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## Labor and Employment Law

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*Woods, Rogers & Hazlegrove, P.L.C.*

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# LABOR AND EMPLOYMENT LAW

*Thomas M. Winn, III* \*

## I. INTRODUCTION

This article discusses three principal areas of state labor and employment law in which there was significant activity in Virginia's state and federal courts over the past year: (1) the doctrine of employment-at-will;<sup>1</sup> (2) non-competition and non-solicitation agreements;<sup>2</sup> and (3) respondeat superior and negligent hiring and retention claims.<sup>3</sup> In addition, this article summarizes some of the significant legislative enactments affecting the employer/employee relationship.<sup>4</sup> Beyond the scope of this article are decisions rendered in other areas of law affecting the employment relationship, including public employment claims,<sup>5</sup> unemployment compensation claims,<sup>6</sup> and workers' compensation claims.<sup>7</sup>

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1. See discussion *infra* Part II.

2. See discussion *infra* Part III.

3. See discussion *infra* Part IV.

4. See discussion *infra* Part V.

5. See, e.g., *Siewert v. Virginia Commonwealth Univ.*, No. HS-21-4, 2002 WL 334897 (Va. Cir. Ct. Feb. 14, 2002) (Richmond City) (overturning hearing officer's rescission of discipline imposed on police officer for causing damage to vehicle); *Teacher Discharge—Contract—Grievance Procedure*, VA. LAW. WKLY. Mar. 4, 2002, at 11.

6. See, e.g., *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002) (holding that under the doctrine of sovereign immunity, the city could not be held liable under a negligent retention theory for alleged rapes by officer during ongoing investigation of alleged victim's complaint concerning her son); *Cent. Delivery Serv. Washington, Inc. v. Virginia Employment Comm'n*, No. 2046002, 2001 Va. App. LEXIS 617 (Ct. App. Nov. 6, 2001) (unpublished decision) (reversing Commission's decision holding certain contract drivers "employees" for purposes of unemployment compensation, instead of independent contractors outside the scope of the Act); *Stasko v. Virginia Employment Comm'n*, 53 Va. Cir. 292 (Cir. Ct. 2001) (Charlottesville City) (affirming Commission's disqualification of claimant who quit his job when his employer changed his compensation from salary basis to hourly basis); *Azimi v. Virginia Employment Comm'n*, 57 Va. Cir. 1 (Cir. Ct. 2001) (Fairfax County) (affirming denial of unemployment compensation to employee who was

## II. EMPLOYMENT-AT-WILL

The principle of employment-at-will is well established in Virginia.<sup>8</sup> The Supreme Court of Virginia has explained in this regard that "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 . . . ."<sup>9</sup>

Thus, in Virginia, 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.<sup>10</sup> The employment-at-will doctrine ordinarily precludes at-will employees who are terminated from asserting common law causes of action for wrongful discharge or wrongful termination of employment.<sup>11</sup> Over the years, however, plaintiffs have continued their assault on the at-will doctrine through creative pleading.

### A. Reasonable Notice

Some of the early decisions addressing the at-will employment doctrine have implied a requirement that the employment may be terminated by either party, with or without cause, at any time "upon reasonable notice." This ambiguous clause can be traced back to *Stonega Coal & Coke Co. v. Louisville & Nashville R.R.*,<sup>12</sup> which held that:

[W]hen a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot be de-

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unavailable to work during hours employer required her services).

7. See, e.g., *Osborne v. Forner*, 36 Va. App. 91, 548 S.E.2d 270 (Ct. App. 2001) (denying benefit and holding that a sole proprietor paint contractor who occasionally retained the services of three different painters did not *regularly* employ or move employees).

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

9. *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 96-97, 465 S.E.2d 806, 808 (1996) (quoting *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 102, 439 S.E.2d 328, 330 (1994)).

10. *Id.* at 96-97, 465 S.E.2d at 808; *Bowman v. State Bank*, 229 Va. 534, 535, 331 S.E.2d 797, 798 (1985).

11. *Lawrence Chrysler Plymouth*, 251 Va. at 97, 465 S.E.2d at 808.

12. 106 Va. 223, 55 S.E. 551 (1906).

terminated by a fair inference from its provisions either party is ordinarily at liberty to terminate it at-will *on giving reasonable notice of his intention to do so*.<sup>13</sup>

Subsequent decisions of the Supreme Court of Virginia have continued to feature reasonable notice language in describing the at-will employment rule. More recently, in *Miller v. SEVAMP, Inc.*,<sup>14</sup> the court affirmed the continued adherence to the freedom of parties "to terminate the contract at will, upon giving the other party reasonable notice."<sup>15</sup>

In *Brehm v. Mathis*,<sup>16</sup> the plaintiff asserted a cause of action based on her employer's alleged failure to provide her with reasonable notice that her employment was being terminated. The parties cited conflicting decisions as to whether there is a "reasonable notice" exception to the employment-at-will doctrine.<sup>17</sup> The defendant cited *Perry v. American Home Products Corp.*<sup>18</sup> and *Wilt v. Water & Wastewater Equipment Manufacturers Ass'n*,<sup>19</sup> which both held that an at-will employee does not have an independent cause of action for the employer's failure to give reasonable notice of termination.<sup>20</sup>

The plaintiff, on the other hand, cited *Person v. Bell Atlantic-Virginia, Inc.*,<sup>21</sup> and *Laudenslager v. Loral*,<sup>22</sup> which held that there is an implied obligation to give reasonable notice of termination unless there is an agreement to the contrary.<sup>23</sup> The court in *Brehm* noted that *Laudenslager* recognized "an implied obligation requiring each party to an at-will employment relationship to give the other reasonable notice of termination unless there is an agreement to the contrary, and that failure to give such notice [was] actionable as a breach of an implied contract."<sup>24</sup> The court distinguished *Person*, however, on the grounds that the claim was

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13. *Id.* at 226, 55 S.E. at 552 (emphasis added).

14. 234 Va. 462, 362 S.E.2d 915 (1987).

15. *Id.* at 465, 362 S.E.2d at 916-17.

16. No. 25917, 2002 Va. Cir. LEXIS 120 (Cir. Ct. Mar. 11, 2002) (Loudoun County).

17. *Id.* at \*3-4.

18. No. 3:96CV595, 1997 U.S. Dist. LEXIS 2521 (E.D. Va. Mar. 4, 1997).

19. 43 Va. Cir. 118 (Cir. Ct. 1997) (Loudoun County).

20. *See Perry*, 1997 U.S. Dist. LEXIS 2521, at \*20-22; *Wilt*, 43 Va. Cir. at 122.

21. 993 F. Supp. 958 (E.D. Va. 1998).

22. 39 Va. Cir. 228 (Cir. Ct. 1996) (Chesapeake City).

23. *See Person*, 993 F. Supp. at 961-62; *Laudenslager*, 39 Va. Cir. at 229.

24. *Brehm*, 2002 Va. Cir. LEXIS 120, at \*4-5 (citing *Laudenslager*, 39 Va. Cir. 228).

preempted by the federal Labor Management Relations Act<sup>25</sup> and thus it was unnecessary for the district court to address the state law on giving notice of termination to an at-will employee.<sup>26</sup> The court further observed that *Person* cited *Slade v. Central Fidelity Bank*<sup>27</sup> for the proposition that the failure to give reasonable notice is actionable as a breach of contract.<sup>28</sup>

The court concluded after analyzing the extant case law, that no “decision of the Virginia Supreme Court [sic] explains the nature of the reasonable notice of termination obligation that is always included in any explanation of the employment-at-will doctrine.”<sup>29</sup> In the final analysis, the court was unpersuaded that the obligation to provide “reasonable notice” required the employer to give an at-will employee notice of his termination in a reasonable period of time before he is actually terminated.<sup>30</sup> Judge Chamblin explained:

I do not agree with this argument because it conflicts with the essence of an at will employment, namely, that the period of its intended duration cannot be determined. Adding a required period of time that is reasonable between notice of termination and actual termination undermines the indefinite duration element of an at will employment.<sup>31</sup>

Instead, the court opined that the reasonable notice requirement merely imposed an obligation on the part of the employer to afford “reasonable notice” that the employee was being terminated, rather than “reasonable notice” in the temporal sense prior to effecting the termination decision.<sup>32</sup> The court explained that the requirement of “reasonable notice” prevented an employer from terminating an employee without notifying him or her of the termination, while retaining the benefits, but not the costs, of the employee’s services.<sup>33</sup> This conclusion, while perhaps logically sound, would appear to have little application to the modern workplace. Nonetheless, this decision should afford employers

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25. Labor Management Relations Act of 1947, 29 U.S.C. §§ 141–157 (2000).

26. *Brehm*, 2002 Va. Cir. LEXIS 120, at \*4.

27. 12 Va. Cir. 291 (Cir. Ct. 1988) (Campbell County).

28. *Brehm*, 2002 Va. Cir. LEXIS 120, at \*5 (citing *Slade*, 12 Va. Cir. 291).

29. *Id.*

30. *Id.* at \*5–6.

31. *Id.* at \*6.

32. *Id.*

33. *Id.* at \*6–7

some comfort, from a liability perspective, in handling termination decisions without adhering to the common practice of providing “two weeks notice” so often afforded in terminations without cause.

### B. *Effect of Handbook Policies on At-Will Status*

Prudent employers with employee handbooks and detailed personnel policies, particularly with regard to discipline, include contract disclaimers in their manuals to avoid breach of contract claims or arguments by potential plaintiffs that terminations must be in strict accordance with the guidelines set forth in such materials. In *County of Giles v. Wines*,<sup>34</sup> the Supreme Court of Virginia faced these very issues in determining whether the plaintiff “presented sufficient evidence to support a jury’s finding that he had an employment contract terminable only for just cause.”<sup>35</sup> The plaintiff based his claim on the detailed disciplinary personnel policies in the county’s employee handbook.<sup>36</sup> Specifically, the plaintiff was discharged for “personality conflicts” and “poor judgments” in the face of a county policy that provided that “[a]n employee may be discharged for inefficiency, insubordination, misconduct, or other just cause.”<sup>37</sup>

The court began its analysis by reciting the now familiar principles underpinning the employment-at-will doctrine:

Virginia strongly adheres to the common law employment-at-will doctrine. In Virginia, an employment relationship is presumed to be at-will, which means that the employment term extends for an indefinite period and may be terminated by the employer or employee for any reason upon reasonable notice. . . . An employee is ordinarily at liberty to leave his employment for any reason or for no reason, upon giving reasonable notice, without incurring liability to his employer. Notions of fundamental fairness underlie the concept of mutuality which extends a corresponding freedom to the employer. The presumption that an at-will employment relationship exists may be rebutted, however, if sufficient evidence is produced to show that the employment is for a definite, rather than an indefinite, term.<sup>38</sup>

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34. 262 Va. 68, 546 S.E.2d 721 (2001).

35. *Id.* at 70, 546 S.E.2d at 721.

36. *Id.* at 73, 546 S.E.2d at 723.

37. *Id.* at 70–71, 546 S.E.2d at 722.

38. *Id.* at 72, 546 S.E.2d at 723 (citations and internal quotations omitted).

Quoting its early decision in *Norfolk Southern Railway v. Harris*,<sup>39</sup> the court explained that a contractual agreement stating “that an employee ‘will not be disciplined or dismissed from [employment] without a just cause’ creates a definite term for the duration of the employment and that the employer could only dismiss the employee for cause.”<sup>40</sup> Applying these principles, the court held that the employee “failed to present evidence that he had an employment contract terminable solely for cause sufficient to rebut the employment-at-will presumption.”<sup>41</sup> The county’s personnel policy stated that “[a]n employee may be discharged for inefficiency, insubordination, misconduct, or other just cause.”<sup>42</sup> The court focused upon the word “may” explaining that the word did not limit the employer’s discharge options to termination only for cause, but merely provided examples of reasons for which an employee could be terminated.<sup>43</sup> The court noted that the policy did not “state that an employee will not be discharged without just cause.”<sup>44</sup> The court also observed that other sections of the county’s personnel policies were “devoid of any language which changes the nature of the at-will employment relationship between the County and its employees.”<sup>45</sup> For these reasons the court held “that the personnel policy at issue in this case is not sufficient to rebut the strong presumption in favor of the at-will employment relationship in this Commonwealth.”<sup>46</sup>

In so holding, the court relied heavily upon its decision in *Progress Printing Co. v. Nichols*,<sup>47</sup> a case that “considered whether an employee was terminable at-will or whether he had an employment contract which prohibited termination without just cause.”<sup>48</sup> Progress had provided its employee, Nichols, with a copy of the Employee Handbook that contained a provision stating that the “company would not discharge or suspend an employee ‘without just cause and shall give a last warning notice . . . in writing’ ex-

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39. 190 Va. 966, 976, 59 S.E.2d 110, 114 (1950).

40. *Giles*, 262 Va. at 72–73, 546 S.E.2d at 723 (quoting *Harris*, 190 Va. at 969, 976, 59 S.E.2d at 111, 114).

41. *Id.* at 73, 546 S.E.2d at 723.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. 244 Va. 337, 421 S.E.2d 428 (1992).

48. *Giles*, 262 Va. at 73–74, 546 S.E.2d at 724.

cept under certain circumstances.”<sup>49</sup> The employer, however, also required “the employee to [sign] [an acknowledgment] form which stated that the employment relationship between Progress Printing and the employee was ‘*at-will and may be terminated by either party at any time.*’”<sup>50</sup> The court recognized that the direct conflict between the provision and the acknowledgment form “[could not] be reconciled in any reasonable way” ruling that “the acknowledgment form that the employee had executed superseded and replaced the provision in the handbook with the agreement that the employment relationship was terminable at-will.”<sup>51</sup> Therefore, the court held that “[i]f the documents are considered a single contract, as the trial court considered them, this conflict, along with the conflicting testimony of the parties as to the nature of the employment relationship, fails to provide sufficient evidence to rebut the presumption of employment at-will.”<sup>52</sup>

Justices Lacy, Kinser, and Lemons dissented from the majority decision in *Giles*, relying on the disciplinary policy in the personnel manual stating that an employee “may be discharged for inefficiency, insubordination, misconduct, or other just cause.”<sup>53</sup> Justice Lacy disagreed with the majority’s interpretation of that policy:

Viewing this statement in the light most favorable to the plaintiff, the word “may” must be construed to mean, not that the employer is at liberty to discharge for causes other than “just cause,” but as allowing the employer to impose a penalty of less than discharge for any of those infractions although such infractions constitute grounds for termination. Section 8-5 also requires the employer to provide the employee with the reasons for termination, a condition that is inconsistent with employment at-will, which requires no reason for termination. Finally, [section] 8-7, “Causes for Suspension, Demotion, or Dismissal,” lists sixteen other specific acts which support a decision to terminate employment. Giving the provisions of the manual a reasonable construction and one favorable to the plaintiff compels the conclusion that the manual allows termination for no grounds other than those identified in [sections] 8-5 and 8-7.<sup>54</sup>

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49. *Id.* at 73, 546 S.E.2d at 724 (quoting *Progress Printing*, 244 Va. 339, 421 S.E.2d at 429) (emphasis in original).

50. *Id.* at 74, 546 S.E.2d at 724 (quoting *Progress Printing*, 244 Va. at 339, 421 S.E.2d at 429).

51. *Id.* (quoting *Progress Printing*, 244 Va. at 342, 421 S.E.2d at 431).

52. *Id.* (quoting *Progress Printing*, 244 Va. at 342, 421 S.E.2d at 431).

53. *Id.* at 77, 546 S.E.2d at 726 (Lacy, J., dissenting).

54. *Id.* (Lacy, J., dissenting).



Moreover, Justice Lacy noted that the County Administrator, the chief personnel officer of the county, testified that, when the employee was first terminated, the Administrator interpreted the personnel policy as allowing termination only for cause, as did a member of the County's Board of Supervisors.<sup>55</sup> Justice Lacy explained that "[c]onsideration of this evidence is appropriate because evidence of the parties' conduct and intent, including a party's interpretation of the contract, is 'entitled to great weight' in determining the construction of an ambiguous contract."<sup>56</sup> Justice Lacy took issue with the majority's rejection of this evidence on the grounds that it merely raised an estoppel argument and that estoppel could not be asserted against the county.<sup>57</sup> Justice Lacy further observed that the employer did not raise an estoppel argument either directly or indirectly and that the majority had created the issue on its own.<sup>58</sup>

The final basis for the dissent was the disagreement over the "new standard . . . established" by the majority.<sup>59</sup> Justice Lacy noted that

the majority rejected all evidence except the employee manual itself and vacated the jury verdict in favor of the employee because the employee could not point to a statement in the personnel manual that the employee "shall only" be terminated for just cause or that the employee "will not be discharged without just cause."<sup>60</sup>

The Justice claimed that this approach would result in an "entry of judgment in favor of the employer, regardless of the evidence introduced."<sup>61</sup> The dissenters expressed grave concern over the potential for this decision to upset the established balance between the jury and the trial court.<sup>62</sup> Justice Lacy decried "this new 'rule,' which eviscerates the historic role of the jury in employment termination cases, without acknowledging what has

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55. *Id.* (Lacy, J., dissenting).

56. *Id.* at 78, 546 S.E.2d at 726 (Lacy, J., dissenting) (quoting *Dart Drug Corp. v. Nicholakos*, 221 Va. 989, 995, 277 S.E.2d 155, 158 (1981)).

57. *Id.* (Lacy, J., dissenting).

58. *Id.* (Lacy, J., dissenting). Justice Lacy also disagreed with the majority's application of the *Progress Printing* standards to this case. *Id.* at 78-79, 546 S.E.2d at 727 (Lacy, J., dissenting).

59. *Id.* at 79, 546 S.E.2d at 727 (Lacy, J., dissenting).

60. *Id.* at 80, 546 S.E.2d at 727 (Lacy, J., dissenting).

61. *Id.* (Lacy, J., dissenting).

62. *Id.* at 80, 546 S.E.2d at 727-28 (Lacy, J., dissenting).

been done or explaining the basis for or perimeters of the rule imposed.”<sup>63</sup>

The significance of the *Giles* case is perhaps revealed most acutely through Justice Lacy’s opinion. The decision would appear to erect an extremely high burden for plaintiffs who seek to contend that personnel policies give rise to contractual rights superseding the employment-at-will doctrine. That this case arose in a public employment setting is also noteworthy and leaves practitioners wondering how this decision may affect the statutory grievance rights of discharged public employees.

### C. The “Public Policy” Exception<sup>64</sup>

In the seminal case of *Bowman v. State Bank of Keysville*,<sup>65</sup> the Supreme Court of Virginia recognized, for the first time, a “narrow exception” to the employment-at-will doctrine which allows at-will employees to state a claim for wrongful discharge if they can identify a public policy that was violated by the termination of their employment.<sup>66</sup> In the more than fifteen years since *Bowman*, plaintiffs have roamed the legislative landscape creatively searching for statutes expressive of Virginia’s “public policy.” While the past year lacked the judicial blockbusters in this area that we have come to expect from the Supreme Court of Virginia,<sup>67</sup> several notable opinions were issued.

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63. *Id.* (Lacy, J., dissenting).

64. For a comprehensive overview of the evolution of wrongful discharge in violation of public policy claims, see Thomas R. Bagby & Thomas M. Winn, III, Connor v. National Pest Control Association: *The Death Knell for Public Policy Discriminatory Discharge Claims?*, 11 J. CIV. LITIG. 149 (1999); and Thomas M. Winn, III, *Annual Survey of Virginia Law: Labor and Employment Law*, 33 U. RICH. L. REV. 965 (1999) [hereinafter Winn, *Labor and Employment*]; and Thomas M. Winn, III, *The Supreme Court Opens the Back Door for Public Policy Discriminatory Discharge Claims*, 12 J. CIV. LITIG. 1 (2000).

65. 229 Va. 534, 331 S.E.2d 797 (1985).

66. *Id.* at 539–40, 331 S.E.2d at 800–01.

67. See, e.g., *City of Virginia Beach v. Harris*, 259 Va. 220, 523 S.E.2d 239 (2000); *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000); *Connor v. Nat’l Pest Control Ass’n*, 257 Va. 286, 513 S.E.2d 398 (1999); *Dray v. New Mkt. Poultry Prods., Inc.*, 258 Va. 187, 518 S.E.2d 312 (1999); *Doss v. JAMCO*, 254 Va. 362, 492 S.E.2d 441 (1997); *Bradick v. Grumman Data Sys. Corp.*, 254 Va. 156, 486 S.E.2d 545 (1997); *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997); *Clark v. Manheim Servs. Corp.*, 38 Va. Cir. 479 (Va. 1996) (per curiam); *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 439 S.E.2d 328 (1994).

In *Rowan v. Tractor Supply Company*,<sup>68</sup> the United States District Court for the Western District of Virginia entered a certification order pursuant to Supreme Court of Virginia Rule 5:42.<sup>69</sup> The order requested that the Supreme Court of Virginia answer the following question: “Does a complaint state a *Bowman* claim under § 18.2-460 when the plaintiff, an at-will employee, alleges that her employer terminated her employment because she refused to yield to employer’s demand that she discontinue pursuing criminal charges of assault and battery against a fellow employee?”<sup>70</sup>

The plaintiff alleged that she was terminated after her employer told her to “keep her mouth shut” or she would “suffer the consequences” of reporting suspected embezzlement by fellow employees.<sup>71</sup> She further alleged that her manager physically assaulted and battered her when she expressed her concerns about the alleged transgressions.<sup>72</sup> As is typical in these cases, the Supreme Court of Virginia began its analysis with a review of *Bowman* and its progeny.<sup>73</sup> The court summarized the parameters of the public policy exception by observing:

[W]e have . . . allowed such an action to proceed when the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy. . . . [W]e have recognized a cause of action for wrongful discharge where the discharge was based on the employee’s refusal to engage in a criminal act. Although criminal statutes do not contain explicit statements of public policy, the protection of the general public from lawless acts is an unquestioned policy underlying such statutes. We recognized that allowing the employment-at-will doctrine to “serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity” would violate this most compelling public policy.<sup>74</sup>

In *Rowan*, however, the court noted that the common law action at issue was not based on a public policy expressly set out in

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68. 263 Va. 209, 559 S.E.2d 709 (2002).

69. *Id.* at 211, 559 S.E.2d at 709; *see also* VA. SUP. CT. R. 5:42.

70. *Rowan*, 263 Va. at 211, 559 S.E.2d at 709; *see also* VA. CODE ANN. § 18.2-460 (Cum. Supp. 2001).

71. *Rowan*, 263 Va. at 211–12, 559 S.E.2d at 709–10.

72. *Id.*

73. *Id.* at 213, 559 S.E.2d at 710–11.

74. *Id.* at 214, 559 S.E.2d at 711.

a specific statute as it was in other cases where the claims were deemed actionable.<sup>75</sup> Nor did the plaintiff claim she was entitled to maintain her claim because she was terminated for refusing to engage in a criminal act as in other cases where the claims were allowed to proceed.<sup>76</sup>

Rather, the plaintiff asserted that Virginia Code section 18.2-460 is “consistent with the policy of the Commonwealth to protect the public from criminals by shielding those who participate in the prosecution and trial of suspected wrongdoers.”<sup>77</sup> The plaintiff argued that “the statute must provide her with a right to such protection and [that] the violation of such right by her employer is a violation of public policy sufficient to support her common law cause of action.”<sup>78</sup>

The court disagreed with the plaintiff,<sup>79</sup> explaining:

[U]nlike the shareholders’ right to vote shares granted by the statute in *Bowman*, § 18.2-460 does not grant a person involved in a criminal prosecution any specific right. Also, in *Bowman* the public policy violated existed to protect the exercise of the statutory right, but here there is no statutory right and, therefore, there exists no corresponding public policy necessary to protect the right.<sup>80</sup>

Moreover, the court concluded that the plaintiff’s description of the public policy underlying Virginia Code section 18.2-460 was inconsistent with prior case law:

We have previously described the public policy underlying the obstruction of justice statute as reflecting the General Assembly’s intent to prohibit interference with the administration of justice and as protecting the public’s safety and welfare. The goal of this policy is not to protect *individuals* from intimidation, but to protect the public from a flawed legal system due to impaired prosecution of criminals. Thus, TSC’s actions in discharging Rowan did not violate a right granted to her but rather violated a criminal statute enacted to ensure that the administration of justice is not subverted.<sup>81</sup>

In conclusion, the court held that Virginia Code section 18.2-460 “did not create any statutory right or a corresponding public

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75. *Id.*; see, e.g., *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997); *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 439 S.E.2d 328 (1994).

76. *Rowan*, 263 Va. at 214, 559 S.E.2d at 711; see, e.g., *Mitchem v. Counts*, 259 Va. 179, 190, 523 S.E.2d 246, 252 (2000).

77. *Rowan*, 263 Va. at 214, 559 S.E.2d at 711.

78. *Id.*

79. *Id.*

80. *Id.* at 215, 559 S.E.2d at 711.

81. *Id.* at 215, 559 S.E.2d at 711–12 (citations and internal quotations omitted).

policy of the type that would support an exception to the employment-at-will doctrine and thus allow a common law action for wrongful termination."<sup>82</sup> Accordingly, the court answered the certified question in the negative.<sup>83</sup> Employers concerned about the recent trend emerging from *Mitchem v. Counts*<sup>84</sup> may take some comfort in knowing that the public policy exception is not without its limits insofar as criminal statutes are concerned.

In *Collins v. Franklin*,<sup>85</sup> the plaintiff sued a shareholder of her employer, who later became the employer's president, for sexual harassment, urging the court to recognize a common law cause of action for sexual harassment.<sup>86</sup> Relying on *Mitchem*,<sup>87</sup> the plaintiff contended that her claim should be permitted to proceed because Virginia courts have recognized a cause of action against an employer for wrongful termination of employment in violation of public policy.<sup>88</sup> The District Court for the Western District of Virginia rejected the claim, explaining:

This precedent is not applicable here since the defendant was not the plaintiff's employer. There is no support in Virginia law for a free-standing tort of sexual harassment, not involving a claim against an employer for wrongful discharge or for a hostile or abusive workplace imputable to the employer. Therefore, the plaintiff has no cause of action in this regard.<sup>89</sup>

Furthermore, the court rejected the plaintiff's attempt to characterize the purported conduct as "solicitation of the crimes of fornication or adultery"<sup>90</sup> warranting a civil cause of action.<sup>91</sup> The court explained that "solicitation of a misdemeanor such as fornication or adultery is not a crime,"<sup>92</sup> and that "a private right of action cannot be implied from a criminal statute."<sup>93</sup>

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82. *Id.* at 215, 559 S.E.2d at 712.

83. *Id.*

84. 259 Va. 179, 523 S.E.2d 246 (2000).

85. No. 2:00CV00044, 2001 WL 589029 (W.D. Va. May 29, 2001).

86. *Id.* at \*1.

87. 259 Va. at 187, 523 S.E.2d at 250 (upholding cause of action for wrongful termination based on the statutory public policies against fornication and lewd and lascivious behavior).

88. *Collins*, 2001 WL 589029, at \*3.

89. *Id.*

90. *Id.*; see also VA. CODE ANN. § 18.2-344, -365 (Repl. Vol. 1996 & Cum. Supp. 2002).

91. *Collins*, 2001 WL 589029, at \*3.

92. *Id.* (citing VA. CODE ANN. § 18.2-29 (Repl. Vol. 1996 & Cum. Supp. 2002); *Weatherford v. Commonwealth*, No. 1489-90-1, 1992 WL 877506 (Va. Ct. App. Mar. 3, 1992) (un-

In *Hammonds v. Builders First Source-Atlantic Group, Inc.*,<sup>94</sup> the plaintiff, a truck driver, alleged his employer unlawfully denied him light duty opportunities and discharged him in violation of public policy.<sup>95</sup> First, the plaintiff attempted to rely on the policies expressed in the Virginians with Disabilities Act ("VDA").<sup>96</sup>

The court began its analysis with an overview of the VDA:

It is undisputed that the VDA "is the statement of Virginia's public policy against disability discrimination." Its purpose is "to encourage and enable persons with disabilities to participate fully and equally in the social and economic life of the Commonwealth and to engage in remunerative employment." However, the VDA also states that "the relief available for violations of this chapter shall be limited to the relief set forth in this section." This provision makes the VDA the exclusive state remedy for disability-based discrimination in employment.<sup>97</sup>

Accordingly, the court held that the plaintiff failed to state a claim upon which relief could be granted because "any disability discrimination claim alleged by the plaintiff should have been pursued under the remedies provided in the VDA itself."<sup>98</sup>

In addition, the plaintiff referred without elaboration to the public policy allegedly reflected by Virginia Code section 40.1-51.1,<sup>99</sup> which requires every employer:

"[T]o furnish each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and to comply with all applicable occupational safety and health rules and regulations promulgated under this title."<sup>100</sup>

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1992) (unpublished decision)).

93. *Id.* (citing *Vansoat & Guster, Inc. v. Washington*, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993)).

94. 2002 U.S. Dist. LEXIS 6202 (W.D. Va. Mar. 28, 2002).

95. *Id.* at \*7-8. The plaintiff alleged a breach of contract claim, but the court held that he had not presented any facts to overcome the presumption of employment-at-will. *Id.* at \*8-10. In addition, the court rejected plaintiff's promissory estoppel claim. *Id.* at \*10-12.

96. *Id.* at \*12; VA. CODE ANN. § 51.5-41 (Repl. Vol. 1999).

97. *Hammonds*, 2002 U.S. Dist. LEXIS 6202, at \*14 (citations omitted).

98. *Id.*

99. VA. CODE ANN. § 40.1-51.1(A) (Repl. Vol. 1999).

100. *Hammonds*, 2002 U.S. Dist. LEXIS 6202, at \*15 (quoting VA. CODE ANN. § 40.1-51.1(A)).

The plaintiff suggested that defendant's refusal to afford him light duty work violated the public policy reflected by this statute.<sup>101</sup> The court rejected this argument as well, reasoning:

Without addressing whether this statute could provide the basis for a public policy-based wrongful discharge claim, the court fails to see any connection between the plaintiff's allegations (failure to provide light duty work) and the duties imposed on the employer (maintaining a work place without recognized hazards) under § 40.1- 51.1.<sup>102</sup>

The court noted the creativity of this argument, but concluded it was without any legal basis because "[s]ection 40.1-51.1 obligates an employer to provide a workplace free of 'exposure to toxic materials or harmful physical agents.'"<sup>103</sup> Despite plaintiff's contentions, the statute did not afford, "a workplace which ensures equal treatment of disabled persons."<sup>104</sup> Ultimately, the court dismissed the claim, concluding that the plaintiff had alleged no facts that brought the case within the purview of this occupational safety statute.<sup>105</sup>

In one of the more interesting "public policy" cases from the past year, *Morgan v. American Diabetes Association*,<sup>106</sup> the plaintiff alleged his employer fired him in response to statements he made to management concerning a fellow employee's sexual harassment complaint.<sup>107</sup> In a bench ruling, the Alexandria Circuit Court overruled the defendant's demurrer and held that the plaintiff made out a *Bowman* claim, finding an actionable public policy in the plaintiff's right to free speech under the Virginia Constitution.<sup>108</sup> As one commentator observed:

The Virginia Constitution's free speech clause is not implicated by the plaintiff's claim. Specifically, it is well settled that Article I, § 12 of the Virginia Constitution . . . forbids most government regulation of the speech of its citizens; it does not, however, guarantee that there will be no private consequences flowing from such protected speech.<sup>109</sup>

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101. *Id.*

102. *Id.*

103. *Id.* at \*16 (quoting VA. CODE ANN. § 40.1-51.1(B) (Repl. Vol. 1999)).

104. *Id.* (quoting the Plaintiff's Objection to Report and Recommendation).

105. *Id.*

106. No. CL010463 (Cir. Ct. 2001) (Alexandria City) (unpublished decision). For comment on the case, see King F. Tower, *The Morgan Case: Which Law Will Prevail*, VA. LAW WKLY., Dec. 24, 2001, at B2.

107. Tower, *supra* note 106.

108. *Id.*

109. *Id.*

This case obviously has significant ramifications for employers employing fewer than fifteen employees who presently are not susceptible to retaliation claims under Title VII of the Civil Rights Act.<sup>110</sup> As the case presently is unreported, it is unclear what, if any, real impact it will have in future litigation, absent an appeal and resolution of these issues.

#### D. *The Statute of Frauds*

In *Shiple v. Jackson*,<sup>111</sup> plaintiff pursued a breach of employment contract claim, contending that his employer had induced him to leave a high-paying job to take a job at the same salary with a commitment by the employer to commit some \$250,000 to fund the venture.<sup>112</sup> The plaintiff alleged he was paid for only two months before the defendant informed him that he would not fund the venture as he allegedly had promised.<sup>113</sup>

The “[d]efendant demurr[ed], contending the alleged oral contract violate[d] Virginia’s statute of frauds,<sup>114</sup> which requires a writing for a contract that cannot be fully performed within one year.”<sup>115</sup> The defendant appears to have argued that the plaintiff’s employment, without the benefit of a contract, was for an indefinite period of time and was subject to the employment-at-will doctrine.<sup>116</sup> With little explanation, the court overruled the demurrer on the grounds that employment-at-will and wrongful discharge were not pertinent issues in the case.<sup>117</sup>

### III. NON-COMPETITION AND NON-SOLICITATION AGREEMENTS

Employers in Virginia face a number of obstacles in seeking to enforce non-competition agreements. As an initial matter, cove-

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110. 42 U.S.C. §§ 2000e–2000e-17 (2000).

111. No. LL-2348-1 (Cir. Ct. 2001) (Richmond City) (order overruling demurrer). For comment on the case, see *Employment-Statute of Frauds-Internet Wine Business*, VA. LAW. WKLY., July 2, 2001, at 11 [hereinafter *Employment*].

112. *Employment*, *supra* note 111.

113. *Id.*

114. VA. CODE ANN. § 11-2(8) (Repl. Vol. 1999 & Cum. Supp. 2002).

115. *Employment*, *supra* note 111.

116. *Id.*

117. *Id.*



nants in restraint of trade are not favored, will be strictly construed against the employer, and, in the event of an ambiguity, will be construed in favor of the employee.<sup>118</sup> Moreover, the employer bears the burden of proving that the restraint is reasonable<sup>119</sup> applying the following tripartite standard that attempts to balance the employer's, its employees', and the public's interests:

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?

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?

Is the restraint reasonable from the standpoint of a sound public policy?<sup>120</sup>

The Supreme Court of Virginia attempted to clarify the first standard in two widely debated decisions from last year, *Simmons v. Miller*<sup>121</sup> and *Motion Control Systems, Inc. v. East*.<sup>122</sup> This year, the court fleshed out the second standard in *Modern Environments, Inc. v. Stinnett*.<sup>123</sup>

In *Stinnett*, a former employee, who worked for a competitor of her former employer, filed a declaratory judgment action seeking a declaration that a non-compete agreement was unenforceable because it was overbroad and contrary to public policy.<sup>124</sup> The provision of the employment agreement at issue stated:

Employee agrees that for as long as Employee remains employed by the company, and for a period of one (1) years [sic] after Employee's employment with the Company ceases, Employee will not (i) *directly or indirectly, own, manage, operate, control, be employed by, participate in or be associated in any manner with the ownership, management, operation, or control of any business similar to the type of busi-*

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118. *Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962); see *Simmons v. Miller* 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001) (citing *Grant v. Carotek, Inc.*, 737 F.2d 410, 412 (4th Cir. 1984)).

119. *Simmons*, 261 Va. at 581, 544 S.E.2d at 678 (citing *Blue Ridge Anesthesia v. Gidick*, 239 Va. 369, 371-72, 389 S.E.2d 467, 468-69 (1990)).

120. *Advanced Marine Enters. v. PRC, Inc.*, 256 Va. 106, 118, 501 S.E.2d 148, 155 (1998).

121. 261 Va. 561, 544 S.E.2d 666 (2001).

122. 262 Va. 33, 546 S.E.2d 424 (2001); see Winn, *Labor and Employment*, *supra* note 64, at 726-29 (discussing *Simmons* and *Motion Control*).

123. 263 Va. 491, 561 S.E.2d 694 (2002).

124. *Id.* at 492, 561 S.E.2d at 695.

ness conducted by the company or any of its affiliates (a "competing business"), which competing business is within a fifty (50) mile radius of the home office or any business location or locations of the Company or any of its affiliates at which Employee worked.<sup>125</sup>

The trial court held that the covenant was overbroad and unenforceable because it prohibited the former employee from being employed in any capacity by a competitor.<sup>126</sup> The employer asserted that the restrictive language at issue was reasonable and not over-broad as a matter of law, citing numerous cases in which the Supreme Court of Virginia had previously enforced identical or similar language in other employment agreements and had not held such language to be overbroad.<sup>127</sup>

The court distinguished the cases cited by the employer, observing:

[T]his [c]ourt did not limit its review to considering whether the restrictive covenants were facially reasonable. The [c]ourt examined the legitimate, protectable interests of the employer, the nature of the former and subsequent employment of the employee, whether the actions of the employee actually violated the terms of the non-compete agreements, and the nature of the restraint in light of all the circumstances of the case. The language of the non-compete agreement was considered in the context of the facts of the specific case. In no case did the [c]ourt hold that the language contained in the restrictive covenant at issue was valid and enforceable as a matter of law under all circumstances.<sup>128</sup>

Only one of the cases cited by the employer, *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*,<sup>129</sup> involved a challenge to

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125. *Id.* at 493–94, 561 S.E.2d at 695 (emphasis in original).

126. *Id.* at 494, 561 S.E.2d at 695.

127. *Id.* (citing *Rash v. Hilb, Rogal & Hamilton Co.*, 251 Va. 281, 285, 467 S.E.2d 791, 794 (1996) (employee "shall not directly or indirectly as an . . . employee . . . or other participant . . . engage in any manner in any" competing business); *New River Media Group, Inc. v. Knighton*, 245 Va. 367, 368, 429 S.E.2d 25, 26 (1993) (employee "would not engage in a business that competed"); *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 239 Va. 369, 370, 389 S.E.2d 467, 468 (1990) (employee will not "be employed by" any competitor); *Paramount Termite Control Co., Inc. v. Rector*, 238 Va. 171, 172, 380 S.E.2d 922, 924 (1989) (employee "will not engage . . . in the carrying on or conducting the business of" former employer); *Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 547, 551, 290 S.E.2d 882, 883 (1982) (employee will not "directly or indirectly . . . be employed by" any competing business); *Meissel v. Finley*, 198 Va. 577, 579, 95 S.E.2d 186, 187 (1956) (employee will not "enter into the insurance business . . . or associate himself or herself with any" insurance agency)).

128. *Id.* at 494–95, 561 S.E.2d at 695.

129. 239 Va. 369, 389 S.E.2d 467 (1990).

the reasonableness of a restrictive covenant on the basis that it precluded a former employee from any type of employment with a competitor.<sup>130</sup> The court explained that in that case, the covenant was reasonable because another provision in the agreement specifically permitted the employee to work in the employer's industry in a non-competing role.<sup>131</sup> The court concluded that *Blue Ridge* provided no support for the employer's position, because the restrictive covenant in *Stinnett* did not include a similar provision.<sup>132</sup>

The court rejected the employer's assertion that prior holdings required the conclusion that as a matter of law the language at issue is reasonable and not overbroad.<sup>133</sup> Because the employer had not offered any other argument or evidence of any legitimate business interest served by prohibiting the employee from being employed in any capacity by a competing company, the court held that the employer did not carry its burden of showing that the restrictive covenant at issue is reasonable and affirmed the trial court.<sup>134</sup>

This decision illustrates the care that must be exercised in drafting non-compete agreements. While a company surely would never intend to prohibit a departing executive from working as a janitor at a competing business, and while the reality of such a scenario stretches the imagination, the naked possibility of such a change in position can render a non-compete unenforceable should it restrict such a job change.

Perhaps the most controversial decision of the past year in this area of the law was issued not by the Supreme Court of Virginia, but by the United States District Court for the Eastern District of Virginia in *Mona Electric Group, Inc. v. Truland Service Corp.*<sup>135</sup> In that case, the employer attempted to enforce a non-solicitation covenant against a former employee.<sup>136</sup> The court began its analysis by addressing whether there was sufficient consideration to support the existence of a binding contract between the two parties.<sup>137</sup>

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130. *Stinnett*, 263 Va. at 495, 561 S.E.2d at 695.

131. *Blue Ridge*, 239 Va. at 370-71, 389 S.E.2d at 468.

132. *Stinnett*, 263 Va. at 495, 561 S.E.2d at 696.

133. *Id.*

134. *Id.* at 496, 561 S.E.2d at 696.

135. 193 F. Supp. 2d 874 (E.D. Va. 2002).

136. *Id.* at 875.

137. *Id.*

The employer argued that its continued employment of the defendant constituted adequate consideration for a restrictive covenant.<sup>138</sup> The court concluded that there was a split in the authority on this issue, noting that the majority of reported decisions appear to follow the employer's rationale,<sup>139</sup> while other courts have "ruled that continued employment, by itself, does not create implied consideration."<sup>140</sup>

The court stated that "[n]either the Fourth Circuit nor the Supreme Court of Virginia has addressed this issue," and turned to the West Virginia Supreme Court of Appeals for guidance.<sup>141</sup> The Virginia court noted that the West Virginia court, in ruling upon a contract governed by Virginia law, had opined that

"Virginia's highest court would probably follow the holding in *Kistler* that when the relationship of employer and employee is established without a restrictive covenant not to compete, any agreement thereafter not to compete, must be in the nature of a new contract based upon new consideration."<sup>142</sup>

The district court then likewise concluded that the Supreme Court of Virginia would find that the mere continuation of employment does not furnish consideration for a non-competition agreement under the facts of this case and ruled that the agreement was void for want of consideration.<sup>143</sup> The court found it significant that the employer did not advise the former employee that failure to sign the agreement would result in termination or in any other employment action.<sup>144</sup>

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138. *Id.* at 875-76.

139. *Id.* at 876 (citing *Daughtry v. Capital Gas Co., Inc.*, 285 Ala. 89, 229 So. 2d 480 (1969); *Roessler v. Burwell*, 119 Conn. 289, 176 A. 126 (1934); *Tasty Box Lunch Co. v. Kennedy*, 121 So. 2d 52 (Fla. Dist. Cir. App. 1960); *Thomas v. Coastal Indust. Servs., Inc.*, 214 Ga. 832, 108 S.E.2d 328 (1959); *Maynard v. Kohls*, 203 N.W.2d 209 (Iowa 1972); *Frier-son v. Sheppard Bldg. Supply Co.*, 247 Miss. 157, 154 So. 2d 151 (1963); *Sarco Co. v. Gulliver*, 3 N.J. Misc. 641, 649, 129 A. 399 (N.J. Ch. 1925), *aff'd*, 99 N.J. Eq. 432 (1926); *Bettinger v. North Fort Worth Ice Co.*, 278 S.W. 466 (Tex. Civ. App. 1925)).

140. *Id.* (citing *Forrest Paschal Machinery Co. v. Milholen*, 27 N.C. App. 678, 220 S.E.2d 190 (1975); *Morgan Lumber Sales Co. v. Toth*, 41 Ohio Misc. 17, 321 N.E.2d 907 (1974); *Kistler v. O'Brien*, 464 Pa. 475, 347 A.2d 311 (1975); *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (Pa. 1974); *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 525 S.E.2d 898 (S.C. Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (S.C. 2001)).

141. *Id.*

142. *Id.* at 876 (quoting *PEMCO Corp. v. Rose*, 163 W. Va. 420, 427, 257 S.E.2d 885, 889 (1979)).

143. *Id.*

144. *Id.*

Despite ruling that the agreement was void, the court concluded there was no evidence that the former employee violated the agreement by "soliciting" the employer's customers.<sup>145</sup> The court cited the absence of any evidence that the former employee had initiated calls to customers during his subsequent employment.<sup>146</sup> Instead, the court concluded that

[the former employee] responded to customer calls to [the new employer] for bids.

[The employee's] acts of responding to customers who solicited him for bids clearly do not violate the Agreement. [The employee] did not sign an agreement that prohibited him from competing with [his former employer], he signed an agreement that precisely prohibited his "solicitation" of Plaintiff's customers. Plaintiff asserts that the Agreement prevents [the employee] from submitting estimates to customers who call him to request bids. This would turn the non-solicitation agreement into a non-competition agreement, and under the unambiguous terms of the Agreement, only solicitation of [the former employers] customer's [sic] is prohibited.<sup>147</sup>

Thus, the court observed that even if it were to find the agreement valid, there was no evidence that the former employee violated the terms of the agreement.<sup>148</sup> Accordingly, the court entered summary judgment for the former employee.<sup>149</sup>

#### IV. RESPONDEAT SUPERIOR AND NEGLIGENT HIRING AND RETENTION

##### A. *Respondeat Superior*

Under the doctrine of respondeat superior—literally, "let the master answer"—an employer is liable for the tortious acts of its employee if the employee was performing his employer's business and acting within the scope of his employment when the tortious acts were committed.<sup>150</sup> The test for employer liability is not whether the tortious act itself is a transaction within the ordinary

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145. *Id.*

146. *Id.* at 877.

147. *Id.*

148. *Id.*

149. *Id.*

150. See *Kensington Assocs. v. West*, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987); see also *Giant of Maryland, Inc. v. Enger*, 257 Va. 513, 515 S.E.2d 111 (1999).

course of the employer's business, but whether the service in which the tortious act was accomplished was within the ordinary course of such business.<sup>151</sup>

In *Cooper v. Hansbury*,<sup>152</sup> a woman pursued a claim of sexual assault against defendant laboratory under the theory of respondeat superior where the laboratory's technician allegedly sexually assaulted her during the course of performing a blood test.<sup>153</sup> The defendant demurred, contending that the alleged conduct, if it occurred at all, was outside the scope of the technician's employment.<sup>154</sup> The circuit court overruled the demurrer, explaining:

Plaintiff alleges that after defendant Hansbury administered a blood test, an activity within the ordinary course of his employment, he sexually assaulted her. Plaintiff's Motion for Judgment contains an allegation of an injury caused by the willful and wrongful act of an employee committed in the course of the employer-employee relationship and within the scope of his employment. It alleges that Hansbury was Collection Specialists' employee, that he assaulted Cooper at his regular place of employment, and that he did so while he was performing the business of his employer for which plaintiff was the employer's customer. A review of the facts, and reasonable inferences therefrom, alleged in plaintiff's Motion for Judgment compels this [c]ourt to conclude that plaintiff has pleaded sufficient facts which, if proven, would create a jury issue whether Hansbury was acting within the scope of his employment.<sup>155</sup>

Thus, employers are now feeling the force of the Supreme Court of Virginia's recent decisions in *Gina Chin & Assoc., Inc. v. First Union Bank*<sup>156</sup> and *Majorana v. Crown Central Petroleum Corp.*,<sup>157</sup> which render it virtually impossible for employers to prevail prior to trial on a "scope of duty" defense.<sup>158</sup>

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151. *Giant of Maryland, Inc.*, 257 Va. at 516-17, 515 S.E.2d at 112-13.

152. 55 Va. Cir. 322 (Cir. Ct. 2001) (Arlington County).

153. *Id.* at 323.

154. *See id.* at 322-23.

155. *Id.* at 323 (citations omitted).

156. 260 Va. 533, 544, 537 S.E.2d 573, 579 (2000).

157. 260 Va. 521, 539 S.E.2d 426 (2000).

158. *See Winn, Labor and Employment, supra* note 64, at 731-34 (discussing the *Chin* and *Majorana* decisions and their likely impact).

## B. *Negligence in Hiring and Retention*

Outgrowths of the doctrine of respondeat superior, claims of negligence in employment continue to become more commonplace and have been pursued hotly in Virginia's courts in recent years. These claims differ from claims of respondent superior because "negligent hiring [and retention are] . . . doctrine[s] 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."<sup>159</sup>

Negligent hiring has been recognized for some time in Virginia.<sup>160</sup> 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.<sup>161</sup>

By comparison, negligent supervision claims allege that the employer negligently monitored the offender's activities.<sup>162</sup> The Supreme Court of Virginia has declined to recognize the tort of negligent supervision and does not impose a duty of reasonable care upon an employer in the supervision of its employees.<sup>163</sup>

Negligent retention is distinct from a negligent hiring or negligent supervision claim in that, in the negligent retention context,

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159. *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 211, 372 S.E.2d 391, 394 (1988) (quoting Note, *Minnesota Developments—Employer Liability for the Criminal Acts of Employers Under Negligent Hiring Theory*: *Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1306–07 (1984)).

160. See, e.g., *Southeastern Apartments Mgmt., Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999); *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429 (Cir. Ct. 1998) (Fairfax County) (noting that the tort of negligent hiring has a long history in the Commonwealth dating back at least to 1903).

161. *Ross Stores*, 45 Va. Cir. at 430 (citing *Davis v. Merrill*, 133 Va. 69, 78–81 112 S.E. 628, 631–32 (1922)); see also *Berry v. Scott & Stringfellow*, 45 Va. Cir. 240 (Cir. Ct. 1998) (Norfolk City).

162. 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.

163. See, e.g., *C&P Telephone v. Dowdy*, 235 Va. 55, 61, 365 S.E.2d 751, 754 (1988); see also *Ross Stores*, 45 Va. Cir. at 432 ("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.").

the employee argues that the employer knew of the offender's prior bad acts but kept the offender in his position anyway, thus unreasonably exposing others to harm.<sup>164</sup> In opining on the tort of negligent retention, the courts have 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 incompetence, negligence, or unfitness for a position."<sup>165</sup>

While the lower courts continue to address negligent hiring and retention claims, over the past year the Supreme Court of Virginia analyzed these torts in only one case, *Interim Personnel of Central Virginia, Inc. v. Messer*.<sup>166</sup> In *Messer*, the court addressed appeals arising from a single action which alleged negligent hiring, where the dispositive question was whether the trial court erred in ruling that foreseeability was a jury issue.<sup>167</sup> In *Messer*, the plaintiff was injured when the vehicle she was operating was struck from the rear by the defendant, Ricky Edward East ("East"), who was intoxicated and negligently operating a pickup truck that he had stolen from one of the defendants, the University of Virginia Alumni Association ("the Association").<sup>168</sup>

At the time of the accident, East was employed by one of the defendants, Interim Personnel of Central Virginia, Inc. ("Interim"), a temporary employment service, and assigned to work for the Association.<sup>169</sup> East's job required that he maintain "a valid Virginia driver's license," which at no time relevant did he actually have.<sup>170</sup> East had been convicted of driving under the influence of intoxicants on two prior occasions and eventually was declared a habitual offender by the Department of Motor Vehicles

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164. See Fletcher, *supra* note 162, at B1. Prior to the Supreme Court of Virginia's decision in *Southeastern Apartments Management, Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999), courts in Virginia were split on the issue of the viability of the tort of negligent retention. See, e.g., Tremel v. Reid, 45 Va. Cir. 364, 383 (Cir. Ct. 1998) (Albemarle County).

165. *Ross Stores*, 45 Va. Cir. at 431; see also *Berry*, 45 Va. Cir. at 247.

166. 263 Va. 435, 559 S.E.2d 704 (2002); see also *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002) (holding that under the doctrine of sovereign immunity, the city could not be held liable under negligent retention theory for alleged rapes by an officer during an ongoing investigation of the alleged victim's complaint concerning her son).

167. *Messer*, 263 Va. at 437, 559 S.E.2d 705.

168. *Id.* at 438, 559 S.E.2d at 705.

169. *Id.* at 438, 559 S.E.2d at 706.

170. *Id.*



("DMV").<sup>171</sup> East misrepresented that he possessed a valid "Class A" driver's license on his employment application.<sup>172</sup> Prior to his employment, Interim administered "a series of basic skill tests" and his references were checked prior to his assignment to various employers.<sup>173</sup>

Subsequently, East left the employment of Interim.<sup>174</sup> He later returned to work for the agency, at which time he completed another application form that sought current information.<sup>175</sup> Again, he misrepresented the status of his driver's license and failed to disclose his criminal background.<sup>176</sup> Interim did not conduct a criminal background check; nor did it request proof of a valid driver's license or check East's DMV record.<sup>177</sup> Prior to the assignment that led to the accident for which the plaintiff brought suit, the Association, which had retained East's services through Interim, did not ask East to produce a driver's license or even ask if he had one.<sup>178</sup> Instead, the company relied on the temporary service to verify he was a licensed driver.<sup>179</sup>

After two weeks on the job, East procured a key to the truck he routinely operated, stole the truck, "traveled to Richmond, and returned to his Charlottesville home on Friday, when he began drinking beer [around eight quarts] and riding around in the truck. . . . [He] eventually drove the truck into the rear of a stopped vehicle that struck the rear of the plaintiff's stopped vehicle."<sup>180</sup>

The court began its analysis of the negligent hiring claim by repeating the standard it established in *Southeast Apartments Management v. Jackman*:

[T]he cause of action for negligent hiring "is based on the principle that one who conducts an activity through employees is subject to liability for harm resulting from the employer's conduct if the em-

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171. *Id.*

172. *Id.*

173. *Id.* at 438-39, 559 S.E.2d at 706.

174. *Id.* at 439, 559 S.E.2d at 706.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 440, 559 S.E.2d at 707.

ployer is negligent in the hiring of an improper person in work involving an unreasonable risk of harm to others.”

Liability for negligent hiring is based upon an employer’s failure to exercise reasonable care in placing an individual with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, due to the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.<sup>181</sup>

The court cautioned, however, that “[m]ere proof of the failure to investigate a potential employee’s background is not sufficient to establish an employer’s liability for negligent hiring.”<sup>182</sup>

For the purpose of discussion, the court assumed, but did not decide, that the corporate defendants “in the exercise of reasonable care” should have discovered “East’s propensities for operating a motor vehicle without a valid operator’s license, for failing to obey court orders to pay fines and to attend counseling, and for driving while intoxicated.”<sup>183</sup> Nonetheless, the court held

that the plaintiff failed, as a matter of law, to establish that, because of the circumstances of the employment, it should have been foreseeable that East posed a threat of injury to others.

....

[T]he mere fact that East had been convicted twice of DUI, had failed to pay fines or attend counseling, and had been declared an habitual offender, would not place a reasonable employer on notice or make it foreseeable that East would steal a truck, operate the stolen vehicle during non-business hours for his own frolic, and cause an accident on the open highway distant from the environs of his job. According to the uncontradicted evidence, East’s employment history showed he had been a model employee, never had consumed alcohol at work or reported for work intoxicated, never had been in any motor vehicle accidents, never had taken any item from any employer without permission, and had no record of theft. In sum, it was not Interim’s placement of East, or his subsequent acceptance for work at the Association, which was a proximate cause of the plaintiff’s injuries.<sup>184</sup>

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181. *Id.* (quoting *Southeastern Apartments Mgmt., Inc. v. Jackman*, 257 Va. 256, 260, 513 S.E.2d 395, 397 (1999) (citations omitted)).

182. *Id.* (citing *Majorana v. Crown Cent. Petroleum*, 260 Va. 521, 531, 539 S.E.2d 426, 431 (2000)).

183. *Id.* at 442, 559 S.E.2d at 708.

184. *Id.* at 442–43, 559 S.E.2d at 708.

Consequently, the court held that the “trial court erred in ruling that foreseeability was a jury issue.”<sup>185</sup>

## V. 2002 LEGISLATION

Following is a summary of legislation impacting workplace law from the 2002 General Assembly Session.<sup>186</sup>

### A. *Pay Schedule*

The General Assembly amended Virginia Code section 40.1-29 to provide that employers can pay employees once a month as long as the employees’ “weekly wages total more than 150 percent of the average weekly wage of the Commonwealth as defined in § 65.2-500(B).”<sup>187</sup> The employer can implement this pay schedule as long as the employee agrees to be paid once a month.<sup>188</sup>

### B. *Employee Protection*

#### 1. Protection for Reporting Threatening Conduct

The General Assembly created new legislation, Virginia Code section 40.1-51.4:5, which provides immunity to employees who report threatening workplace conduct.<sup>189</sup>

#### 2. Prohibition on Penalizing Employees for Absence Due to Court Appearance or Jury Duty

The General Assembly expanded the statutory protections available to employees who are summoned or subpoenaed to court to include persons “who, having appeared, [are] required in writ-

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185. *Id.* at 443, 559 S.E.2d at 708.

186. For a comprehensive review of the General Assembly’s past term, see <http://legis.state.va.us>.

187. VA. CODE ANN. § 40.1-29 (Repl. Vol. 2002); see also *id.* § 65.2-500(B) (Repl. Vol. 1995).

188. *Id.* § 40.1-29.

189. *Id.* § 40.1-51.4:5 (Repl. Vol. 2002).

ing by the court to appear at any future hearing.”<sup>190</sup> Employees who have given the employer notice of the court appearance are now protected from discharge, adverse personnel action, or being forced to use sick leave or vacation time for such an absence.<sup>191</sup> An employer who fails to comply with this statute is guilty of a Class 3 misdemeanor.<sup>192</sup>

### 3. Prohibition on “Genetic Testing or Genetic Characteristics as a Condition of Employment”<sup>193</sup>

Employers may no longer (i) “require . . . a genetic test . . . as a condition of employment” or (ii) “refuse to hire, fail to promote, discharge, or otherwise adversely affect any terms or condition of employment” based on such characteristics or tests.<sup>194</sup> An employer or prospective employer may, however, use such information for decisions about “long-term care, life or disability insurance policy.”<sup>195</sup> Violators are subject to actual or punitive damages, including back pay with interest, or injunctive relief.<sup>196</sup>

### 4. Protections for Members of the Military Reserves

The General Assembly added new sections to the Virginia Code which provide for increased job security for members of the military reserves.<sup>197</sup> The new legislation guarantees members of the Virginia National Guard, Virginia State Defense Force, or naval militia called to active state duty by the Governor the right to take leave without pay from civilian employment.<sup>198</sup> The bill also guarantees that if the employee is still qualified for his previous employment after the service, he or she must immediately be restored to the previous position or to a “position of like seniority, status and pay,” unless the employer’s circumstances make the

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190. *Id.* § 18.2-465.1 (Cum. Supp. 2002).

191. *Id.*

192. *Id.*

193. *Id.* § 40.1-28.7:1 (Repl. Vol. 2002).

194. *Id.* § 40.1-28.7:1(A)(1)–(2).

195. *Id.* § 40.1-28.7:1(D).

196. *Id.* § 40.1-28.7:1(B).

197. *Id.* §§ 44-93 to -93.5 (Repl. Vol. 2002).

198. *Id.* § 44.93-2 (Repl. Vol. 2002).

restoration unreasonable.<sup>199</sup> If the employee is no longer qualified for the previous position, he or she must be placed in another position, for which the employee is qualified, and that will give the employee appropriate seniority, status, and salary, unless the employer's circumstances now make the placement unreasonable.<sup>200</sup>

## 5. Service as a Union Officer

The General Assembly amended Virginia Code section 40.1-61 to prohibit employers from requiring a person to abstain or refrain from holding office in a labor union or labor organization as a condition of gaining or continuing employment.<sup>201</sup>

## VI. CONCLUSION

Clearly, employment and labor law in Virginia was affected by several important decisions over the past year. Like the prior year, this past year lacked the blockbuster decisions involving the public policy exception to the employment-at-will doctrine, but a steady stream of such claims in the lower courts likely will fuel further decisions by the Supreme Court of Virginia. Once again, the evolving case law in the enforcement of non-competitive agreements underscores the necessity of drafting covenants not to compete that are not overly broad in geographic scope and/or duration, not unduly burdensome to the employee and their ability to earn a livelihood, and are rationally related to the employer's interests. Even in the absence of enforceable covenants not to compete, employees must walk the fine line between merely preparing to compete with an employer and breaching the fiduciary duty of loyalty owed to the employer.

In addition, the plaintiff's bar continues to follow a national trend in pursuing claims against employers under common law negligence theories. The past year's decisions again afford fuel for future litigation against employers vicariously through the doctrine of respondeat superior and directly through negligent hiring

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199. *Id.*

200. *Id.* § 44.93-3 (Repl. Vol. 2002).

201. *Id.* § 40.1-61 (Repl. Vol. 2002).

and retention claims. These decisions have further fleshed out the standards for such claims and provide guidance for practitioners involved in litigation involving these theories.

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