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W. David Paxton
Gentry Locke Rakes & Moor, L.L.P.

Gregory R. Hunt
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LABOR AND EMPLOYMENT LAW

W. David Paxton *
Gregory R. Hunt **

I. INTRODUCTION

This article looks back on important Virginia labor and employment law developments during the past year, including significant case law and legislation.¹ Contract issues continued to dominate state-law employment litigation in Virginia, especially disputes regarding the enforceability of restrictive covenants. Section II of this article is devoted to some of the more significant employment contract cases considered by Virginia state and federal courts this past year. Section III discusses recent Virginia cases in which courts have considered Virginia's narrow exception to the at-will employment doctrine for wrongful discharges that violate a public policy of the Commonwealth of Virginia. Defamation claims by former employees against their former employers are in vogue, and Section IV concerns two such recent cases considered by the Supreme Court of Virginia. Section V discusses a unique Supreme Court of Virginia case in which an employee pursued an abuse of process claim against her employer. Finally, Section VI provides an overview of significant employment-related legislative activity during the 2007 Session of the Virginia General Assembly.

* Partner, Gentry Locke Rakes & Moore, L.L.P., Roanoke, Virginia. B.A., 1976, Hampden-Sydney College; J.D., 1980, University of Virginia School of Law.

** Associate, Gentry Locke Rakes & Moore, L.L.P., Roanoke, Virginia. B.A., 1997, Washington and Lee University; J.D., 2001, University of Richmond School of Law.

1. Federal labor and employment developments, as well as workers' compensation and public sector employment, are beyond the scope of this article.

II. EMPLOYMENT AGREEMENTS

A. Restrictive Covenants

Given the ever-increasing globalization of the economy, and the corresponding increase in the mobility of goods and services, more and more companies are turning to restrictive covenants to protect the things that give them a competitive advantage—their investment in people, ideas, and business relationships. Courts in Virginia have historically been receptive to enforcing reasonably drawn restrictive covenants, but following the lead of the Supreme Court of Virginia in *Omniplex World Services Corp. v. US Investigations Services, Inc.*,² are subjecting these agreements to greater scrutiny. Consequently, the margin for error when drafting restrictive covenants is getting smaller.

Restrictive covenants such as non-competition and non-solicitation agreements are disfavored restraints of trade that will only be enforced if they are: (1) “narrowly drawn to protect the employer’s legitimate business interest;” (2) “not unduly burdensome on the employee’s ability to earn a living;” and (3) “not against public policy.”³ The focus of most litigation considering the enforceability of restrictive covenants is the first element—whether the covenant is narrowly tailored to protect the employer’s legitimate business interests or is overbroad in terms of temporal or geographic scope or function.⁴

Such was the case in *Lanmark Technology, Inc. v. Canales*.⁵ In that case, Lanmark sought to enforce the following non-compete agreement against a former employee:

Employee shall not, for a period of two years following termination of employment with the Company, assist, as an employee or otherwise, any competitor to [Lanmark] to obtain business opportunities to perform services similar to those provided by [Lanmark] that relates to

2. 270 Va. 246, 618 S.E.2d 340 (2005).

3. *Id.* at 249, 618 S.E.2d at 342 (citing *Modern Env’ts, Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002); *Simmons v. Miller*, 261 Va. 561, 580–81, 544 S.E.2d 666, 678 (2001)).

4. *See id.* at 250, 618 S.E.2d at 343 (concluding that the restrictive covenant at issue was overbroad and unenforceable because the scope of the restriction was not limited to employment in actual competition with the former employer).

5. 454 F. Supp. 2d 524 (E.D. Va. 2006).

(1) a contract or project being performed by [Lanmark], (2) a business opportunity that [Lanmark] is pursuing, or (3) a person or organization for whom [Lanmark] has provided or is providing services.⁶

The employee had worked for Lanmark performing an inventory audit for a customer, but was terminated after only five months of employment.⁷ Thereafter, he accepted employment with a company that had a contract to perform “management and oversight services” for the same customer he had serviced at Lanmark.⁸ Lanmark considered the employee’s new job to be a breach of the non-compete agreement and sued its former employee.⁹ The employee asserted the non-compete agreement was overbroad and unenforceable and moved for summary judgment.¹⁰

The court concluded that the non-compete was functionally overbroad, as the scope of services prohibited by the non-compete far exceeded the services the employee actually performed for Lanmark during his employment.¹¹ According to the court, non-compete clauses that “restrict the former employee’s performance of functions for his new employer [are upheld] only to the extent that the proscribed functions are the *same* functions as were performed for the former employer.”¹² Because the non-compete provision at issue prohibited “*any* form of employment with a competitor, including work *unrelated* to the employee’s work at Lanmark . . . the non-compete clause far exceed[ed] Lanmark’s legitimate interest.”¹³ Thus, the non-compete was unenforceable.¹⁴

The court also concluded that the non-compete was ambiguous and susceptible to multiple interpretations because the agreement failed to define several key terms, including the words “‘competitor,’ ‘business opportunity,’ ‘services,’ ‘similar’ services, ‘perform,’ and ‘pursuing.’”¹⁵ Because these terms were “capable of

6. *Id.* at 526–27.

7. *Id.*

8. *Id.* at 527.

9. *Id.*

10. *Id.*

11. *Id.* at 529–30.

12. *Id.* at 528 (quoting *Cantol, Inc. v. McDaniel*, No. 2:06cv86, 2006 U.S. Dist. LEXIS 24648, at *14 (E.D. Va. Apr. 28, 2006) (emphasis added)).

13. *Id.* at 530.

14. *Id.*

15. *Id.* at 530–31.

more than one reasonable construction,” and at least one interpretation of these terms caused the non-compete to be functionally overbroad, the clause was unenforceable.¹⁶

Parikh v. Family Care Center, Inc. also focused on whether a restrictive covenant protected the employer’s legitimate business interest.¹⁷ This case is unique, however, in that the scope of the restrictive covenant was not the issue. Instead, the former employee challenging the covenant asserted that the employer had *absolutely no* legitimate business interest in enforcing the covenant.¹⁸

Parikh involved a lawsuit by a medical practice against a former physician employee to enforce a covenant not to compete contained in an employment agreement.¹⁹ The covenant, to which the physician had agreed, required the physician to pay the practice \$10,000 for each month he competed within twenty miles of the practice for three years following his departure from the practice.²⁰ At the time the practice hired the physician, it was a professional corporation engaged in the practice of medicine in the Commonwealth of Virginia.²¹ Another doctor served as the practice’s sole director and shareholder.²² Approximately ten years after the physician was hired, the practice’s director died in an automobile accident, and his non-physician wife inherited ownership of the practice.²³ The physician then left the practice to join a competing practice located less than one mile away.²⁴

The practice prevailed at a bench trial, and was awarded \$210,000 in damages.²⁵ The physician appealed, asserting that the covenant was no longer enforceable because the practice was no longer authorized to offer medical services and, therefore, had no legitimate business interest in enforcing the restrictive covenant.²⁶

16. *Id.* at 531.

17. 273 Va. 284, 288, 641 S.E.2d 98, 100 (2007).

18. *Id.* at 289, 641 S.E.2d at 100.

19. *Id.* at 286, 641 S.E.2d at 99.

20. *Id.* at 287, 641 S.E.2d at 99.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 286, 641 S.E.2d at 99.

26. *Id.* at 287–88, 641 S.E.2d at 99.

The Supreme Court of Virginia agreed with the physician and reversed.²⁷ According to the court, because the director's wife was not a physician, the practice became a non-professional corporation by operation of law upon the death of the director.²⁸ In the court's view, Virginia Code section 13.1-542.1 prohibits a non-professional corporation from engaging in the practice of medicine in Virginia.²⁹ Because the practice could not engage in the practice of medicine, it could not compete with the physician, and it had no legitimate business interest in enforcing the covenant not to compete.³⁰

In *Devnew v. Flagship Group, Ltd.*, a former employee sought a declaratory judgment that non-solicitation and confidentiality provisions included in his employment agreement with an insurance broker were unenforceable.³¹ The employee was essentially a supervisor of the broker's sales agents and had access to confidential information regarding all of the company's customers.³² He negotiated the following non-solicitation agreement with the company:

(b) For a period of two (2) years following termination of his employment (whether voluntary or involuntary and whether before or after the expiration of the term of this Agreement), Employee specifically agrees not to solicit, divert, accept, nor service, directly or indirectly, as an insurance solicitor, insurance agent, insurance broker, insurance wholesaler, managing general agent or otherwise, for Employee's account or the account of any other agent, broker, insurer or other entity, any insurance or bond business of any kind or character available from [the company] during Employee's employment with [the company]:

(i) From any person, firm, corporation, or other entity that is a customer or account of [the company] during the term of this Agreement, or

(c) The prohibited conduct . . . shall include, without limitation, (i) the quoting of premiums or fees, (ii) the furnishing of policy expirations or underwriting or service information (iii) the placing of insurance coverage, (iv) the sale of product(s), or (v) the provision of ser-

27. *Id.* at 291, 641 S.E.2d at 101.

28. *Id.* at 287, 641 S.E.2d at 99.

29. *Id.* at 290, 641 S.E.2d at 101; *see also* VA. CODE ANN. § 13.1-542.1 (Repl. Vol. 2006 & Supp. 2007).

30. *Parikh*, 273 Va. at 291, 641 S.E.2d at 101.

31. No. CH05-3173, 2006 Va. Cir. LEXIS 291, at *1-2, *11 n.9 (Cir. Ct. Dec. 29, 2006) (Norfolk City).

32. *Id.* at *11-12.

vices(s), whether such activities result from actions initiated by a [company] customer or by Employee.³³

Upon termination of his employment, the employee filed suit, requesting that the Norfolk City Circuit Court find this non-solicitation provision overbroad and unenforceable.³⁴ Specifically, the employee claimed that the provision was overbroad in function, as it precluded him from performing certain work for “non-competitive employers or in a non-competitive capacity.”³⁵ The employee also asserted that the two-year duration, and the fact that the restriction included no geographic scope, contributed to the covenant’s overbreadth.³⁶

The court disagreed with the employee, finding that the non-solicitation provision was narrowly tailored to protect the company’s legitimate business interests because it only prohibited the employee “from engaging in such activities when the conduct is directed toward a current [company] customer or a former client from [the employee’s] recent employment tenure, and involves insurance or bond business available from [the company] during that time.”³⁷ The court further concluded that no geographic limitation was needed, as the covenant was “implicitly limited to the geographic areas where [the company’s] customers are located,” and held that the two-year term of the covenant was reasonable under the facts of the case.³⁸ The court also noted that the employee had “not been unduly restricted in his ability to earn a livelihood” as he obtained comparable employment shortly after his termination, and that public policy favored enforcing the agreement.³⁹ Thus, the non-solicitation provision was enforceable.⁴⁰

In evaluating the employment agreement’s confidentiality provision, the court applied the same standard it applied to the non-solicitation provision: to be enforceable, it must be narrowly tailored.⁴¹ The court held that the company had a legitimate interest

33. *Id.* at *10 n.8.

34. *Id.* at *1.

35. *Id.* at *21–22.

36. *Id.* at *19, *22–23.

37. *Id.* at *13, *21–22.

38. *Id.* at *19, *23.

39. *Id.* at *25–27.

40. *Id.* at *29–30.

41. *Id.* at *27–28 (citing *Totten v. Employee Benefits Mgmt., Inc.*, 61 Va. Cir. 77 (Cir.

in protecting its confidential information.⁴² Moreover, in light of the employee's unfettered access to all of the company's customer and account information, the scope of the confidentiality provision at issue did not exceed the company's legitimate business interests.⁴³ Further, the court found that the confidentiality clause did not restrict the employee's ability to earn a livelihood and was not against Virginia public policy.⁴⁴

The employee also claimed that a provision of the employment agreement included a scrivener's error which invalidated the entire agreement.⁴⁵ According to the employee, a portion of the agreement that referred to "selling ventures" should have read "selling fish."⁴⁶ The court rejected this claim, noting that the employee and his counsel had opportunities to review drafts of the negotiated agreement before it was signed by the parties, and this language was never questioned.⁴⁷ Thus, there was no evidence in the record to support that an error was made.⁴⁸

B. *Other Contracts*

In *Khosla v. Global Mortgage, Inc.*, a Virginia circuit court found that an arbitration clause contained in an otherwise invalid employment agreement was nevertheless enforceable.⁴⁹ The plaintiff had accepted employment with the defendant mortgage company as a branch manager and signed an employment agreement in reliance on the company's representation that it had obtained the required licenses to operate in Virginia.⁵⁰ After signing a five-year lease, hiring five loan officers, paying franchising fees, and setting up an office (at a cost of approximately \$270,000), the employee learned from the Virginia State Corporation Commission that the mortgage company's license request had been denied.⁵¹ When the employee confronted the company about his

Ct. 2003) (Roanoke County)).

42. *Id.* at *28.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at *29.

47. *Id.*

48. *Id.*

49. 72 Va. Cir. 229, 231 (Cir. Ct. 2006) (Fairfax County).

50. *Id.* at 229-30.

51. *Id.* at 230.

finding, he was ordered to shut down his operation until the proper licensing could be obtained.⁵² He then sued the mortgage company for fraud and breach of contract.⁵³

The mortgage company sought to compel arbitration of the dispute based on a clause in the employee's agreement with the company which stated:

All disputes that cannot be resolved by the parties shall be submitted to binding arbitration to a single arbitrator under the rules and regulations of the American Arbitration Association or another nationally recognized arbitration organization and judgment on the arbitration award may be entered in any court of competent jurisdiction.⁵⁴

The employee argued that the entire contract was invalid because he was fraudulently induced to sign it; and therefore, the arbitration clause relied upon by the company was ineffective.⁵⁵ The court recognized that, "[a]s a general rule, a party charged with fraudulent inducement of a contract may not rely on the terms of that contract as a defense."⁵⁶ According to the court, however, arbitration clauses are an exception to this general rule.⁵⁷ Relying on the United States Supreme Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, the court arrived at the following three conclusions: (1) "an arbitration provision is severable from the remainder of the contract;" (2) "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator;" and (3) "this arbitration law applies in state as well as federal courts."⁵⁸ Because the arbitration provision at issue was severable from the contract, and the employee did not specifically challenge the validity of the arbitration clause, the court concluded that the validity of the contract should be determined by an arbitrator.⁵⁹ The court stayed the

52. *Id.*

53. *Id.* at 229.

54. *Id.* at 230.

55. *Id.* at 230–31.

56. *Id.* at 231.

57. *Id.*

58. *Id.* (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006)).

59. *Id.*

employee's fraud and breach of contract claims pending arbitration.⁶⁰

The company also argued that arbitration of the employee's claims should take place in Florida and be governed by Florida law based on choice of venue and choice of law provisions contained in the employee agreement.⁶¹ Noting that the choice of venue and choice of law provisions were not contained in the arbitration clause, and that such provisions do not enjoy the same "separate status" as arbitration clauses, the court found that these provisions were unenforceable because the employee had called the validity of the contract into question.⁶² Thus, the court held that arbitration was "to take place in Virginia with Virginia law controlling."⁶³

In *JDS Uniphase Corp. v. Jennings*, a federal district court applying Virginia law considered whether an employer had "cause" to terminate a management level employee.⁶⁴ The employee was employed at-will, meaning he could be terminated at any time upon reasonable notice, with or without cause.⁶⁵ Pursuant to a letter agreement, however, the employee was entitled to six months pay as severance if he was terminated without cause.⁶⁶ The agreement defined "cause" as "willful failure . . . to comply with the written or known policies and procedures of the Company including but not limited to the [Company] Corporate Code of Business Conduct."⁶⁷

The employee was fired for intentionally hiring a temporary employee without consulting with the employer's human resources department, which was a direct violation of company policy.⁶⁸ Indeed, the employee reportedly told the company's Senior

60. *Id.* at 233.

61. *Id.* at 230-31.

62. *Id.* at 233.

63. *Id.* The employer assigned error to the court's determination that the choice of law and choice of venue provisions were unenforceable, and the Supreme Court of Virginia granted the employer's appeal on these issues on May 23, 2007. See the Supreme Court of Virginia, <http://www.courts.state.va.us/scv/appeals/070288.html> (last visited Oct. 19, 2007). The employee did not appeal the court's finding that the arbitration clause was enforceable. See *Khosla*, 72 Va. Cir. at 231.

64. 473 F. Supp. 2d 705, 708-09 (E.D. Va. 2007).

65. *Id.* at 708.

66. *Id.*

67. *Id.*

68. *Id.* at 708-09.

Human Resources Manager that he deliberately ignored the company's hiring procedures because he believed her department was "useless."⁶⁹ A senior officer's assessment that the employee "was unable to work effectively with the rest of [his] team" was also a factor in the decision to terminate the employee.⁷⁰ The employer took the position that it had "cause" to terminate the employee and did not pay him severance.⁷¹

Before the district court, the employee did not deny that he had deliberately violated the company's hiring policies and procedures, but he claimed that the true reason for his termination was retaliation for making management aware of company tax problems.⁷² Thus, he argued, he was terminated because he was a "whistleblower," not for "cause," and the company breached the letter agreement by not paying him severance.⁷³ The court disagreed, holding that "no reasonable fact finder could conclude [that the employee] was terminated without cause."⁷⁴ In the court's opinion, the fact that the employee had admitted to willfully disregarding company policy was dispositive, as this action amounted to "cause" under the letter agreement.⁷⁵ Therefore, the employee's breach of contract claim failed as a matter of law.⁷⁶

III. WRONGFUL DISCHARGE

A. Bowman *Claims*

Although Virginia strongly adheres to the employment-at-will doctrine, courts recognize a very narrow exception for wrongful discharges that violate public policy.⁷⁷ These claims, known as

69. *Id.* at 708.

70. *Id.* at 709.

71. *Id.*

72. *Id.*

73. *Id.* The employee's breach of contract claim was actually a counterclaim in response to breach of contract, breach of fiduciary duty, conversion, and misappropriation of trade secrets claims raised by the employer. *Id.* at 706. The court did not address the employer's claims in its opinion. *See id.* at 706–07. The employee also asserted a counterclaim under the federal Sarbanes-Oxley Act, 18 U.S.C. § 1514A, which is beyond the scope of this article. *See id.*

74. *Id.* at 709.

75. *Id.* at 709–10.

76. *See id.* at 710

77. *Rowan v. Tractor Supply Co.*, 263 Va. 209, 213, 559 S.E.2d 709, 710–11 (2002).

"*Bowman* claims" after the case in which the Supreme Court of Virginia first recognized them,⁷⁸ are only viable in three limited circumstances: (1) where "an employer violated a policy enabling the exercise of an employee's statutorily created right;"⁷⁹ (2) "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;"⁸⁰ or (3) "where the discharge was based on the employee's refusal to engage in a criminal act."⁸¹ As a result, unlike other jurisdictions, Virginia has seen few of these "public policy" discharge claims in recent years.

In *McFarland v. Virginia Retirement Services of Chesterfield, L.L.C.*, a Virginia federal district court considered a *Bowman* claim.⁸² In that case, the plaintiff, an employee of a retirement community, alleged that she was terminated for telling a state investigator that her employer had taken residents of the retirement community on an "outside excursion in 95 degree weather."⁸³ The plaintiff characterized such actions as abuse of aged adults, which by virtue of her position with the company she was required to report pursuant to Virginia Code section 63.2-1606.⁸⁴ The United States District Court for the Eastern District of Virginia found that these allegations stated a wrongful discharge claim under both the first and second circumstances recognized by the Supreme Court of Virginia.⁸⁵

The court first found that, if the employee's allegations were true, her discharge violated a public policy enabling the exercise of a statutorily created right.⁸⁶ The court determined that the public policy underlying Virginia Code section 63.2-1606 was the "protection, care, and well-being of Virginia's aged adults."⁸⁷ Further, this statute conferred upon the plaintiff the right (and the

78. *Id.*, 559 S.E.2d at 710 (citing *Bowman*, 229 Va. 534, 331 S.E.2d 797).

79. *Id.* at 213-14, 559 S.E.2d at 711 (citing *Bowman*, 229 Va. 534, 331 S.E.2d 797).

80. *Id.* at 214, 559 S.E.2d at 711 (citing *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)).

81. *Id.* (citing *Mitchem v. Counts*, 259 Va. 179, 190, 523 S.E.2d 246, 252 (2000)).

82. 477 F. Supp. 2d 727, 730 (E.D. Va. 2007).

83. *Id.* at 730, 732.

84. *Id.* at 733-34 (quoting VA. CODE ANN. § 63.2-1606(A)(5), (6) (Repl. 2007)).

85. *Id.* at 733-36; see generally *supra* text accompanying notes 78-81.

86. *McFarland*, 477 F. Supp. 2d at 733.

87. *Id.*

obligation) to report suspected abuse of aged adults to further the public policy behind the statute.⁸⁸ Accordingly, terminating an employee for exercising her right to report suspected abuse would violate Virginia public policy.⁸⁹

The court next noted that, if the employee's allegations were true, her termination would also be a violation of a public policy explicitly expressed in a statute.⁹⁰ The court relied upon Virginia Code sections 63.2-1730 and 63.2-1731, which prohibit retaliation or discrimination against any person who reports abuse or neglect of the aged, as sources of this explicitly expressed public policy.⁹¹ According to the court, these statutes expressly convey that it is a public policy of the Commonwealth of Virginia to protect persons responsible for the care of aged adults.⁹² As the employee was a member of the class of persons the statutes were designed to protect, she stated a wrongful discharge claim.⁹³

The court also briefly considered whether the employee had stated a wrongful discharge claim under the third set of circumstances recognized by the Supreme Court of Virginia—refusal to engage in a criminal act.⁹⁴ The court noted that the employee did not allege that her employer had asked her to commit a crime or that she was terminated for refusing to engage in a criminal act.⁹⁵ Therefore, she could not state a claim for wrongful discharge under the third set of circumstances.⁹⁶

B. *Constructive Discharge*

The question of whether this narrow, judicially created “public policy” exception to the at-will doctrine extends to circumstances

88. *Id.* at 733–35 (citing VA. CODE ANN. § 63.2-1606(A)–(B), (F) (Repl. Vol. 2007)).

89. *Id.* at 733, 735. *But cf. Rowan*, 263 Va. at 215, 559 S.E.2d at 711–12 (holding that statute prohibiting obstruction of justice conferred no right on employee to be free from intimidation and could not serve as a source of a public policy to support a wrongful discharge claim); *Dray v. New Mkt. Poultry Prods., Inc.*, 258 Va. 187, 191, 518 S.E.2d 312, 313 (1999) (noting that Virginia does not recognize a general common-law “whistleblower” retaliation claim).

90. *McFarland*, 477 F. Supp. 2d at 735–36.

91. *Id.* (quoting VA. CODE ANN. §§ 63.2-1730, -1731 (Repl. Vol. 2007)).

92. *Id.* at 736.

93. *Id.*

94. *Id.* at 736 n.4.

95. *Id.*

96. *Id.*; see generally *supra* text accompanying note 81.

where an employee resigns, as opposed to being discharged, remains a matter of debate. The Supreme Court of Virginia has not squarely addressed whether such a “constructive discharge” claim is viable, and the state and federal courts that have considered the issue are split.⁹⁷ In three recent companion cases from the United States District Court for the Western District of Virginia, *Johnson v. Paramount Manufacturing, LLC*,⁹⁸ *Watson v. Paramount Manufacturing, LLC*,⁹⁹ and *Hill v. Paramount Manufacturing, LLC*,¹⁰⁰ Senior United States District Judge Glen M. Williams weighed in on the debate, concluding that the Supreme Court of Virginia would recognize a constructive discharge cause of action.¹⁰¹

IV. DEFAMATION

Defamation claims are fast becoming a preferred cause of action for employees seeking to hold employers accountable for their conduct. Two recent defamation cases in which juries returned sizeable awards for employees, *Government Micro Resources, Inc. v. Jackson*¹⁰² and *Raytheon Technical Services Co. v. Hyland*,¹⁰³ underscore this trend and highlight the considerable risk employers face in making negative statements regarding their employees.

In *Government Micro Resources, Inc.*, the Supreme Court of Virginia considered allegations of defamation by a former executive employee against his former employer and the company’s owner for statements the owner made regarding the circumstances leading to the executive’s termination.¹⁰⁴ The executive had served as the company’s president and chief executive offi-

97. Compare *Padilla v. Silver Diner*, 63 Va. Cir. 50, 57 (Cir. Ct. 2003) (Virginia Beach City) (recognizing constructive discharge claim), with *Dixon v. Denny’s Inc.*, 957 F. Supp. 792, 798–99 (E.D. Va. 1996) (finding constructive discharge not actionable under Virginia law).

98. No. 1:05cv00079, 2006 U.S. Dist. LEXIS 67735 (W.D. Va. Sept. 21, 2006).

99. No. 1:05cv00080, 2006 U.S. Dist. LEXIS 78100 (W.D. Va. Oct. 18, 2006).

100. No. 1:05cv00082, 2006 U.S. Dist. LEXIS 78488 (W.D. Va. Oct. 18, 2006).

101. *Hill*, 2006 U.S. Dist. LEXIS 78488, at *11; *Watson*, 2006 U.S. Dist. LEXIS 78100, at *11; *Johnson*, 2006 U.S. Dist. LEXIS 67735, at *16.

102. 271 Va. 29, 624 S.E.2d 63 (2006).

103. 273 Va. 292, 641 S.E.2d 84 (2007).

104. 271 Va. at 35–37, 624 S.E.2d at 66–67.

cer.¹⁰⁵ He alleged that, upon his termination, the company's owner told a customer that the executive had "mismanaged" the company, cost the owner "an exorbitant amount of money," and had been removed from his job because he "lost \$3 million."¹⁰⁶ The trial testimony of the customer's executives confirmed substantially similar statements were made.¹⁰⁷ The owner testified that he did not make the statements, but acknowledged that "it would be false if someone said that."¹⁰⁸ A jury found in favor of the former executive, and awarded him \$5 million in compensatory damages and \$1 million in punitive damages on his defamation claim.¹⁰⁹ On the company's motion, the court reduced the award to \$1 million in compensatory damages and reduced the punitive damages award to the statutory cap of \$350,000.¹¹⁰ Both sides appealed.¹¹¹

The company and its owner argued to the Supreme Court of Virginia that the owner's statements were expressions of opinion and, thus, not defamatory as a matter of law.¹¹² According to the defendants, the terms "exorbitant" and "mismanaged" in these statements illustrated that the statements were merely expressions of the owner's subjective judgment, not statements of fact.¹¹³ The court disagreed, concluding that the causes of the company's financial losses could be proved, and were proved, by the evidence.¹¹⁴ Thus, the statements alleged were capable of being proven true or false and were not expressions of opinion.¹¹⁵ The defendants also asserted that the statement that the executive had "mismanaged" the company and cost the owner "an exorbitant amount of money" was not timely raised, as it was not included in the executive's complaint or bill of particulars.¹¹⁶ The trial court had determined that this statement was "essentially

105. *Id.* at 36, 624 S.E.2d at 66.

106. *Id.* at 37, 624 S.E.2d at 67.

107. *Id.*

108. *Id.*

109. *Id.* at 35, 624 S.E.2d at 66. The executive's lawsuit also included a breach of contract claim for which the jury awarded him \$200,500 in compensatory damages. *Id.* The court reduced this award to \$112,500. *Id.* Neither party appealed this result. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 40, 624 S.E.2d at 68.

113. *Id.*

114. *Id.*, 624 S.E.2d at 69.

115. *Id.*

116. *Id.* at 39, 624 S.E.2d at 68.

the same allegation” that the executive had made in his bill of particulars, and the supreme court concurred.¹¹⁷

The defendants further challenged the sufficiency of the former executive’s evidence to establish that the defamatory statements had been made, as well as the evidence that the defendants had acted with malice to support a punitive damage award.¹¹⁸ The defendants contended that, because the witnesses to the defamatory statements could not recall the exact words used by the owner, the executive failed to carry his burden of proof.¹¹⁹ The court noted that defamatory statements must only “be substantially proven as alleged” and found that the recollections of the witnesses, as well as the executive’s testimony regarding his conversations with the witnesses, were sufficient to satisfy this standard.¹²⁰ As for evidence of malice, the defendants argued that the executive had to “produce clear and convincing proof that there were reasons for a defendant to doubt the veracity of the defamatory statement or that all judgment and reason were abandoned and no objective basis existed for the defamatory charge.”¹²¹ The court characterized this as a misstatement and misapplication of law.¹²² The executive needed only to prove by clear and convincing evidence that the owner “*either* knew the statements he made were false at the time he made them, *or* that he made them with a reckless disregard for their truth.”¹²³ In the court’s opinion, there was clear and convincing evidence that the owner knew the defamatory statements to be false at the time he made them.¹²⁴

The supreme court also reinstated the jury’s \$5 million compensatory damages award for defamation.¹²⁵ The trial court’s ex-

117. *Id. But see* Fuste v. Riverside Healthcare Ass’n, 265 Va. 127, 134, 575 S.E.2d 858, 862 (2003) (A pleading alleging defamation must set out the exact words in *haec verba*. (citing Fed. Land Bank of Balt. v. Birchfield, 173 Va. 200, 215, 3 S.E.2d 405, 410 (1939))).

118. *Id.* at 41, 624 S.E.2d at 69.

119. *Id.*

120. *Id.* (quoting *Birchfield*, 173 Va. at 215, 3 S.E.2d at 410).

121. *Id.* at 42, 624 S.E.2d at 70.

122. *Id.*

123. *Id.* (quoting *Ingles v. Dively*, 246 Va. 244, 253, 435 S.E.2d 641, 646 (1993)).

124. *Id.* at 43, 624 S.E.2d at 70. The defendants also argued that the statements were entitled to a qualified privilege because they were made in good faith, but the court found that any such privilege would have been lost because the jury determined that the defendants acted with actual malice. *Id.* at 43–44, 624 S.E.2d at 70–71. For this reason, the court did not address the defendants’ argument that a qualified privilege protected the statements. *Id.* at 43, 624 S.E.2d at 70–71.

125. *Id.* at 35, 49, 624 S.E.2d at 66, 74.

planation for setting aside the jury award was that it perceived the jury was confused as to the types of injuries for which the executive could recover on his defamation claim.¹²⁶ In support of its conclusion of jury confusion, the trial court noted that the jury had included \$88,000 as part of its breach of contract award that was indisputably related to the defamation claim.¹²⁷ The trial court also noted the jury instructions “led the jury to include in the defamation award emotional distress damages that arose not from the defamation, but from [the executive’s] termination,”¹²⁸ and “the jury improperly included in the defamation award economic injuries [the executive] had identified as flowing from his loss of employment.”¹²⁹ The supreme court found that, with the exception of the \$88,000 that was improperly allocated, there was no evidence in the record to support that the jury was confused.¹³⁰ Further, in the court’s judgment, the \$5 million award was not excessive in light of the evidence presented at trial as to the defamatory statements’ impact on the executive’s emotional state, reputation, and employment opportunities, which had to be construed in the light most favorable to the executive.¹³¹

In *Raytheon Technical Services Co.*, the Supreme Court of Virginia considered whether five statements made by an employee’s supervisor in a written performance evaluation, which were later published to the CEO of the employer’s parent company, were defamatory.¹³² The conflict between the employee and her supervisor began after the employee gave a “confidential” assessment of her supervisor’s abilities, which included some negative feedback, to a consulting firm hired to evaluate the supervisor.¹³³ The supervisor heard about the employee’s statements to the consultants, and shortly thereafter, presented the employee with a performance evaluation that included several negative comments.¹³⁴ The employee, who had been with the employer for twenty-one

126. *Id.* at 45, 624 S.E.2d at 72.

127. *Id.*

128. *Id.* at 45–46, 624 S.E.2d at 72.

129. *Id.* at 46, 624 S.E.2d at 72.

130. *Id.* at 45–46, 624 S.E.2d at 72.

131. *Id.* at 45, 48, 624 S.E.2d at 71, 73–74.

132. 273 Va. 292, 296, 298, 641 S.E.2d 84, 86–88 (2007).

133. *Id.* at 297, 641 S.E.2d at 87.

134. *Id.* at 297–98, 641 S.E.2d at 87.

years and promoted to a senior management position, had never before received an unfavorable performance evaluation.¹³⁵

The supervisor later fired the employee and used the negative performance recited in the evaluation to justify his decision.¹³⁶ The employee then sued the supervisor and her employer for defamation, among other claims.¹³⁷ On the defamation claim, five statements contained in the negative performance evaluation were submitted to the jury, which returned an award of \$1.5 million in compensatory damages and \$2 million in punitive damages for the employee.¹³⁸

The employer and supervisor appealed, asserting that performance reviews, by nature, set forth the opinions of an evaluator, which are not actionable as defamation.¹³⁹ The Supreme Court of Virginia, however, refused to adopt a blanket exclusion precluding the use of performance reviews as a source of defamatory statements, and it separately evaluated the five statements to determine whether each was a non-actionable expression of opinion or an actionable statement of fact.¹⁴⁰

The court found that the following two statements were provably true or false and, thus, were statements of fact that could serve as a basis for a defamation claim:

[1] Cynthia and her team met their cash goals, but were significantly off plan on all other financial targets including Bookings by 25%, Sales by 11.5%, and profits by 24%.

...

[2] Cynthia lead [sic] RTSC in the protest of the FAA's evaluation selection process for the TSSC contract and through a difficult procurement for the TSA, both of which demanded her constant attention. These visible losses created significant gaps in our strategic plans and in her business unit financial performance.¹⁴¹

135. *Id.* at 296–98, 641 S.E.2d at 86–87.

136. *Id.* at 298, 641 S.E.2d at 88.

137. *Id.* at 299, 641 S.E.2d at 88.

138. *Id.* The court reduced the punitive damage award to the statutory cap of \$350,000. *Id.* at 300, 641 S.E.2d at 88.

139. *Id.* at 300, 302, 641 S.E.2d at 88, 90.

140. *Id.* at 303–04, 641 S.E.2d at 91.

141. *Id.* at 304–05, 641 S.E.2d at 91.

Because these were statements of fact, not expressions of opinion, they were properly submitted to the jury.¹⁴²

The court found, however, that the following three statements were “not susceptible to proof as a matter of fact” and, therefore, were expressions of opinion:

[3] Cynthia is frequently verbose and vocal in her opinions, to a degree that others stop participating in open dialogue.

...

[4] She has received specific feedback from her customers, the Beacon group study, her employees, and her leader on her need to listen and learn from others, yet she has appeared to be unwilling to accept and work with this feedback.

...

[5] Cynthia has also been inappropriately and openly critical of her leader, her peers, and other leaders in the company. This behavior is not only destructive to the team, it negatively impacts her image in the eyes of others, including customers.¹⁴³

According to the court, the third statement was an expression of opinion because it was a matter of perspective whether the employee’s “verbose and vocal” opinions caused others not to participate.¹⁴⁴ Similarly, the court found that the fourth statement was an expression of the supervisor’s perspective that the employee “appeared to be unwilling,” which made the statement neither provably true, nor provably false.¹⁴⁵ As for the fifth statement, the court found that it contained both fact and opinion, but ultimately concluded that the statement as a whole conveyed the supervisor’s opinion that the employee’s criticism of others was “inappropriate.”¹⁴⁶ Therefore, the trial court erred in submitting these statements to the jury.¹⁴⁷ Because the supreme court could not determine which of the five statements the jury relied upon for its verdict, the judgment was set aside and the case remanded for a new trial.¹⁴⁸

142. *Id.* at 305, 641 S.E.2d at 91.

143. *Id.* at 305–06, 641 S.E.2d at 92.

144. *Id.* at 305, 641 S.E.2d at 92.

145. *Id.*

146. *Id.* at 305–06, 641 S.E.2d at 92.

147. *Id.* at 306, 641 S.E.2d at 92.

148. *Id.*

V. ABUSE OF PROCESS

The Supreme Court of Virginia considered an employee's abuse of process claim against her employer and the company's owner in *Montgomery v. McDaniel*.¹⁴⁹ The dispute between the parties originated with an internal complaint of sexual harassment and assault and battery by the employee's daughter, who was also employed with the company, against the company's owner.¹⁵⁰ In connection with this complaint, the owner consented to disciplinary action, was relieved of his duties, and signed an agreement promising not to enter the company's premises or contact any company employee.¹⁵¹ After just one month, however, the owner repudiated the agreement and returned to the company.¹⁵² The employee's daughter then sued the company and its owner, raising a variety of claims.¹⁵³ In response, the owner filed cross claims against the daughter, as well as third-party claims against the employee and four other employees.¹⁵⁴ The four other employees then responded with their own cross claims against the company and its owner.¹⁵⁵ Eventually, the owner and his company non-suited their claims against the employee and either non-suited or dismissed their claims against the other company employees.¹⁵⁶

Shortly after the owner and the company non-suited their claims against the employee, she filed a separate lawsuit for abuse of process, alleging that the owner and the company had sued her merely to gain leverage to force her daughter to withdraw her lawsuit.¹⁵⁷ The trial court sustained the demurrer of the

149. 271 Va. 465, 467, 628 S.E.2d 529, 530-31 (2006).

150. *Id.*

151. *Id.*, 628 S.E.2d at 531.

152. *Id.* He also placed the company's chief financial officer, who had confronted the owner about the harassment, on administrative leave, as well as three other employees. *Id.*, 628 S.E.2d at 530-31.

153. *Id.* at 467-68, 628 S.E.2d at 531. The daughter's claims included compensatory and punitive damages for the assault and battery, as well damages for fraud. *Id.* She also sought a declaratory judgment that the owner had given her ownership rights in the company and other entities, and sought an accounting and imposition of a constructive trust for these entities. *Id.*

154. *Id.* at 468, 628 S.E.2d at 531. The owner's claims included tortious interference with business relationships, breach of fiduciary duty, constructive fraud, common law and statutory conspiracy, breach of contract, and breach of employment duties and responsibilities. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

owner and his company.¹⁵⁸ In affirming the decision of the trial court, a majority of the Supreme Court of Virginia determined that the facts alleged by the employee did not establish the requisite elements of an abuse of process claim: “(1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceedings.”¹⁵⁹ While the employee’s complaint included ample allegations to support the contention that the owner and his company had an ulterior motive for suing the employee, in the court’s opinion, the employee’s allegations did not support that the owner and the company had engaged in acts “not proper in the regular prosecution of the proceedings.”¹⁶⁰ The majority rejected the employee’s argument that the decision to nonsuit the lawsuit rather than dismiss it with prejudice was an improper use of process, as this is a statutory right conferred by the General Assembly.¹⁶¹ Further, the fact that the owner had continued to pursue his cross-bill against the employee after conceding that one of his claims failed was not an improper use of process where his remaining claims remained viable.¹⁶² Finally, the owner’s refusal to turn over the full text of a settlement agreement until ordered to do so by the court was, in the majority’s opinion, a “routine use of process,” not an improper use of process.¹⁶³

Justice Lemons penned a strong dissent, in which Chief Justice Hassell joined, disagreeing with the majority’s determination that the owner’s refusal to timely turn over the settlement agreement in its entirety was not an improper use of process.¹⁶⁴ Justice Lemons observed that the employee had alleged more than mere failure to turn over the settlement document; she alleged that the owner had only turned over “a self-serving portion” of the document in an attempt to conceal certain portions of the agreement, “well knowing that revealing those provisions would eliminate any chance of prevailing” at an upcoming hearing.¹⁶⁵ He reasoned

158. *Id.*

159. *Id.* at 469, 471, 628 S.E.2d at 531–33 (quoting *Donohoe Constr. Co. v. Mount Vernon Assocs.*, 235 Va. 531, 539, 369 S.E.2d 857, 862 (1988)).

160. *Id.* at 469, 628 S.E.2d at 531–32 (quoting *Donohoe Constr. Co.*, 235 Va. at 539, 369 S.E.2d at 862).

161. *Id.* at 470, 628 S.E.2d at 532.

162. *Id.* at 469–70, 628 S.E.2d at 532.

163. *Id.* at 470–71, 628 S.E.2d at 532–33.

164. *Id.* at 471–73, 628 S.E.2d at 533–34 (Lemons, J., dissenting).

165. *Id.* at 472, 628 S.E.2d at 534.

that such conduct, if true, amounts to obstruction of discovery.¹⁶⁶ In Justice Lemons's opinion, "[a]n allegation involving an abuse of discovery which increases the cost of litigation surely must qualify as 'an improper use of process,' especially where the improper motive is financial coercion."¹⁶⁷

VI. SIGNIFICANT LEGISLATIVE DEVELOPMENTS

A. *Minimum Wage*

Perhaps the most closely watched labor and employment legislation during the 2007 Session of the General Assembly were the numerous proposals to increase the Commonwealth's minimum wage.¹⁶⁸ At the end of the 2007 Session, all of these proposals remained in committee, leaving Virginia's minimum wage at the rate set by the Federal Fair Labor Standards Act.¹⁶⁹

The General Assembly did, however, make a change to the Virginia Minimum Wage Act. Previously, persons aged 65 or older were excluded from the Act's definition of "employee."¹⁷⁰ Accordingly, the Act's provisions and remedies did not apply to such persons. During the 2007 Session, the General Assembly removed the exclusion for persons sixty-five or older.¹⁷¹

166. *Id.* at 473, 628 S.E.2d at 534.

167. *Id.*

168. See H.B. 1634, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 1651, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 1654, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 2004, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 2508, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 2849, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 2873, Va. Gen. Assembly (Reg. Sess. 2007); H.B. 3054, Va. Gen. Assembly (Reg. Sess. 2007); S.B. 766, Va. Gen. Assembly (Reg. Sess. 2007); S.B. 1277, Va. Gen. Assembly (Reg. Sess. 2007); S.B. 1327, Va. Gen. Assembly (Reg. Sess. 2007).

169. See VA. CODE ANN. § 40.1-28.10 (Repl. Vol. 2002). The current federal minimum wage is \$5.85 per hour. Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, 121 Stat. 188 (to be codified at 29 U.S.C. § 206(a)(1)). Effective July 24, 2008, the federal minimum wage will increase to \$6.55 per hour. *Id.* The minimum wage increases to \$7.25 per hour on July 24, 2009. *Id.*

170. VA. CODE ANN. § 40.1-28.9(B)(11) (Repl. Vol. 2002 & Cum. Supp. 2007).

171. Act of Mar. 25, 2007, ch. 832, 2007 Va. Acts 1331 (codified as amended at VA. CODE ANN. § 40.1-28.9 (Cum. Supp. 2007)).

B. *Obtaining Employee Criminal Records*

Amendments to Virginia Code section 19.2-389 make it a little easier for employers and prospective employers to obtain criminal conviction information regarding employees or potential employees. Previously, pursuant to section 19.2-389, most employers could only directly obtain criminal histories for employees whose job duties required that they enter the homes of others.¹⁷² Individuals, however, could request copies of their own criminal records,¹⁷³ and employers often circumvented the restrictions of section 19.2-389 by requiring employees to provide such information. The General Assembly's revisions to Virginia Code section 19.2-389 permit employers and prospective employers to directly request records of criminal convictions, at the employer's cost, for employees or prospective employees, provided that the employee or prospective employee has consented to the request in writing.¹⁷⁴

C. *Leave to Attend Criminal Proceedings*

The General Assembly enacted a new statute that requires employers to grant leave to employees who are victims of crimes to attend related criminal proceedings.¹⁷⁵ The employee must provide notice to the employer of the need for leave by copy of a form provided by the relevant law enforcement agency.¹⁷⁶ Employees are only entitled to leave if they, as crime victims, have a right or opportunity to appear at the proceeding.¹⁷⁷ The term "proceeding" is not limited to criminal trials, but is broadly defined to include initial appearances and hearings regarding bail, plea deals, sentencing, and probation.¹⁷⁸

An employer does not have to compensate an employee for time missed to attend criminal proceedings.¹⁷⁹ Further, an employer

172. VA. CODE ANN. § 19.2-389(A)(34) (Cum. Supp. 2007).

173. *Id.* § 19.2-389(A)(11) (Cum. Supp. 2007).

174. Act of Mar. 15, 2007, ch. 361, 2007 Va. Acts 497 (codified as amended at VA. CODE ANN. § 19.2-389(H) (Cum. Supp. 2007)).

175. Act of Mar. 15, 2007, ch. 423, 2007 Va. Acts 590 (codified as amended at VA. CODE ANN. § 40.1-28.7:2 (Cum. Supp. 2007)).

176. VA. CODE ANN. § 40.1-28.7:2(B) (Cum. Supp. 2007).

177. *Id.* § 40.1-28.7:2(A) (Cum. Supp. 2007).

178. *Id.*

179. *Id.* § 40.1-28.7:2(D) (Cum. Supp. 2007).

may “limit” an employee’s leave if it would create an “undue hardship,” which the statute defines as “significant difficulty and expense to a business” in “consideration of the size of the employer’s business and the employer’s critical need of the employee.”¹⁸⁰ The statute also includes anti-retaliation and discrimination provisions that prohibit employers from taking adverse employment action against employees or prospective employees who have exercised their rights under the statute.¹⁸¹

D. *Employment of Minors*

The General Assembly revised Virginia Code section 40.1-113 to substantially increase the maximum civil penalty for child labor offenses that result in the serious injury or death of a child.¹⁸² Previously, a civil penalty for any violation of the child labor laws could not exceed \$1,000.¹⁸³ The 2007 revisions to section 40.1-113 raise the ceiling for offenses that result in the serious injury or death of a child to \$10,000.¹⁸⁴ The ceiling for civil penalties for other child labor violations remains at \$1,000.¹⁸⁵

E. *Payroll Deduction for Support Payments*

Many Virginia employers subject to court orders to withhold employee wages for support payments must now remit those wages to the Department of Social Services by electronic funds transfer.¹⁸⁶ Pursuant to amendments to Virginia Code section 20-79.3, employers with at least 100 employees, and all payroll processing firms with at least fifty clients, can no longer mail payments to the Department, but must use electronic funds transfer to remit such payments within four days of the pay date.¹⁸⁷

180. *Id.* § 40.1-28.7:2(A)–(B) (Cum. Supp. 2007).

181. *Id.* § 40.1-28.7:2(E) (Cum. Supp. 2007).

182. Act of Mar. 20, 2007, ch. 667, 2007 Va. Acts 1017 (codified as amended at VA. CODE ANN. § 40.1-113 (Cum. Supp. 2007)).

183. VA. CODE ANN. § 40.1-113(A) (Repl. Vol. 2002).

184. *Id.* (Cum. Supp. 2007).

185. *Id.*

186. VA. CODE ANN. § 20-79.3(A)(12) (Cum. Supp. 2007).

187. *Id.* The statute contains no guidance as to how to calculate an employer’s total number of employees to determine whether specific employers fall under this requirement. *See id.*

F. *Virginia Employment Commission Payroll and Tax Reports*

In a similar effort designed to reduce the amount of paper records processed by the Commonwealth, the General Assembly enacted legislation to require more employers to file payroll and tax reports with the Virginia Employment Commission ("VEC") electronically.¹⁸⁸ Currently, employers with 250 or more employees in any calendar quarter must file payroll and tax reports by "magnetic medium."¹⁸⁹ Effective January 1, 2009, all employers with 100 or more employees must file quarterly payroll and tax reports on an electronic medium prescribed by the VEC.¹⁹⁰ Waivers of this requirement are available if the employer can demonstrate it creates an "unreasonable burden."¹⁹¹

G. *Rights of Military Service Members*

Virginia Code sections 44-93.2 through 44-93.5 provide certain rights and protections to military service members, including the right to take unpaid leave for military service, restoration rights, and the right to be free from discrimination or retaliation for their military service.¹⁹² Previously those rights and protections only extended to members of the Virginia National Guard, the Virginia State Defense Force, and the naval militia called to active duty by the governor.¹⁹³ The General Assembly has expanded the scope of these Virginia Code sections to include those called to active duty by the federal government pursuant to Title 32 of the United States Code.¹⁹⁴ The General Assembly also added a provision that enables employees to recover reasonable attorney's fees and costs incurred because of an employer's violation of these statutes.¹⁹⁵

188. See Act of Mar. 20, 2007, ch. 638, 2007 Va. Acts 970 (codified as amended at VA. CODE ANN. § 60.2-512(B) (2007)).

189. VA. CODE ANN. § 60.2-512(B) (Supp. 2007).

190. *Id.*

191. *Id.*

192. VA. CODE ANN. §§ 44-93.2 to 44-93.5 (Cum. Supp. 2007).

193. *Id.* (Repl. Vol. 2002).

194. See Act of Mar. 9, 2007, ch. 214, 2007 Va. Acts 303 (codified as amended at VA. CODE ANN. §§ 44-93.2 to 44-93.5 (Cum. Supp. 2007)).

195. *Id.* (codified as amended at VA. CODE ANN. § 44-93.5 (Cum. Supp. 2007)).

VII. CONCLUSION

Perhaps the most talked about Virginia employment law case this past year was the Supreme Court of Virginia's decision upholding the \$5 million compensatory damage award for defamation in *Government Micro Resources, Inc. v. Jackson*.¹⁹⁶ This case, as well as the \$1.5 million jury award for defamation in *Raytheon Technical Services Co. v. Hyland*,¹⁹⁷ raised the eyebrows of many labor and employment attorneys in the Commonwealth, both from the plaintiffs' and the defense bars. Where in the past, defamation claims were oftentimes an afterthought in employment litigation, expect that plaintiffs' attorneys will now look for circumstances in which to assert a defamation claim against employers. An increase in the volume of employment-related defamation claims in light of these jury verdicts would not be surprising.

There seems to be an ever-increasing amount of litigation in state and federal courts across the Commonwealth considering the enforceability of restrictive covenants, which is a reflection that employees are becoming more aggressive in challenging such restrictions, either by obtaining competing employment or seeking declaratory relief. These agreements can be enforceable if narrowly tailored, as illustrated by *Devnew v. Flagship Group, Ltd.*¹⁹⁸ It seems that more often than not, however, employers try to overreach, and the result is an unenforceable covenant as in *Lanmark Technology, Inc. v. Canales*.¹⁹⁹

It was a slow year for labor and employment-related legislation in Virginia, as the most closely watched labor legislation—the numerous and varied proposals to increase the minimum wage—never made it out of committee. But expect this debate to continue during the 2008 Session, as more and more states raise their minimum wage, putting pressure on the General Assembly to do the same for Virginia's workers.

196. 271 Va. 29, 43, 624 S.E.2d 63, 70 (2006).

197. 273 Va. 292, 299, 641 S.E.2d 84, 88 (2007).

198. No. CH05-3173, 2006 Va. Cir. LEXIS 291, at *13, *27 (Cir. Ct. Dec. 29, 2006) (Norfolk City).

199. 454 F. Supp. 2d 524, 530 (E.D. Va. 2006).
