes.[65] This required the supreme court once again

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59. *Id.* (emphasis added).

60. 254 Va. 362, 492 S.E.2d 441 (1997).

61. *See id.* at 370, 492 S.E.2d at 445.

62. *See id.* at 371, 492 S.E.2d at 446.

63. *See id.*

64. *See id.*; *see also* Humphrey v. Columbia/HCA John Randolph, Inc., 46 Va. Cir. 109, 111 (Chesterfield County 1998) (citing *Doss* and holding that the VHRA "cannot support the plaintiff's cause of action in her motion for judgment"); Flayhart v. Interocean Ugland Mgt. Corp., 45 Va. Cir. 542, 546 (Norfolk City 1998) (citing the same proposition as *Humphrey*); Dearing v. Thor, Inc., No. CL97001222-00 (Roanoke City Cir. Ct. June 18, 1998) (sustaining demurrer to extent public policy claim is based on VHRA).

65. *Compare* Oakley v. May Dep't Stores Co., 17 F. Supp. 2d 533, 535-36 (E.D. Va. 1998) (rejecting plaintiff's reliance on the VHRA, Title VII, and Virginia Code section 18.2-57 (assault and battery crime)), *and* Joyner v. Fillion, 17 F. Supp. 2d 519, 528 (E.D. Va. 1998) (rejecting plaintiff's reliance on the Constitution of Virginia and Virginia Code section 15.1-48.1, which prohibits discrimination by the constitutional officer), *and* McCarthy v. Texas Instruments, Inc., 999 F. Supp. 823, 829-30 (E.D. Va. 1998) (rejecting plaintiff's reliance on the Constitution of Virginia, a local ordinance, and Title VII), *and* Blake v. Timber Truss Hous. Sys., Inc., No. 97-00097-C, 1998 WL 213699, at *4-5 (W.D. Va. 1998) (unreported decision) (rejecting reliance on Virginians with Disabilities Act), *and* Flayhart v. Interocean

to address the availability of public policy discriminatory discharge claims after the 1995 amendments.

3. The Supreme Court Holds That the *"Lockhart*-Amendments" Bar Public Policy Claims Based on the Policies Expressed in the Virginia Human Rights Act, Regardless of Whether There Are Other Sources of the Policy–*Conner v. National Pest Control Ass'n*[66]

On February 26, 1999, the Supreme Court of Virginia, in *Conner v. National Pest Control Ass'n* addressed the availability of claims based on policies reflected in the Virginia Human Rights Act where those same policies are expressed elsewhere.[67] In *Conner*, the supreme court held that the VHRA precludes actions based on a violation of public policies enunciated in *both* the VHRA *and* other provisions of state, federal, or local statutes or ordinances.[68]

In *Conner*, the plaintiff alleged that the termination of her employment "'constituted discrimination . . . based on her gender' [in violation of] the public policy against . . . discrimination in employment as articulated in the VHRA and other provisions of Virginia and federal law."[69] The defendant demurred on the ground that the claim was precluded by the 1995 amendments to the VHRA.[70] The trial court sustained the demurrer, and the plaintiff appealed.[71]

On appeal, the supreme court held that actions based on alleged violations of policies reflected in *both* the VHRA and some other state, federal, or local statute are precluded as a matter of law by the 1995 amendments to the VHRA.[72] In reaching this decision, the

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Ugland Mgt. Corp., 45 Va. Cir. 542, 546 (Norfolk City 1998) (sustaining demurrer to extent public policy claim is based on Virginia Code section 18.2-387 (indecent exposure crime)), *with* Rodriguez v. Newport News Shipbuilding & Drydock Co., 44 Va. Cir. 405, 406-07 (Newport News City 1998) (denying demurrer in post-*"Lockhart*-Amendment" case to extent public policy claim is based on Virginians with Disabilities Act, holding that "[a]s long as there is a statutory embodiment of the public policy independent of the VHRA, the common law wrongful discharge claim is available since *Bowman* and its progeny survive"), *and Dearing*, No. CL97001222-00 (denying demurrer to extent public policy claim is based on Virginia's Fair Contracting Act).

66. 257 Va. 286, 513 S.E.2d 398 (1999).
67. *See id.* at 288, 513 S.E.2d at 398-99.
68. *See id.* at 290, 513 S.E.2d at 400.
69. *Id.* at 288, 513 S.E.2d at 399 (alteration in original).
70. *See id.*
71. *See id.*
72. *See id.* at 290, 513 S.E.2d at 400.

supreme court concluded, as it had in *Doss*, that the VHRA's exclusivity provision would be circumvented and rendered meaningless if the plaintiff "could maintain her common law action based upon an alleged violation of a policy enunciated in the VHRA by simply citing a different Virginia Code section or other source of public policy which enunciated the same policy."[73] Moreover, the supreme court noted that the General Assembly made statutory causes of action the "*exclusive* avenues for pursuing a remedy for an alleged violation of any public policy 'reflected in' the VHRA," regardless of whether the policy was also reflected or expressed elsewhere.[74] Accordingly, the supreme court affirmed the dismissal of plaintiff's claim.[75]

After *Conner*, it appears that public policy discriminatory discharge claims are no longer available under Virginia common law. The long-term effect of *Conner* should be to channel employment discrimination claims back through the administrative procedures contemplated by the federal antidiscrimination statutes. Claimants employed by employers with fifteen or more employees (or twenty or more in the case of age discrimination) may pursue such claims.[76] Before resorting to litigation, such claimants must file charges of discrimination with the EEOC (or designated state or local deferral agencies) and attempt to resolve their claims voluntarily through the administrative process.[77] In addition, employees of certain small employers may pursue limited claims of employment discrimination directly under the VHRA. Thus, the result of the "*Lockhart*-Amendments" and the *Conner* decision should be to return the state of the law to its position prior to *Lockhart*, with the addition of a limited statutory claim applicable to certain small employers.

B. *Reliance on Criminal Statutes*

Over the past year, plaintiffs in a number of cases have attempted to rely on criminal statutes as expressions of "public policy" on which to ground public policy wrongful discharge claims. In *Oakley v. May Department Stores Co.*,[78] the plaintiff alleged that her employer

73. *Id.* at 289, 513 S.E.2d at 400.
74. *Id.* at 290, 513 S.E.2d at 400 (emphasis added).
75. *See id.*
76. *See* 29 U.S.C. § 630(b) (1994); 42 U.S.C. § 2000e(b) (1994).
77. *See, e.g.*, 42 U.S.C. § 2000e-5 (1994).
78. 17 F. Supp. 2d 533 (E.D. Va. 1998).

sexually harassed and wrongfully terminated her employment in violation of Virginia's public policy as articulated, inter alia, in Virginia Code section 18.2-57, which makes it a crime to commit a simple assault or an assault and battery.[79] The court rejected the plaintiff's attempted reliance on the criminal statute, explaining:

> The statutory public policies that fit the *Bowman* exception are those where the employee was discharged for either taking an employment action expressly permitted by Virginia law, or where the employee is discharged for exercising statutorily created rights that are not explicitly protected. In addition, the right must be one designed to protect the public, not a "private right."
>
> The assault and battery statute relied on by plaintiff does not provide a *Bowman* public policy exception for plaintiff to the at-will employment doctrine. First, section 18.2-57 provides criminal penalties for those committing assaults and/or batteries. Plaintiff's complaint is a civil action, alleging a common law tort of assault and battery. Moreover, Count IV indicates that plaintiff was assaulted by defendant . . . sometime in 1994, yet she was not terminated . . . until well into 1997. The connection between the two events is not alleged or in anyway apparent from the complaint. Section 18.2-57 simply does not support plaintiff's cause of action for wrongful discharge.[80]

In *Humphrey v. Columbia/HCA John Randolph, Inc.*,[81] the plaintiff asserted that her employer discharged her for complaining about a doctor who allegedly dispensed a misbranded drug.[82] The plaintiff contended, inter alia, that her discharge violated the public policy enunciated in the Virginia Drug Control Act, which criminalizes the misbranding of any drug or delivery of a misbranded drug.[83] In support of her claim, the plaintiff argued that the Virginia Drug Control Act was designed to promote the health of Virginia residents and thus expresses a public policy sufficient to support a *Bowman*-type claim.[84] The court disagreed and sustained the defendant's demurrer, explaining:

> While the Court would agree that the portion of the act cited here seeks to prevent misbranded drugs from being distributed and thus protect members of the public, it is impossible for the Court to see this as an expression of a specific public policy on which the *Bowman* exception

79. *See id.* at 536.
80. *Id.* (citations omitted).
81. 46 Va. Cir. 109 (Chesterfield County 1998).
82. *See id.*
83. *See id.* at 110 (citing VA. CODE ANN. §§ 54.1-3400 to -3472 (Cum. Supp. 1994)).
84. *See id.*

> can be invoked in light of the case law defining such claims. Also, it is important to note that there is a specific criminal penalty and enforcement mechanism created by the Virginia Drug Control Act for a violation of this statute. This underscores the intent of the legislature that this statute was not to have a separate mechanism for civil enforcement under the exception to the at-will doctrine.[85]

The Circuit Court for Fairfax County rejected a similar claim in *Wenig v. Hecht Co.*,[86] in which the plaintiff attempted to rely on Virginia Code sections 18.2-57 (Assault and Battery), 18.2-416 (Punishment for Using Abusive Language to Another), 18.2-388 (Profane Swearing and Intoxication in Public), and/or 18.2-499 through 18.2-501 (Conspiracy to Injure Another in Trade Business or Profession).[87] The court sustained the defendants' demurrers to the extent the plaintiff was relying on the assault and battery, abusive language, and profane swearing and intoxication statutes, noting that:

> [T]o some extent, most, if not all, statutes enacted by Virginia are intended to either preserve public safety, public health or the general welfare of the citizens. Those rather general connections, even if supportable in logic, are too attenuated to be the basis of a *Bowman* claim given the limited nature of such claims.[88]

In addition, the court rejected the plaintiff's reliance on Virginia's business conspiracy statute, explaining that "these statutes address injuries to one's business rather than to one's employment interests."[89]

In *Gochenour v. Beasley*,[90] the plaintiff alleged that her employer "secreted a video camera in a wall receptacle [pointing directly] at the area of her crotch while she was typing,"[91] and "the photographs of her pubic areas were collected by the defendant . . . and used for his own prurient gratification and transmitted over the [I]nternet to others so inclined."[92] The plaintiff allegedly resigned and contacted

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85. *Id.* at 110-11.
86. 47 Va. Cir. 290 (Fairfax County 1998).
87. *See id.* at 294.
88. *Id.* at 295 (alteration in original) (quoting Perry v. American Home Prods. Corp., No. Civ. A.3:96CV 595, 1997 WL 109658, at *4 (E.D. Va. Mar. 4, 1997).
89. *Id.* (citing Buschi v. Kirven, 775 F.2d 1240, 1259 (4th Cir. 1985); Jordan v. Hudson, 690 F. Supp. 502, 507 (E.D. Va. 1988); Zimper v. LVI Energy Recovery Corp., 23 Va. Cir. 423 (Fairfax County 1991)).
90. 47 Va. Cir. 218 (Rockingham County 1998).
91. *Id.* at 219.
92. *Id.*

the police concerning possible criminal prosecution.[93] After first concluding that claims of constructive discharge in violation of public policy are actionable, the court turned its analysis to the public policy foundation for the plaintiff's claim.[94]

The court addressed whether "the criminal prohibition on filming, videotaping and photographing persons' genitalia and other private parts without their permission and under circumstances in which they would have an expectation of privacy [is] a statutorily articulated public policy of the Commonwealth of Virginia on which to support a wrongful termination claim."[95] After examining the scant authority in Virginia on the issue of criminal statutes as the public policy basis for wrongful discharge claims, as well as authority from other jurisdictions,[96] the court concluded that "certain of the penal statutes of the Commonwealth of Virginia articulate a public policy that may be a sufficient basis for a *Bowman* wrongful termination claim."[97] With regard to the statute in question, the court held that the plaintiff's claim was actionable, noting:

> In the instant case the public policy that is implicated is patently clear. Section 18.2-386.1 of the Code of Virginia is clearly a statute designed to protect people's privacy and to prohibit the surreptitious filming, photographing or videotaping of a person's private parts without their permission. This protection is afforded to all of the citizens of the Commonwealth, and it is hard to conceive of a public policy more embedded in basic concepts of common decency and civility. It would seem axiomatic that if the public policy that was implied from the corporate code concerning the unfettered right of shareholders to vote on corporate mergers was a sufficient basis for a *Bowman* claim that the public policy articulated in this portion of the criminal code protecting citizens from temporarily or permanently recorded

93. *See id.*

94. *See id.* at 222. See *infra* notes 109-23 and accompanying text for a discussion of the plaintiff's attempted reliance on the Constitution of Virginia and Virginia Code section 19.2-59 as sources of public policy.

95. *Gochenour*, 47 Va. Cir. at 225.

96. *See id.* at 226-30 (citing Oakley v. May Dep't Stores Co., 17 F. Supp. 2d 533, 536 (E.D. Va. 1998) (rejecting use of § 18.2-57, the criminal prohibition against assault and battery, as public policy for a *Bowman* claim); Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025 (Ariz. 1985); Skierkowski v. Creative Graphics Servs., Inc., No. 94-04632425, 1995 WL 283945, at *1 (Conn. Super. May 5, 1995) (unreported decision); Anders v. Specialty Chem. Resources, Inc., 700 N.E.2d 39 (Ohio Ct. App. 1997); Fox v. MCI Communications Corp., 931 P.2d 857 (Utah 1997); Hodges v. Gibson Prods. Co., 811 P.2d 151 (Utah 1991); Humphrey v. Columbia/HCA John Randolph, Inc., 46 Va. Cir. 109 (Chesterfield County 1998).

97. *Gochenour*, 47 Va. Cir. at 228.

> voyeuristic activity is an equally strong, if not far stronger, public policy upon which to base a wrongful termination claim.[98]

In *Flayhart v. Interocean Ugland Management Corp.*,[99] the plaintiff alleged, inter alia, that when she walked into the defendant's office to deliver a facsimile, she found the defendant "entirely naked except for a hard hat laid over his genitals" and that he made no attempt to cover himself.[100] The criminal statute upon which the plaintiff rested her wrongful discharge claim was Virginia Code section 18.2-387, which provided in pertinent part:

> Every person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a Class 1 misdemeanor.[101]

The court noted that "Virginia has yet to recognize a cause of action for wrongful discharge based on 'indecent exposure' laws, and this court should not create a new cause of action in plaintiff's favor."[102] Moreover, the court noted that the plaintiff's supervisor did not expose his private parts or otherwise make an obscene display in violation of the statute because there was no allegation that he removed the hard hat.[103]

These cases underscore the lack of uniformity presently applied to cases involving alleged violations of criminal statutes as the public policy foundation for *Bowman*-type claims. Until the Supreme Court of Virginia addresses such issues a plaintiff's likelihood of success appears to turn on the criminal statute cited and the venue in which the claims are litigated.

C. *Reliance on Virginia's Wage Payment Laws*

In *Eslami v. Global One Communications, Inc.*,[104] the plaintiff alleged that his employment was terminated in violation of an

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98. *Id.* at 228.
99. 45 Va. Cir. 542 (Norfolk City 1998).
100. *Id.* at 543.
101. VA. CODE ANN. § 18.2-387 (Repl. Vol. 1996).
102. *Flayhart*, 45 Va. Cir. at 546-47.
103. *See id.* at 547.
104. No. 174096, 1999 WL 51864, at *1 (Va. Cir. Ct. Fairfax County Jan. 11, 1999). (unreported decision).

employment contract and that he was not timely compensated for work performed prior to his termination.[105] The plaintiff asserted a public policy wrongful discharge claim premised upon Virginia Code section 40.1-29, which affords employees the right to submit grievances concerning wage and hour disputes to the Commissioner of Labor and Industry.[106] The court sustained the defendant's demurrer to the wrongful discharge claim on the ground that an employer's action or inaction in the post-termination phase, such as improper withholding of wages, cannot give rise to a cause of action for wrongful discharge.[107] In addition, the court noted that there was no causal connection between the basis of plaintiff's discharge and any public policy underlying the wage payment statute insofar as plaintiff did not allege "that he was wrongfully terminated by [the defendant] in an effort to withhold timely payment of the compensation owed him."[108]

D. *Reliance on the Constitution of Virginia*

In the continuing search for actionable sources of public policy, plaintiffs increasingly have attempted to rely upon certain provisions in the Constitution of Virginia. The Circuit Court for Rockingham County recently addressed two such cases. First, in *Gochenour*,[109] the court rejected the plaintiff's attempted reliance on the Constitution of Virginia as an actionable source of public policy.[110] The court noted in this regard that:

> "[I]t is not possible . . . to base a wrongful termination claim, with nothing more, on the Bill of Rights of the Virginia Constitution." The reason is that the Constitution acts as a restraint on governmental actions, not on *private* actions. . . . [P]ermitting a *Bowman* wrongful termination claim to be premised upon the general principles of our democratic society articulated in the Virginia Bill of Rights would be to make every employment termination case actionable. There would be few terminations of employment that a skillful lawyer could not with some degree of candor characterize as violating the terminated employee's right to life, liberty, and pursuit of happiness by taking

105. *See id.*
106. *See id.*
107. *See id.* at *3.
108. *Id.*
109. 47 Va. Cir. 218 (Rockingham County 1998); *see also supra* text accompanying notes 90-98.
110. *See id.* at 223.

> away his or her means of earning a living. The sweeping breadth of such a claim is clear evidence that it cannot stand as the premise for a *Bowman* type claim.[111]

Similarly, the court rejected the plaintiff's attempted reliance upon the prohibition on warrantless searches contained in Virginia Code section 19.2-59, explaining that that provision "does not apply to private individuals or businesses but only applies to circumscribe the activities of 'individuals who by virtue of their governmental employment can be found guilty of malfeasance in office.'"[112]

In *Shifflet v. Lewis*,[113] the plaintiff alleged that his employment was terminated because he consulted an attorney after seeking reimbursement from the defendant for medical expenses incurred as a result of an alleged work-related accident.[114] In support of his claim the plaintiff contended, inter alia, that "Article I, § 11, of the Virginia Constitution, which guarantees Due Process of Law, includes the 'right to retain and/or consult with counsel in a civil matter so that one may have meaningful access to the courts.'"[115] Foreshadowing its holding in the case, the Circuit Court of Rockingham County began its analysis by observing that:

> Given the overriding importance in a democracy for a citizen to *know and obey* the law, it would seem clear that any citizen must have a right to consult with an attorney to know the law and to learn of his or her rights under the law. Because denying a working person of the right to consult a lawyer with the threat of losing his or her job seems antithetical to the fundamentals of a nation which operates by the rule of law, it would seem that there must be such a right and a means of protecting that right.[116]

The court first noted that the Constitution of Virginia has been widely held to restrict only the acts of government, and not those of private citizens.[117] Because there was no allegation of governmental activity in the employer's actions, the court held that the "[p]laintiff

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111. *Id.* (quoting Shiflett v. Lewis, 47 Va. Cir. 95, 101 (Rockingham County 1998)).

112. *Id.* at 224 (quoting Buonocore v. C&P Tel. Co., 254 Va. 469, 473, 492 S.E.2d 439, 441 (1997)).

113. 47 Va. Cir. 95 (Rockingham County 1998).

114. *See id.* at 96.

115. *Id.* at 99 (citations omitted).

116. *Id.* at 100.

117. *See id.* at 101 (citing Town of Madison v. Ford, 255 Va. 429, 432, 498 S.E.2d 235, 236 (1998) ("[T]he Virginia Constitution . . . establish[es] the limits of governmental action."); Dean v. Paolicelli, 194 Va. 219, 226, 72 S.E.2d 506, 510-11 (1952) ("The office and purpose of the constitution is to shape governmental activity.").

cannot premise a *Bowman* claim solely on the provisions of the Virginia Constitution because our Constitution does not, standing alone, restrict activities of private citizens."[118]

Next, the court turned its attention to the various statutes "enacted for the protection of working individuals"[119] and opined:

> Although it is an exceedingly close call, this Court is of the view that the numerous statutes which the legislature has enacted to protect workers as well as the general common law principal that all persons are presumed to know and obey the law, provide an articulated public policy of the Commonwealth of Virginia that an employee has a statutorily protected right to consult with a lawyer to learn his or her rights under the law. To rule otherwise would be contrary to the very concept of being a "nation of laws and not of men." If the defendants' position were accepted, the working people of this Commonwealth would be subjected to being forced, under the pain of losing their job, to a life of complete ignorance of the rights and protections the legislature has seen fit to afford them. This cannot be the result contemplated by the legislature.
>
> . . . To deny a working person the right to consult a lawyer is every bit as violative of the public policy of Virginia contemplated by the various statutes designed to protect workers, as denying an employee who is a shareholder of his or her employer-corporation the right to cast his or her vote for a slate of candidates at an annual or special meeting of shareholders.[120]

Based on this analysis, the court limited its holding to those cases where a plaintiff merely has consulted with an attorney.[121] The court did not expressly decide whether an employee may be terminated for having retained an attorney to bring an action against his or her employer.[122]

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118. *Shifflet*, 47 Va. Cir. at 102.

119. *Id.* at 103 (citing Virginia Code sections 40.1-52 to -77 (discussing laws regulating, inter alia, unions, strikes, and right to work); sections 40.1-78 to -116 (regarding child labor laws); sections 40.1-22 to -28.7 (discussing occupational health and safety); section 40.1-27.1 (discussing the discharge of employees for work-related injuries); and sections 40.1-1 to -11 (referring to the hiring of illegal aliens, etc.)).

120. *Id.* at 103-04.

121. *See id.* at 104.

122. *See id.* The court also denied the defendants' demurrer to plaintiff's claim that he was terminated in violation of the Workers' Compensation Act, Virginia Code section 65.2-308(B), which provides: "'The employee may bring an action in a circuit court having jurisdiction over the employer or person who allegedly discharged the employee in violation of this section.'" *Id.* (quoting VA. CODE ANN. § 65.2-308(B) (Repl. Vol. 1995)).

The *Shifflet* decision alarmed employers because of the lack of a defined, specific expression of public policy giving rise to the plaintiff's claim.[123] Instead, the court appeared to rely upon a vague penumbra emanating from a loosely connected set of employment protection statutes to create a public policy regarding consultation with counsel.

E. *The Supreme Court Clarifies the Plaintiff's Burden of Proof and Confirms the Availability of Punitive Damages in Public Policy Wrongful Discharge Cases*

On April 17, 1998, the Supreme Court of Virginia, in the case of *Shaw v. Titan Corp.*,[124] responded to two questions certified to it by the United States Court of Appeals for the Fourth Circuit. The first question concerned "the adequacy of jury instructions given on the issue of causation in a common law action for wrongful termination of employment."[125] The second question involved "the availability of punitive damages in such an action."[126]

In *Shaw*, the plaintiff alleged he was terminated from his employment because of his race, gender, and age.[127] The defendant removed the case to federal court, and thereafter, a jury returned a verdict in the plaintiff's favor, awarding compensatory and punitive damages.[128] The employer argued before the supreme court that the district court erred in refusing to instruct the jury with regard to an explicit "but-for" causation standard, a "sole" causation standard, or a "mixed motive" causation standard, and that the court erred in awarding punitive damages.[129]

The supreme court began its analysis by rejecting the plaintiff's first assignment of error.[130] The court noted that the district court instructed the jury to find in favor of the plaintiff if the plaintiff

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123. Indeed, the plaintiff in *Shifflet* did not appear to specify the precise statute the employer contravened, as required by the supreme court in *Brooks*. *See* Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94, 98-99, 465 S.E.2d 806, 809 (1996). The decision thus appears to be at odds with the supreme court's continued emphasis on the narrow availability of this exception to the employment-at-will doctrine. *See id.*

124. 255 Va. 535, 498 S.E.2d 696 (1998).

125. *Id.* at 538, 498 S.E.2d at 697.

126. *Id.*

127. *See id.* at 539, 498 S.E.2d at 698.

128. *See id.* at 539-40, 498 S.E.2d at 698.

129. *See id.* at 541, 498 S.E.2d at 699.

130. *See id.*

proved by a preponderance of the evidence that the employer intentionally terminated his employment because of his race, gender, age, or a combination of these factors.[131] In addition, the court noted the district court instructed the jury that if the employer fired the plaintiff for nondiscriminatory reasons, the jury was required to return a verdict in favor of the employer.[132] The court concluded that these instructions "fully and fairly stated the common law of Virginia in effect" at the time the plaintiff's claim accrued.[133] In so holding, the court explained that "[a] plaintiff is not required to prove that the employer's improper motive was the sole cause of the wrongful termination."[134] The court further noted that the district court's instructions adequately incorporated Virginia's common-law stand-ard of proximate causation.[135] Moreover, the court stated that "the common law of Virginia has not presently adopted the 'mixed motive' causation standard."[136]

The court then turned to the issue of the availability of punitive damages.[137] Citing its previous decisions in *Bowman*, *Bailey*, and *Lockhart*, the court explained that public policy wrongful discharge claims sound in tort.[138] Because a plaintiff may recover punitive damages if he pleads and proves an intentional tort, the court found that the district court did not err in awarding punitive damages.[139]

II. NEGLIGENCE IN HIRING, RETENTION, AND SUPERVISION

Tort actions in which the employer was alleged to be responsible for the acts of its employees received a great deal of attention in the

131. *See id.* at 542, 498 S.E.2d at 699.
132. *See id.*
133. *Id.*
134. *Id.* at 543, 498 S.E.2d at 700.
135. *See id.* at 544, 498 S.E.2d at 700.
136. *Id.*
137. *See id.*
138. *See id.* at 545, 498 S.E.2d at 701 (citing Bowman v. State Bank of Keysville, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985); Bailey v. Scott-Gallaher, Inc., 253 Va. 121, 125, 480 S.E.2d 502, 504 (1997); Lockhart v. Commonwealth Educ. Sys. Corp., 247 Va. 98, 105, 439 S.E.2d 328, 331-32 (1994)).
139. *See id.*

Virginia courts this year. Outgrowths of the doctrine of respondeat superior,[140] claims of negligent hiring,[141] negligent retention,[142] and negligent supervision[143] are becoming more commonplace and have been actively litigated in Virginia's courts. Most noteworthy among decisions in this area was *Southeastern Apartments Management, Inc. v. Jackman*,[144] a case in which the Supreme Court of Virginia reversed a trial court's verdict against the owner of an apartment building on theories of negligent hiring and negligent retention.[145] The court held that the tenant failed to establish a prima facie case on either front.[146] At the same time, however, the court unequivocally announced that Virginia recognizes the tort of negligent retention.[147]

Prior to the court's decision in *Jackman*, courts in Virginia were split on the issue of the viability of the tort of negligent retention.[148] Employees argued that because negligent hiring is recognized as an actionable claim, logic would dictate that Virginia also recognizes negligent retention as an actionable claim. Some courts were

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140. "Under the doctrine of *respondeat superior*, an employer is liable for the tortious act of his employee if the employee was performing his employer's business and acting within the scope of his employment when the tortious act was committed." Kensington Assocs. v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987).

The Supreme Court of Virginia recently issued a decision involving the doctrine of respondeat superior, which has been touted by some as "set[ting] an outer limit on employer liability." Deborah Elkins, *Employer Was Not Liable for Workplace Assault:* Respondeat Superior *Being Reined In?*, VA. LAW. WKLY., Apr. 26, 1999, at A1; *see* Giant of Maryland, Inc. v. Enger, 257 Va. 513, 516, 515 S.E.2d 111, 112-13 (1999) (reversing jury verdict in favor of an elderly customer hit by a supermarket clerk, explaining that the test for employer liability is not "whether the tortious act itself is a transaction within the ordinary course of the business of the master . . . but whether the service itself, in which the tortious act was done, was within the ordinary course of such business"); Davis v. Merrill, 133 Va. 69, 77-78, 112 S.E. 628, 631 (1922).

141. "[N]egligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others." J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 211, 372 S.E.2d 391, 394 (1988).

142. Negligent retention is distinct from a negligent hiring or negligent supervision claim in that the employee argues the employer knew of the offender's prior bad acts, but kept the offender in his position anyway, thus unreasonably exposing others to harm. *See* Paul Fletcher, *Negligent Retention: Your Success May Depend on Whether You Sue in State or Federal Court*, VA. LAW. WKLY., Sept. 29, 1997, at B1.

143. Negligent supervision claims allege that the employer negligently monitored the offender's activities.

144. 257 Va. 256, 513 S.E.2d 395 (1999).

145. *See id.* at 262, 513 S.E.2d at 398.

146. *See id.* at 261, 513 S.E.2d at 397.

147. *See id.* at 260, 513 S.E.2d at 397.

148. *See, e.g.*, Tremel v. Reid, 45 Va. Cir. 364, 383 (Albemarle County 1998).

persuaded by this argument, but until *Jackman*, there had been little guidance on the subject from Virginia's highest court.[149]

In *Jackman*, a tenant allegedly molested by the apartment's maintenance supervisor sued the owner of the building for the negligent hiring and retention of the employee.[150] The tenant, Kimberly Jackman ("Jackman"), woke up during the night to find the maintenance supervisor of her building, Douglas Turner ("Turner"), standing in her apartment.[151] After stating that "he had had quite a bit to drink," Turner sat down beside Jackman and began rubbing her thigh.[152] He left the apartment after she pleaded with him to leave.[153] Jackman then fled the building and reported the incident to the police.[154]

The jury entered judgment in favor of Jackman, finding that the building owner was negligent in his hiring and retention of Turner, and awarded Jackman damages in the amount of $12,500.[155] The owner of the building appealed the decision on the ground that the evidence Jackman presented was insufficient to create a prima facie case of either negligent hiring or negligent retention.[156]

In discussing the negligent hiring claim, the court detailed the process by which Turner was hired.[157] One of several applicants for the advertised job of maintenance supervisor, Turner submitted a "very professionally printed" personal resume.[158] Subsequently, the apartment resident manager, Melanie L. Ayscue ("Ayscue"), and the apartment regional manager interviewed Turner.[159] As part of the application process, Turner signed a release allowing the employer to inquire into his work, educational, and credit history by contacting his personal references and looking at public records.[160] Ayscue was able to talk with only two of the six people Turner listed as

149. *See Jackman*, 257 Va. at 258, 513 S.E.2d at 396.
150. *See id.*
151. *See id.*
152. *Id.*
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.* at 258, 513 S.E.2d at 396. The building owner also appealed the lower court's failure to rule that his negligence if any, was not a proximate cause of the tortious conduct. However, because of the supreme court's stance on the first issue, the court declined to reach the proximate cause issue. *See id.*
157. *See id.* at 259, 513 S.E.2d at 396.
158. *Id.*
159. *See id.*
160. *See id.*

personal references, both of whom gave him a good recommendation.[161] Turner indicated on his application that of thirty-four crimes listed, he had only committed "[t]raffic [v]iolations."[162] Ayscue performed a background check on Turner, but failed to obtain a copy of his criminal record.[163] She testified that the law did not mandate she do so.[164] Finally, Turner scored "fine" on a behavioral test he took before being hired.[165] Ayscue hired Turner with the regional manager's approval.[166]

The court noted that while the tort of negligent hiring is recognized in Virginia, Jackman failed to state a prima facie case of negligent hiring as a matter of law because there was nothing to put the building owner on notice that hiring Turner might lead to a sexual assault on a tenant.[167] None of the information gathered in connection with Turner's application indicated that he might have "a propensity to molest women," his recommendations were favorable, and his application did not suggest a problem.[168] Furthermore, the court found that reasonable care did not require the employer to investigate Turner's criminal record and dismissed as inconsequential the tenant's argument that an examination of that record would have disclosed several bad checks Turner had written years earlier.[169]

Regarding the negligent retention claim, the court mentioned Ayscue's suspicion that Turner had an alcohol or drug abuse problem and her observations concerning Turner's "romantic" interest in women living in the apartment complex.[170] The supreme court quickly determined these facts were not indicia that Turner was "a dangerous employee and one likely to commit sexual assaults."[171] Jackman also brought out at trial that Ayscue mentioned to her that she and a fellow employee found Turner to be "obnoxious" and avoided him during their lunch breaks.[172] The supreme court dealt with this as well, finding "the fact that an employee is 'obnoxious,'

161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.* at 261, 513 S.E.2d at 397.
168. *Id.*
169. *See id.*
170. *See id.*
171. *Id.*
172. *See id.* at 262, 513 S.E.2d at 398.

in the opinion of other employees, [does not] furnish notice to an owner exercising reasonable care that the employee is likely to sexually assault tenants."[173]

In *Courtney v. Ross Stores, Inc.*,[174] the Circuit Court of Fairfax County was confronted with a Motion for Judgment alleging the employer was guilty of negligent hiring, negligent retention, and negligent supervision of an employee who verbally abused a customer on the basis of racial animosity.[175] The court granted defendant's demurrer as to the negligent hiring and supervision counts but overruled the demurrer on the negligent retention claim.[176]

In addressing the negligent hiring count, the court mentioned that the tort had a history in Virginia, dating back to 1903.[177] The court acknowledged that most negligent hiring cases involved some sort of physical harm to the plaintiff; however, physical harm was not required to make a prima facie case.[178] What is required, according to the court, is knowledge.[179] A plaintiff must demonstrate to the court

> that an employee had a propensity for the conduct that ultimately resulted in the injury to others and knowledge of the propensity was reasonably discoverable; the employer failed to inquire; and, had the employer inquired, it would not have placed the employee in the position that it did. . . . [U]nlike the knowledge element for negligent supervision or retention, the knowledge must occur prior to the hiring or placement.[180]

The court found that no facts were presented that would satisfy the knowledge requirement for negligent hiring.[181]

In opining on the tort of negligent retention, the court noted that for liability to be imposed, the employer must "negligently retain or fail to fire or remove an employee after learning of the employee's

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173. *Id.*
174. 45 Va. Cir. 429 (Fairfax County 1998).
175. *See id.* at 429.
176. *See id.* at 431-32.
177. *See id.* at 430.
178. *See id.*
179. *See id.*
180. *Id.*
181. *See id.* at 431.

incompetence, negligence, or unfitness for a position."[182] The court held there was sufficient evidence to support the plaintiff's allegations that Ross was aware of the employee's discriminatory conduct toward African-Americans and overruled the demurrer.[183]

By swiftly dealing with the charge of negligent supervision in granting Ross Stores' demurrer, the court concluded: "In Virginia there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here."[184]

The Circuit Court for the City of Norfolk also had the opportunity to rule on claims of negligent hiring and retention.[185] Dorothy Berry ("Berry"), an employee of Scott & Stringfellow, allegedly was subjected to repeated sexual harassment from her supervisor.[186] The court granted the defendant's demurrer with respect to Berry's negligent hiring claim, ruling that Berry "must allege acts of her supervisor, prior to his employment, which would have suggested to Scott & Stringfellow that Walker had the propensity to sexually harass and assault female employees and was, therefore, unfit for the job."[187] In the court's opinion, Berry's assertions did not allege the necessary facts to make out a successful claim of negligent hiring.[188] The court held that Scott & Stringfellow's demurrer to the negligent retention claim should be overruled because Berry's motion alleged Scott & Stringfellow had "actual or constructive knowledge of Walker's propensity to sexually harass and assault female employees."[189] These facts were sufficient to support a negligent retention claim.[190]

The ability of third parties to bring negligent hiring and retention claims was also argued before a Virginia court in *Tremel v. Reid*.[191] Michael Tremel ("Tremel"), a minor, alleged that his Boy Scout Leader, Floyd Reid ("Reid"), sexually assaulted him on numerous

182. *Id.*
183. *See id.* at 432.
184. *Id.* (citing C&P Tel. Co. of Va. v. Dowdy, 235 Va. 55, 61, 365 S.E.2d 751, 754 (1988)); *see also* Call v. Shaw Jewelers, Inc., No. 3:98CV449, 1999 U.S. Dist. LEXIS 636 (E.D. Va. Jan. 7, 1999) (unreported decision).
185. *See* Berry v. Scott & Stringfellow, 45 Va. Cir. 240 (Norfolk City 1998).
186. *See id.* at 241.
187. *Id.* at 248.
188. *See id.*
189. *Id.* at 245.
190. *See id.* at 247.
191. 45 Va. Cir. 364 (Albemarle County 1998).

occasions.[192] Both Tremel and his parents brought numerous claims against Reid, the Boy Scouts of America ("BSA"), the Stonewall Jackson Area Council ("SJAC"), and the Johnny Reb Corporation.[193] The court ruled that the child's injury did not give the parents a cause of action based on negligent hiring against SJAC and BSA because the defendants "owed no legal duty to [the parents] since the injuries [the parents] complain of grow out of the relationship of these Defendants to [the parent's] son Michael and not to [the parents] directly."[194] However, the court allowed Tremel's claims for negligent hiring and retention to go forward.[195]

III. COVENANTS NOT TO COMPETE AND THE FIDUCIARY DUTY OF LOYALTY

Cases involving the duties, created by both fiduciary responsibilities[196] and contract, flowing from employee to employer continued to receive a great deal of coverage in the Virginia courts. Virginia courts heard a number of cases addressing the attempted enforcement of noncompetition agreements during the past year.

In *Advanced Marine Enterprises, Inc. v. PRC Inc.*,[197] PRC required all new employees to sign an agreement, part of which read as follows:

> Employee agrees not to compete with PRC for a period of eight months following termination of employee's employment, by rendering competing services to or, with respect to such services, solicit any customer of PRC for whom Employee performed services while employed by PRC, within 50 miles of a PRC office.[198]

Because of lost business, PRC informed certain employees in its marine engineering department that they should begin looking for

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192. *See id.* at 365.
193. *See id.* at 365.
194. *Id.* at 383.
195. *See id.* at 385.
196. Although the focus of this section is on the enforceability of noncompetition agreements, other cases involving an employee's alleged violation of his fiduciary duties to the employer deserve brief mention. For example, in *Phoenix Financial Corp. v. Radford*, 44 Va. Cir. 445, 445-46 (Roanoke City 1998), a Virginia circuit court held that an employee's duty of loyalty ends when the employment relationship is terminated.
197. 256 Va. 106, 501 S.E.2d 148 (1998).
198. *Id.* at 111, 501 S.E.2d at 151.

work elsewhere.[199] Pirrera, a senior manager in this department, contacted Advanced Marine Enterprises, Inc. ("AME"), a marine engineering firm, to discover if AME would be interested in hiring all the managers from PRC's marine engineering department.[200] AME expressed interest in the idea, and subsequently both AME and PRC managers began formulating a plan for AME to hire every employee in PRC's marine engineering department away from PRC.[201]

The elaborate plan called for AME to make secret offers of employment to every employee in PRC's marine engineering department.[202] According to the plan, all employees would resign from PRC on the same day, without giving the two weeks notice required by the company.[203] In essence, AME's objective was to obtain not only PRC's managers and employees, but also its customers and contracts.[204]

Aware of the terms of the noncompetition provision in PRC's employment agreement, the defendants projected the amount of damages they likely would incur if faced with a lawsuit.[205] This did not deter their efforts, however, as they felt the benefits outweighed any potential liability.[206]

The PRC managers compiled a "matrix" to describe the plan for luring business away from PRC.[207] This matrix contained confidential and proprietary information of PRC, including "the value of certain work, and the amount of government funding available for each job in PRC's marine engineering department."[208]

AME used the information received from PRC managers to prepare offers for all employees of PRC's marine engineering department.[209] The PRC managers formulated a plan for distributing the offer letters based on the concern that certain employees might

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199. *See id.*
200. *See id.*
201. *See id.* at 111-12, 501 S.E.2d at 151.
202. *See id.* at 112, 501 S.E.2d at 151.
203. *See id.*
204. *See id.* Of the plan, one PRC manager commented, "the idea was 'to put together an entity that the [PRC] customer can't live without.'" *Id.*
205. *See id.*
206. *See id.*
207. *See id.* at 112, 501 S.E.2d at 151-52.
208. *Id.* The matrix also assessed the ease with which it would be able to divert each position in the department to AME. *See id.*
209. *See id.* at 112, 501 S.E.2d at 152.

not keep their offer from AME confidential.[210] According to plan, the PRC managers gave out the offers encouraging each employee to accept and say nothing to PRC about the offer.[211]

Suspecting that PRC might learn of the plan, Pirrera sent an e-mail to the other PRC managers.[212] His message directed the managers to talk to the other employees and have them back up computer files, transfer files to clients, and determine their task backlogs.[213]

On the day specified in the plan, PRC's entire marine engineering department resigned, giving no notice.[214] Prior to this, a number of employees and managers had copied customer files and sent them to the clients' sites and either copied or removed other confidential and proprietary information from PRC.[215]

PRC instituted an action in state court against AME and the former PRC managers and employees.[216] One of their claims sought to have the court find the noncompetition agreements enforceable.[217] AME argued that the clause should not be enforced "because it was unreasonably broad, unduly harsh, and oppressive."[218] The trial court disagreed and the supreme court affirmed.[219]

In its opinion, the Supreme Court of Virginia began by repeating the criteria to be considered in evaluating the enforceability of a covenant not to compete.[220] The court found the PRC agreement was

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210. *See id.* at 112-13, 501 S.E.2d at 152.
211. *See id.* at 113, 501 S.E.2d at 152.
212. *See id.*
213. *See id.*
214. *See id.*
215. *See id.* at 113-14, 501 S.E.2d at 152.
216. *See id.* at 114, 501 S.E.2d at 152.
217. *See id.* at 114, 501 S.E.2d at 153.
218. *Id.* at 118, 501 S.E.2d at 155.
219. *See id.*
220. *See id.* The court cited the commonly applied considerations for evaluating the validity of such agreements:

> (1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate business interest?
>
> (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?
>
> (3) Is the restraint reasonable from the standpoint of a sound public policy?

Id. (citing New River Media Group, Inc. v. Knighton, 245 Va. 367, 369, 429 S.E.2d 25, 26 (1993) (quoting Roanoke Eng'g Sales Co. v. Rosenbaum, 223 Va. 548, 552, 290 S.E.2d 882, 884 (1982))).

not unduly harsh in limiting the efforts of its former employees to find work nor was it unreasonable from the standpoint of public policy.[221] Furthermore, the court did not object to the geographic restriction in the face of PRC having 300 offices worldwide because the prohibition applied to a narrow line of services and the briefness of the eight-month restriction.[222]

Several notable cases regarding the enforceability of restrictive covenants came before circuit courts in Virginia. In *Wheeler v. Fredericksburg Orthopedic Assocs.*,[223] Wheeler, a doctor, sought a temporary injunction to prohibit her former medical practice group from interfering with her ability to practice medicine within a thirty-five mile radius of Fredericksburg.[224] The court found that because the language of the covenant did not allow Wheeler to practice as a doctor, regardless of her specialty, within thirty-five miles of Fredericksburg, failure to grant the injunction would work a significant hardship on Wheeler.[225] Furthermore, because the defendants did not even practice in Wheeler's specialty, no irreparable harm would flow to them by failure to enforce the noncompetition agreement.[226] Finally, because Wheeler was the only physician practicing in her specialty within the Fredericksburg area, non-issuance of the injunction would cause the general public to suffer.[227]

In a second case, the Circuit Court for the City of Richmond refused to enforce a noncompetition agreement because it found the agreement was broader than necessary to protect the employer's business interests and would seriously impair the former employee's ability to earn a livelihood.[228] The former manager of Summs Recovery, Charles Belle, signed a noncompetition agreement that prohibited him from competing with the employer for one year

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221. *See id.* at 118-19, 501 S.E.2d at 155.

222. *See id.* at 119, 501 S.E.2d at 155.

223. 44 Va. Cir. 399 (Fredericksburg City 1998).

224. *See id.* at 399. The noncompetition provision in Wheeler's agreement prohibited her from practicing as a "professional" or practicing medicine within a 35-mile radius of Fredericksburg. *See id.*

225. *See id.*; *see also* Nida v. Business Advisory Sys., Inc., 44 Va. Cir. 487, 498 (Winchester City 1998) (refusing to enforce a covenant not to provide lender services "anywhere in the world" because of the breadth of the geographic scope).

226. *See id.* at 401-02.

227. *See id.* at 402.

228. *See* Summs Recovery and Collection, Inc. v. Belle, 44 Va. Cir. 475 (Richmond City 1998).

within a fifty-mile radius of "any Summs office."[229] After his termination, Summs Recovery asked the court to enforce the noncompetition agreement, which it declined to do.[230]

The court paid particular attention to the fact that the geographical scope of the agreement would "span approximately from the North Carolina border, to the east coast, almost to Charlottesville, north towards Fredericksburg, and well into Maryland."[231] The court found this particularly onerous because there was no evidence that Summs Recovery had business "south of Petersburg, west of Richmond, north of Ashland, and in several other locations included in the geographical reach of the noncompetition agreement" or that they were trying to expand in those areas.[232] The court concluded that the agreement failed the first two prongs of the three-part reasonableness test.[233]

Although the geographical reach of the agreement was its only real problem, the court refused to edit or "blue-line" the agreement to make it enforceable.[234] As its reason for refusing to edit the agreement, the court stated that "it is well established in Virginia that courts will not rewrite contracts."[235] Given the court's unwillingness to alter the agreement's scope, the court declared the agreement invalid and refused to order its enforcement.[236]

Despite the general reluctance among the circuit courts to enforce covenants not to compete, at least one circuit court stated that an employer's failure to have an employee sign a covenant not to compete rendered the employer's assertions that the employee breached its fiduciary duties to the employer and tortiously interfered with a contract nonactionable.[237] The Circuit Court of Fairfax County was guided by the Supreme Court of Virginia's decision in *Peace v. Conway*[238] in holding that, in the absence of a convenant not to compete, the employer did not have a cause of action against an

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229. *Id.* at 477.
230. *See id.* at 479.
231. *Id.* at 477.
232. *Id.* at 477-78.
233. *See id.* at 478; *see also supra* note 220 and accompanying text (discussing the three-part reasonableness test).
234. *See id.*
235. *Id.* at 478.
236. *See id.*
237. *See* Deepwood Veterinary Clinic, Inc. v. Sabo, 45 Va. Cir. 508, 509 (Fairfax County 1998).
238. 246 Va. 278, 435 S.E.2d 133 (1993).

employee who solicited her former employer's customers from a list compiled by memory and then competed with her former employer post-termination.[239] Quoting from Justice Hassell's opinion in *Peace*, the lower court stated "'it is not unusual in the business world for an employee to leave his employment and start a competing business. When this occurs, inevitably customers of the former employer will desire to continue to deal with the former employee in the new business.'"[240] In addition, the court held the employee's actions prior to termination–forming a new corporation, preparing to open her new business, and agreeing to employ dissatisfied employees of her former employer–"were mere preparation, not competition, and did not breach her fiduciary duty to her employer."[241]

The issue of assignability of covenants not to compete continued to be revisited in the courts despite precedent that suggested the issue is settled.[242] In *Christian Defense Fund v. Stephen Winchell's Associates*,[243] the Circuit Court of Fairfax County addressed the assignability of convenants not to compete.[244] Upon resigning from Hart Conover, Inc. ("HCI"), Benjamin Hart ("Hart") signed a consulting agreement with HCI agreeing "not to work for or provide services to the Christian Coalition ("CC") for one year."[245] Subsequently, HCI merged with the Christian Defense Fund ("CDF").[246] Thereafter, on May 12, 1998, "Stephen Winchell & Assoc., Inc. ("Winchell"), hired Hart as an independent contractor . . . on the CC account."[247] CDF sought to enforce the noncompetition provision signed by Hart against CC.[248]

The court refused CDF's request for a temporary injunction compelling Hart to adhere to the agreement,[249] commenting that "a contract for personal services is not assignable unless both parties

239. *See Deepwood*, 45 Va. Cir. at 509.
240. *Id.* (quoting *Peace*, 246 Va. at 282, 435 S.E.2d at 135).
241. *Id.*
242. *See, e.g.*, Reynolds & Reynolds Co. v. Hardee, No. 96-2077, 1997 U.S. App. LEXIS 36368, at *1 (4th Cir. Dec. 30, 1997) (unreported decision), *aff'g* 932 F. Supp. 149 (E.D. Va. 1996).
243. 47 Va. Cir. 148 (Fairfax County 1998).
244. *See id.* at 150.
245. *Id.* at 148.
246. *See id.*
247. *Id.*
248. *See id.* at 148-49.
249. *See id.* at 148.

agree to the assignment."[250] According to the court, Hart's personal services contract "was transferred to CDF without the consent of Hart by virtue of the merger"; therefore, CDF did not have standing to enforce the covenant not to compete.[251]

A case with an unusual application of the duty of loyalty was *Parrish v. Worldwide Travel Service, Inc.*[252] In *Parrish*, the plaintiff was subject to an employment contract with a "just cause" termination provision.[253] The employer terminated the employee for failing to follow instructions with regard to his duties.[254] The employee sued for breach of the contract and the employer contended that the employee breached his duty of loyalty to his employer.[255] The Supreme Court of Virginia agreed with the employer and ruled that the employer had sufficient cause to terminate the employee because "[a]n employee's duty of loyalty to his employer includes the duty to follow the employer's reasonable instructions."[256]

IV. CONCLUSION

By far, the most meaningful decision in Virginia employment law handed down this past year, if not the past five years, is *Conner v. National Pest Control Ass'n*. On its face, *Conner* appears to bar public policy discriminatory discharge claims in Virginia and provide employers and employees alike with a certainty that has eluded them since the *Lockhart* decision and its progeny.

While *Conner* seems to overshadow other employment law decisions issued during the period in review, the importance and implication of certain other decisions should not be ignored. The *Jackman* court's explicit recognition of the viability of the tort of negligent retention should put to rest the confusion that permeated the Commonwealth as to whether such a tort is recognized.

Finally, the evolving case law in the enforcement of noncompetition agreements underscores the necessity of drafting covenants not to compete that are not overly broad in geographic scope and/or

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250. *Id.* at 150 (citing McGuire v. Brown, 114 Va. 235, 239-42, 76 S.E. 295, 297 (1912); Epperson v. Epperson, 108 Va. 471, 475-77, 62 S.E. 344, 346 (1908)).
251. *Id.*
252. 257 Va. 465, 512 S.E.2d 818 (1999).
253. *See id.* at 466, 512 S.E.2d at 820.
254. *See id.* at 467, 512 S.E.2d at 819.
255. *See id.* at 466, 512 S.E.2d at 819.
256. *Id.* at 468, 512 S.E.2d at 820.

duration, not unduly burdensome to the employee and their ability to earn a livelihood, and are rationally related to the employer's interests.