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LABOR AND EMPLOYMENT LAW

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I. INTRODUCTION

During the past year, there were several significant developments in labor and employment law at the federal level and relatively few at the state level. Because the federal developments will likely have a profound impact on employers and employees throughout Virginia, they warrant significant discussion in this survey. In addition to examining notable decisions from the Supreme Court of the United States, the United States Court of Appeals for the Fourth Circuit, the United States District Courts for the Eastern and Western Districts of Virginia, the Supreme Court of Virginia, and various circuit courts in Virginia, this survey also discusses the legislative changes that might impact employers or employees in Virginia.

Because this article constitutes a survey of labor and employment law, it is necessarily limited in depth and substantive scope, as well as in temporal scope.

II. RETALIATION

Retaliation claims enjoy increasing popularity because they frequently survive summary judgment, and the underlying elements are easy for jurors to grasp. Three recent decisions, two from the Supreme Court of the United States and one from the

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Fourth Circuit Court of Appeals, will make retaliation claims even more popular by making them more accessible and easier to prove.

First, in *Crawford v. Metropolitan Government*, the Supreme Court of the United States expanded the reach of the “opposition clause” of Title VII’s anti-retaliation provision.¹ In addition to prohibiting discrimination in employment on the basis of protected categories, Title VII prohibits retaliation by making it unlawful for an employer to discriminate against an employee (1) “because he has opposed any practice made an unlawful employment practice by this subchapter” (the “opposition clause”), or (2) “because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter” (the “participation clause”).²

In 2002, the Metropolitan Government of Nashville and Davidson County (“Metro”) investigated rumors that Gene Hughes, the school district employee relations director, was engaging in sexual harassment.³ In the course of the investigation, a Metro human resources officer asked Crawford whether she witnessed any “inappropriate behavior” by Hughes,⁴ and Crawford described numerous instances of sexually harassing behavior in response.⁵ For instance, Hughes once responded to Crawford’s greeting, “Hey Dr. Hughes, what’s up?” by grabbing his crotch and saying, “[Y]ou know what’s up.”⁶ Crawford also informed the Metro human resources officer that Hughes had “repeatedly ‘put his crotch up to [her] window;’ and on one occasion he had entered her office and ‘grabbed her head and pulled it to his crotch.’”⁷ Although two other employees also described instances of sexual harassment by Hughes, Metro took no action against him.⁸ Instead, shortly following its investigation, Metro discharged Crawford and both of the other employees who reported the

1. 555 U.S. ___, 129 S. Ct. 846, 849 (2009).

2. 42 U.S.C. § 2000e-3(a) (2006).

3. *Crawford*, 555 U.S. at ___, 129 S. Ct. at 849.

4. *Id.* (quoting *Crawford v. Metro. Gov’t*, 211 F. App’x 373, 374–75 (6th Cir. 2006)).

5. *Id.* at ___, 129 S. Ct. at 849.

6. *Id.* (quoting *Crawford*, 211 F. App’x at 375 & n.1).

7. *Id.*

8. *Id.* at ___, 129 S. Ct. at 849.

sexual harassment, citing embezzlement as the basis for Crawford's discharge.⁹

In response, Crawford exhausted her administrative remedies and commenced the action that ultimately led to this decision.¹⁰ In her claim, Crawford alleged that her discharge violated both the opposition clause and the participation clause of Title VII's anti-retaliation provision.¹¹ The United States District Court for the Middle District of Tennessee granted summary judgment for Metro, holding that Crawford's participation in Metro's internal investigation did not satisfy the opposition clause because she never "instigated or initiated any complaint," but had "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else."¹² The United States Court of Appeals for the Sixth Circuit affirmed, agreeing that because Crawford had not "opposed" any unlawful employment practice, she was not entitled to protection under Title VII's anti-retaliation provision.¹³

The Supreme Court reversed unanimously and described the Sixth Circuit's rule—protecting an employee who initiates a report of sexual harassment, but not one who reports the same conduct in response to a question—as "freakish."¹⁴ The Court held that the opposition clause covered Crawford's elicited comments "as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense."¹⁵

The Court supported its decision by using Webster's Dictionary to dissect the "ordinary meaning" of the term "oppose," which means "to resist or antagonize . . . ; to contend against; to confront; resist; withstand."¹⁶ Because "[o]ppose' goes beyond 'active,

9. *Id.*

10. *Id.* at ___, 129 S. Ct. at 849–50.

11. *Id.*

12. *Id.* at ___, 129 S. Ct. at 850 (quoting *Crawford v. Metro. Gov't*, No. 3:03-0996, 2005 WL 6011557, at *2 (M.D. Tenn. Jan. 6, 2005)).

13. *See id.* The Sixth Circuit, citing its own precedent, held that the opposition clause required "active, consistent 'opposing' activities to warrant . . . protection against retaliation." *Id.* (quoting *Crawford v. Metro. Gov't*, 211 F. App'x 373, 376 (6th Cir. 2006)).

14. *Id.* at ___, 129 S. Ct. at 849, 851, 853.

15. *Id.* at ___, 129 S. Ct. at 850–51.

16. *Id.* at ___, 129 S. Ct. at 850 (quoting WEBSTER'S NEW INT'L DICTIONARY 1710 (2d ed. 1958)).

consistent' behavior," there is "no reason to doubt that a person can 'oppose' by responding to someone else's question."¹⁷ Equally compelling, if "an employee who reported discrimination in answering an employer's questions could be penalized with no remedy," then "prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."¹⁸

The Court's decision in *Crawford* will likely have a major impact on retaliation claims, because it broadens the scope of the opposition clause and, thereby, makes this popular claim available to an even greater pool of litigants. Curiously, although complainants are not the only parties entitled to sue for retaliation, the Court rejected the argument that a ruling for *Crawford* would make employers less likely to investigate claims of discrimination or harassment.¹⁹

The Court also analyzed retaliation claims in *CBOCS West, Inc. v. Humphries*.²⁰ *Humphries*, a former assistant manager of a Cracker Barrel restaurant, brought suit against CBOCS West, Inc. ("CBOCS"), the owner of Cracker Barrel, claiming he was terminated on the basis of his race and because he complained about the discharge of another African-American.²¹ After exhausting administrative remedies, *Humphries* brought suit under Title VII and the "equal contract rights" provision of § 1981 of the United States Code.²²

The district court dismissed the Title VII claims for failure to pay filing fees and granted CBOCS's motion for summary judgment on the § 1981 claims.²³ The United States Court of Appeals for the Seventh Circuit upheld the award of summary judgment

17. *Id.* at ___, 129 S. Ct. at 851 ("Countless people were known to 'oppose' slavery before Emancipation, or are said to 'oppose' capital punishment today, without writing public letters, taking to the streets, or resisting the government.").

18. *Id.* at ___, 129 S. Ct. at 852. Because the Court's holding ultimately rested on the opposition clause, the Court did not reach *Crawford*'s "argument that the Sixth Circuit misread the participation clause as well." *Id.* at ___, 129 S. Ct. at 853.

19. *See id.* at ___, 129 S. Ct. at 852.

20. 553 U.S. ___, 128 S. Ct. 1951, 1954 (2008).

21. *Id.* at ___, 129 S. Ct. at 1954.

22. *Id.* Section 1981 is a "longstanding civil rights law, first enacted just after the Civil War." *Id.* It provides, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (2006).

23. *CBOCS*, 553 U.S. at ___, 128 S. Ct. at 1954.

for CBOCS in regard to the direct discrimination claim, but remanded the § 1981 claim for trial.²⁴ In doing so, the Seventh Circuit rejected CBOCS's argument that § 1981 could not serve as the basis for a retaliation claim.²⁵ The Supreme Court granted certiorari to resolve whether § 1981 prohibits retaliation against an individual who complains about discrimination involving others.²⁶

Seven of the Court's nine Justices answered this question affirmatively based on a consideration of *stare decisis*.²⁷ The Court reached this result based on the following analysis:

(1) [I]n 1969, *Sullivan*,²⁸ as interpreted by *Jackson*,²⁹ recognized that § 1982 encompasses a retaliation action; (2) this Court has long interpreted §§ 1981 and 1982 alike;³⁰ (3) in 1989, *Patterson*,³¹ without mention of retaliation, narrowed § 1981 by excluding from its scope conduct, namely post-contract-formation conduct, where retaliation would most likely be found; . . . ; and (4) since 1991, the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions.³²

The Court rejected each of the arguments that CBOCS raised. First, CBOCS argued the express language of § 1981 did not pro-

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at ___, 128 S. Ct. at 1954–55.

28. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). *Sullivan* analyzed 42 U.S.C. § 1982, a Code provision enacted simultaneously with § 1981 that was designed to protect the rights of black citizens. *Sullivan*, 396 U.S. at 235; see *CBOCS*, 553 U.S. at ___, 128 S. Ct. at 1955; see also 42 U.S.C. § 1982 (2006). The *Sullivan* Court decided that § 1982 provided grounds to sue for retaliation where a white male was terminated from his employment with a corporation when he stood up for a black man who was not allowed to enter a private park owned by the corporation. *Sullivan*, 396 U.S. at 237; see *CBOCS*, 553 U.S. at ___, 128 S. Ct. at 1955.

29. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005) (“[I]n *Sullivan* we interpreted a general prohibition on racial discrimination [in § 1982] to cover retaliation against those who advocate the rights of groups protected by that prohibition.”).

30. In its analysis, the Court looked to *Runyon v. McCrary*, 427 U.S. 160 (1976), which held that §§ 1981 and 1982 were similar in that they both addressed private conduct. See *CBOCS*, 553 U.S. at ___, 128 S. Ct. at 1955 (citing *Runyon*, 427 U.S. at 173). The Court also noted that it “has construed §§ 1981 and 1982 alike because it has recognized the sister statutes’ common language, origin, and purposes.” *CBOCS*, 553 U.S. at ___, 128 S. Ct. at 1956. Specifically, “[l]ike § 1981, § 1982 traces its origin to § 1 of the Civil Rights Act of 1866 . . . [and] represents an immediately post-Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy.” *Id.*

31. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

32. *CBOCS*, 553 U.S. at ___, 128 S. Ct. at 1957–58.

vide a cause of action for retaliation.³³ In rejecting this argument, the Court noted that § 1982 has been held to encompass claims of retaliation, even though the language does not address such claims, and that another civil rights statute is read broadly to include protection from retaliation despite the absence of explicit language.³⁴ CBOCS also argued that Congress must have intended to omit a retaliation claim from § 1981 because Congress did not include any specific language allowing such a claim when it reenacted the statute in 1991.³⁵ To support this argument, CBOCS noted that Congress included explicit anti-retaliation language in all other civil rights statutes.³⁶ The Court rejected this argument on grounds that in light of the *Sullivan* decision, it was more likely that Congress saw no need to include explicit language.³⁷

The Court also rejected CBOCS's claim that if § 1981 were applied to "employment-related retaliation actions," it would "overlap with Title VII."³⁸ The Court noted that a similar "overlap" exists with respect to "employment-related direct discrimination," and that it has previously recognized a "necessary overlap" between Title VII and § 1981.³⁹ Further, the Court has held that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."⁴⁰

Based on these principal reasons, the Court agreed with the Seventh Circuit and ruled in favor of Humphries, holding that § 1981 encompasses retaliation claims.⁴¹ Obviously, this ruling will allow employees to bring retaliation claims under Title VII, as well as under § 1981. This ruling is especially significant because § 1981 has a longer statute of limitations than Title VII and does not include the damage caps applicable under Title VII.⁴² Further, § 1981 is ubiquitous—it applies to all employers, regardless of

33. *Id.* at ___, 128 S. Ct. at 1958.

34. *See id.* (citing *Jackson*, 544 U.S. at 173–74).

35. *Id.* at 1959.

36. *Id.*; *see, e.g.*, National Labor Relations Act, 29 U.S.C. § 158(a)(4) (2006).

37. *CBOCS*, 553 U.S. at ___, 128 S. Ct. at 1959.

38. *See id.* at ___, 128 S. Ct. at 1960.

39. *Id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989)).

40. *Id.* (quoting *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975)).

41. *Id.* at ___, 128 S. Ct. at 1961.

42. Compare 42 U.S.C. § 1981 (2006), and *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004), with 42 U.S.C. §§ 2000e-5(e)(1) (2006).

size—whereas Title VII applies only to employers with fifteen or more employees.⁴³ Because employees will no longer be confined by the limitations of Title VII, they will enjoy greater flexibility in prosecuting claims of retaliation.

The United States Court of Appeals for the Fourth Circuit addressed retaliation claims in *Buckley v. Mukasey* by stressing the relevance of prior litigation to show retaliatory animus.⁴⁴ Buckley, an African-American woman working as a special agent for the Drug Enforcement Agency (“DEA”), had been involved in a class action in 1977, alleging race discrimination against the DEA.⁴⁵ In the current action, Buckley sought to introduce evidence of the prior litigation, in an attempt to evince the DEA’s motive for retaliation.⁴⁶

The lower court did not allow Buckley to introduce the evidence, but the Fourth Circuit disagreed,⁴⁷ holding that the lower court “erred as a matter of law in relying on the Federal Rules of Evidence to limit” evidence of a separate discrimination claim being offered to establish retaliatory animus in the current action.⁴⁸ According to the Fourth Circuit, claims “based on retaliation for pursuing discrimination claims in the past[,] are inextricably linked to past acts of discrimination.”⁴⁹ Thus, “[b]ecause such evidence of prior bad acts speaks directly to the defendant’s motive or intent to retaliate, such evidence must be admitted if the plaintiff is to have any real chance of proving her retaliation claim.”⁵⁰ In *Buckley*, the court held the plaintiff-employee was entitled to a new trial because this error affected the employee’s “substantial rights by rendering her unable to cogently demonstrate . . . litigation-related retaliatory animus.”⁵¹

Stated simply, nothing in the Federal Rules of Evidence supported the district court’s decision to keep out evidence of the earlier litigation.⁵² The evidence was “unquestionably ‘[r]elevant’

43. Compare 42 U.S.C. § 1981 (2006), with 42 U.S.C. § 2000e(b) (2006).

44. 538 F.3d 306, 318 (4th Cir. 2008).

45. *Id.* at 309–10.

46. *Id.* at 314–15.

47. *Id.* at 315, 319.

48. *Id.* at 320.

49. *Id.* at 319.

50. *Id.*

51. *Id.* at 320–21.

52. See *id.* at 318–20.

within the meaning of Rule 401” to establishing retaliatory animus.⁵³ Under Rule 404(b), such evidence of other wrongs or acts is admissible to show motive and intent.⁵⁴ The evidence should not have been excluded under Rule 403, because the risk of unfair prejudice to the defendants did not outweigh the importance of the evidence to Buckley’s claims.⁵⁵ Additionally, the court noted, a limiting instruction could have been used to caution the jury that the evidence was to be considered only as evidence of retaliatory animus.⁵⁶

III. TITLE VII AND THE ADEA

The Supreme Court’s decision in *Meacham v. Knolls Atomic Power Laboratory* might lead to more disparate-impact claims under the Age Discrimination in Employment Act (“ADEA”), because it requires an employer to demonstrate that it used reasonable factors other than age to arrive at the personnel decision at issue.⁵⁷ Although *Meacham* may lead to more disparate-impact claims under the ADEA and also make it more difficult for employers to obtain summary judgment on such claims, *Ilozor v. Hampton University* requires employees to establish age discrimination by producing evidence sufficient for a jury to conclude that age was the motivating factor.⁵⁸

A. *The Age Discrimination in Employment Act*

In *Meacham*, the federal government ordered Knolls Atomic Power Laboratory (“KAPL”) to reduce its workforce for the 1996 fiscal year.⁵⁹ In response, KAPL told its managers to select those to be laid off by scoring them on three scales including flexibility, critical skills, and performance.⁶⁰ Of the thirty-one salaried employees laid off, thirty of them were at least forty years old.⁶¹

53. *Id.* at 319.

54. *Id.*

55. *Id.* at 320.

56. *Id.*

57. 554 U.S. ___, 128 S. Ct. 2395, 2398 (2008).

58. See 286 F. App’x 834, 839 (4th Cir. 2008) (per curiam).

59. 554 U.S. at ___, 128 S. Ct. at 2398.

60. *Id.*

61. *Id.*

Twenty-eight of those over forty sued KAPL, alleging disparate-treatment and disparate-impact under the ADEA.⁶²

The jury returned a verdict for the employees on their disparate-impact claim, but not on their disparate-treatment claim.⁶³ The United States Court of Appeals for the Second Circuit affirmed, but the Supreme Court vacated and remanded for further proceedings consistent with its decision in *Smith v. City of Jackson*,⁶⁴ which it decided while KAPL's petition for certiorari was pending.⁶⁵ The Court in *City of Jackson* used a "reasonableness" standard as opposed to a "business necessity" standard when examining factors other than age that the employer used in its decision making.⁶⁶

On remand, the court of appeals found for KAPL because the court applied the "business necessity" standard rather than the "reasonableness" standard from *City of Jackson*, and because the employees had not carried the burden of persuasion on the reasonableness factor.⁶⁷ The Supreme Court granted certiorari to resolve conflicting decisions regarding which party was to be assigned the burden of persuasion on the reasonableness factor when using the "reasonable factors other than age" ("RFOA") defense.⁶⁸

The RFOA exception in the ADEA states: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age."⁶⁹ The Court began by noting that it has previously characterized the RFOA exception as one of the ADEA's five affirmative defenses, and that the "burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."⁷⁰ Because the RFOA exception legitimizes otherwise illegal conduct by re-

62. *Id.*

63. *Id.* at ___, 128 S. Ct. at 2399.

64. 544 U.S. 228 (2005).

65. *Meacham*, 554 U.S. at ___, 128 S. Ct. at 2399.

66. *Id.*; see *City of Jackson*, 544 U.S. at 243.

67. *Meacham*, 554 U.S. at ___, 128 S. Ct. at 2399.

68. *Id.* at ___, 128 S. Ct. at 2398, 2400.

69. *Id.* at ___, 128 S. Ct. 2400 (quoting 29 U.S.C. § 623(f)(1) (2006)).

70. *Id.* (quoting *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)).

ference to an additional item of proof, it creates a defense obligating the one invoking it to bear the burden of proof.⁷¹

The Court also noted that *City of Jackson* confirms that the prohibition against age discrimination extends to disparate-impact claims.⁷² Next, the Court explained that “[t]he RFOA defense in a disparate-impact case . . . is not focused on the asserted fact that a non-age factor was at work; we assume it was. The focus of the defense is that the factor relied upon was a ‘reasonable’ one for the employer to be using.”⁷³ Significantly, reasonableness is distinct and independent from the “because of age” condition.⁷⁴ Consequently, trial courts evaluating the RFOA defense going forward will first assure that non-age factors were used, and then require the employer to present credible evidence establishing that the non-age factors on which it relied were reasonable.

Finally, the Court stated that a plaintiff cannot merely allege disparate impact by claiming a “generalized policy that leads to” disparate impact; rather, the plaintiff must identify “*specific* employment practices that are allegedly responsible for any observed statistical disparities,” which, the Court noted, is “not a trivial burden.”⁷⁵ Although it essentially conceded that placing the burden of persuasion on employers will make such claims more difficult and costly to defend, the Court observed that such concerns must be directed at Congress, because it wrote the RFOA exception “in the orthodox format of an affirmative defense.”⁷⁶

The *Meacham* decision is significant because it establishes that an employer defending a disparate-impact claim on the basis of “reasonable factors other than age” must not only produce evidence raising the defense, but must also persuade the fact finder of its merit.⁷⁷ In so doing, *Meacham* eases the burden on plaintiffs advancing disparate-impact claims, while making it more difficult and costly for employers to assert the RFOA defense.

The news is not all bad for employers though, because in a 5-4 decision in June 2009, the Supreme Court made it more difficult

71. *Id.* at ___, 128 S. Ct. at 2401.

72. *Id.* at ___, 128 S. Ct. at 2403.

73. *Id.*

74. *Id.*

75. *Id.* at ___, 128 S. Ct. at 2405–06.

76. *Id.* at ___, 128 S. Ct. at 2406.

77. *Id.* at ___, 128 S. Ct. at 2398.

for ADEA plaintiffs to establish that their employer discriminated on the basis of age by holding, in *Gross v. FBL Financial Services, Inc.*, that a mixed-motive jury instruction “is never proper in an ADEA case.”⁷⁸ The basis for this decision is the view that a plaintiff’s burden of proof under the ADEA is more strict than under Title VII, which allows employees to bring a discrimination claim “in which an improper consideration was ‘a motivating factor’ for an adverse employment decision.”⁷⁹

Plaintiff Jack Gross, a fifty-four-year-old employee of FBL Financial Services, sued for age discrimination when he was demoted from a managerial position and some of his job duties were reallocated to a younger female employee.⁸⁰ The United States Court of Appeals for the Eighth Circuit overturned a \$46,945 jury verdict in Gross’s favor, ruling that the jury had been improperly instructed under the *Price Waterhouse v. Hopkins* (i.e., mixed-motives) standard, as Gross admitted that he failed to present any direct evidence of age discrimination.⁸¹ Presumably, the Eighth Circuit would allow a mixed-motives instruction where the evidence of age discrimination was direct rather than circumstantial. The Supreme Court vacated the decision of the court of appeals and remanded the case.⁸²

The Supreme Court noted that the plain language of the ADEA requires a plaintiff to “prove that age was the ‘but-for’ cause of the employer’s adverse decision.”⁸³ For that reason, the Court held

78. 557 U.S. ___, 129 S. Ct. 2343, 2346 (2009).

79. *Id.* at ___, 129 S. Ct. at 2349 (citing 42 U.S.C. § 2000e-2(m)). Unlike disparate treatment claims, in mixed motives claims under Title VII, an employee seeks to prove that an adverse employment action was motivated by both permissible and impermissible (i.e., discriminatory) considerations, rather than proving that the discriminatory reason was the factor behind the adverse employment action. Compare 42 U.S.C. § 2000e-(2)(m) (2006), with 29 U.S.C. § 623(a)(1) (2006); see also *Gross*, 557 U.S. at ___, 129 S. Ct. at 2349.

80. *Gross*, 557 U.S. at ___, 129 S. Ct. at 2346–47.

81. See *id.* at ___, 129 S. Ct. at 2347; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). *Price Waterhouse* dealt with a mixed-motives Title VII case, holding that if a “plaintiff shows that discrimination was a ‘motivating’ or a ‘substantial’ factor in the employer’s [adverse] action,” the burden of persuasion would then shift to the employer “to show that it would have taken the same action regardless of that impermissible consideration.” *Gross*, 557 U.S. at ___, 129 S. Ct. at 2347 (citing *Price Waterhouse*, 490 U.S. at 258).

82. *Gross*, 557 U.S. at ___, 129 S. Ct. at 2352.

83. *Id.* at ___, 129 S. Ct. at 2350. The ADEA states, “[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” 29 U.S.C. § 623(a)(1) (2006) (emphasis added); see *Gross*, 557 U.S. at ___, 129 S. Ct. at 2350.

that the mixed-motives burden-shifting framework does not apply in ADEA claims; therefore, it would never be proper to instruct the jury that a plaintiff may establish age discrimination “by showing that age was simply *a* motivating factor.”⁸⁴ Consequently, the responsibility rests with the employee to prove that age was the motivating factor for the adverse employment action. This case essentially widens the gap between Title VII and the ADEA, and will make it significantly more difficult for employees to succeed in prosecuting ADEA claims.

B. *Title VII and the ADEA in the Fourth Circuit*

In *Ilozor v. Hampton University*, the United States Court of Appeals for the Fourth Circuit affirmed summary judgment for the employer in a suit alleging breach of contract and discriminatory discharge under the ADEA and Title VII.⁸⁵ Benedict Ilozor, a former professor at Hampton University (“Hampton”), alleged that Hampton, Eric Sheppard, and Bradford Grant failed to renew his contract due to his age and his national origin.⁸⁶

Ilozor is Nigerian-born and a citizen of both Nigeria and Australia.⁸⁷ He was a tenured faculty member at Deakin University in Sydney before Grant, the department chair selected him for a non-tenure track position in Hampton’s Architecture Department.⁸⁸ This position was a temporary annual position in which Ilozor carried a nine-month contract with no guarantee of reappointment.⁸⁹ Ilozor was thirty-eight years old when he accepted the position.⁹⁰

84. *Gross*, 557 U.S. at ___, 129 S. Ct. at 2349 (emphasis added).

85. 286 F. App’x 834, 835 (4th Cir. 2008) (per curiam).

86. *Id.* at 835. Ilozor’s breach of contract claim was premised on Grant’s statement to Ilozor in an e-mail prior to the start of Ilozor’s employment that Grant was “not sure how much [the university] can financially support [Ilozor’s] move to Virginia and [Grant thought] that it would not be more than a flight to Virginia.” *Id.* The court held that statement “plainly did not create an enforceable contract for the payment of all costs associated with moving Ilozor and his family from Australia to Virginia.” *Id.* at 841. Additionally, the court noted the contract Ilozor signed with Hampton did not contain a provision for the payment of moving expenses. *Id.* at 835–36. Therefore, the court affirmed summary judgment on that claim. *Id.* at 841.

87. *Id.* at 835.

88. *Id.*

89. *Id.*

90. *Id.*

In his first semester at Hampton, Ilozor was assigned to teach a class with another professor, who complained to Grant repeatedly that Ilozor did not respect her and gave conflicting directions in class.⁹¹ Students in the class also complained that Ilozor was “confusing” in class.⁹² The same result occurred the following semester, when Ilozor taught another class with a different professor with whom Ilozor had developed a friendly relationship.⁹³ Both professors stated they would never teach with Ilozor again.⁹⁴ Despite this professional dysfunction, Grant recommended that Ilozor stay at Hampton for the coming year, and Hampton renewed his annual contract.⁹⁵

Ilozor became upset when Grant did not offer him a tenure-track position, and instead recommended Professor Shannon Chance for that position.⁹⁶ Ilozor claimed that when he confronted Grant about this decision, Grant responded, “[Chance] is a good American lady, she is younger than you are, she is free with no distraction from kids, and has a great potential to grow.”⁹⁷ Ilozor further claimed that at the start of the next academic year, Grant made two offensive remarks to Ilozor.⁹⁸ First, Grant commented that “[n]o American pretends to be an African” and that Grant had “no connection with Africa.”⁹⁹ Second, in response to Ilozor’s question to Grant about African architectural taxonomy, Grant stated, “I am not an African. Go to an African.”¹⁰⁰

Due to the complaints by professors with whom Ilozor co-taught in his first two semesters at Hampton, Grant assigned Ilozor to teach a class by himself in the new academic year.¹⁰¹ The class was considered a failure, however, and staff, faculty, and students continued to complain that Ilozor was condescending,

91. *Id.* at 836.

92. *Id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *Id.* Professor Chance was the professor with whom Ilozor co-taught during his first semester at Hampton. *Id.*

97. *Id.* Grant denied making this statement, but the court accepted Ilozor’s version of the facts as true, as is required in an appeal from an award of summary judgment for the defendant. *Id.* n.5.

98. *Id.*

99. *Id.* at 837.

100. *Id.* Again, Grant denied making these statements, but the court accepted Ilozor’s version of the facts as true. *Id.* n.6.

101. *Id.* at 837.

behaved inappropriately, and that the project he assigned his class was too large and complex.¹⁰² In response to this negative feedback, Grant wrote a memo recommending that Ilozor's contract not be renewed.¹⁰³ Among other things, this memo "referenced Ilozor's credentials as 'foreign based' and also indicated that, '[c]oming from Nigeria via Australia and arriving in the U.S. for the first time, Dr. Ilozor has had a very difficult time, understanding and contributing to our mission and direction.'"¹⁰⁴ Hampton selected a twenty-four-year-old candidate who just completed graduate school to replace Ilozor.¹⁰⁵ This decision led Ilozor to allege that Hampton discriminated against him on the basis of his national origin and age in violation of Title VII and the ADEA.¹⁰⁶

In reviewing the grant of summary judgment to Hampton *de novo*,¹⁰⁷ the Fourth Circuit noted it "review[s] professorial employment decisions with great trepidation,' remaining 'cognizant of the fact that professorial appointments necessarily involve subjective and scholarly judgments, with which we have been reluctant to interfere.'"¹⁰⁸ Ultimately, the court determined that Ilozor could not succeed in proving either of his discrimination claims.¹⁰⁹ The central issue was whether Ilozor had been the victim of intentional discrimination, and to be successful, Ilozor was required to produce sufficient evidence "that the protected trait[s] actually motivated [Hampton's] decision" to not renew his contract.¹¹⁰

The court decided that, contrary to Ilozor's assertions, Grant's memo referencing Ilozor's "foreign based" credentials did not "render the memo a revelation of animosity toward or stereotyping of persons with Ilozor's background."¹¹¹ The court also rejected Ilozor's allegation that Grant's statements regarding Ilozor's lack of communication skills and complaints about Ilozor giving

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 838.

106. *Id.* at 835, 838.

107. *Id.* at 838.

108. *Id.* at 839 (quoting *Jiminez v. Mary Washington College*, 57 F.3d 369, 376 (4th Cir. 1995) (internal quotation marks omitted)).

109. *Id.* at 840.

110. *Id.* at 839 (quoting *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286 (4th Cir. 2004) (en banc) (internal quotation marks omitted)).

111. *Id.* at 840.

confusing directions in class “represent[ed] veiled references to Ilozor’s foreign accent.”¹¹² Further, Ilozor failed to demonstrate how “Grant’s comments that he did not personally consider himself an African and . . . that he believed no American should pretend to be an African” established a “discriminatory animus” toward African-born individuals.¹¹³

The court used the oft-cited *Proud v. Stone* “same hirer and firer” analysis to buttress its decision.¹¹⁴ Since Grant was the person who made both the decision to hire Ilozor and the decision not to renew his contract, a “powerful inference” exists that “discrimination did not motivate [Grant].”¹¹⁵ Finally, the court determined that even when viewing the evidence in Ilozor’s favor, Grant’s comments that Chance received the tenure track position “because she was a ‘good American lady’” and was “younger than Ilozor,” did not constitute evidence sufficient for a jury to conclude “that Hampton’s decision not to renew Ilozor’s contract was based on his national origin and/or age, rather than the problems with his performance and his difficulty working in Hampton’s collaborative environment.”¹¹⁶

This result may be surprising to some at first blush, because the evidence that Ilozor presented could establish pretext when considered cumulatively, and when considered in the light most favorable to the plaintiff. When analyzed more closely, however, this decision makes plain that a discharged employee must have evidence that rebuts the employer’s proffered legitimate, non-discriminatory reasons squarely. Otherwise, the evidence of pretext will be regarded as stray, isolated comments that do not evince any intention to discriminate. In this instance, although Ilozor had a theory for his discharge and some support for this theory, he was unable to convince the court that the employer’s proffered reasons for his discharge were inconsistent with his evidence.

112. *Id.*

113. *Id.*

114. *See id.*; *see also Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

115. *Ilozor*, 286 F. App’x at 840 (quoting *Proud*, 945 F.2d at 797 (“[I]t hardly makes sense to hire workers from a group one dislikes . . . only to fire them once they are on the job.”)).

116. *Id.*

IV. SEXUALLY HOSTILE WORK ENVIRONMENT, RETALIATION, AND SEXUAL HARASSMENT

A. *Sexually Hostile Work Environment and Retaliation*

In two decisions this past year, the Fourth Circuit expanded protection for certain employees claiming hostile work environment and retaliation. First, *Ziskie v. Mineta* essentially lowered the standard necessary to establish a hostile work environment claim¹¹⁷ by establishing that plaintiffs advancing such claims can present “me too” evidence (i.e., evidence of conduct or comments not directed to them specifically).¹¹⁸ Second, in *Caldwell v. Johnson*, the court extended the lower burden reflected in *Burlington Northern & Santa Fe Railroad Co. v. White* to federal employees.¹¹⁹ Consequently, federal employees advancing retaliation claims are required to demonstrate only that “a reasonable employee would have found the challenged action materially adverse,”¹²⁰ and are no longer required to demonstrate any adverse employment action.¹²¹

In *Ziskie v. Mineta*, a female air traffic controller brought suit against her employer, alleging a sexually hostile work environment, and that her employer retaliated against her for complaining of discrimination.¹²² Ziskie had worked only part-time until the Federal Aviation Administration discontinued all part-time employment for air traffic controllers.¹²³ To work around the elimination of part-time employment, Ziskie began taking sick days on the days she was previously allowed to stay home.¹²⁴ Soon thereafter, Ziskie complained of profanity and other crude language, sexist comments that were directed at other employees or to no one in particular, preference given to male employees in making their schedules, and hostile treatment by several male co-workers.¹²⁵

117. See 547 F.3d 220, 229–30 (4th Cir. 2008).

118. See *id.* at 225.

119. *Caldwell v. Johnson*, 289 F. App'x 579, 592 (4th Cir. 2008) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67–68 (2006)).

120. *Id.* at 588 (quoting *Burlington Northern*, 548 U.S. at 67–68).

121. See *id.* at 588, 592.

122. *Ziskie*, 547 F.3d at 222.

123. *Id.*

124. *Id.*

125. *Id.* at 222–23.

Ziskie began keeping a diary of the offensive comments she heard in the office.¹²⁶

The United States District Court for the Eastern District of Virginia granted summary judgment to the employer on the hostile work environment claim because Ziskie could not prove the treatment was severe or pervasive.¹²⁷ In so doing, the district court refused to admit affidavits from female co-workers regarding statements about which Ziskie had no personal knowledge.¹²⁸ The district court also granted summary judgment to the employer on the retaliation claim, because Ziskie failed to show she suffered any adverse employment action, or that there was a causal connection between the protected activity and any adverse employment action.¹²⁹

The Fourth Circuit affirmed summary judgment for the employer on the retaliation claim, but reversed on the hostile work environment claim.¹³⁰ To establish a hostile work environment claim, a plaintiff must show “the offending conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer.”¹³¹ In light of these elements, the Fourth Circuit disagreed with the exclusion of the co-worker affidavits regarding conduct not directly witnessed by Ziskie, especially for purposes of determining if the offending conduct was sufficiently severe or pervasive to alter the work environment.¹³² The court held that evidence of offensive conduct not directed at the plaintiff is relevant, because it can show whether the working environment was hostile, even if the plaintiff did not witness such behavior firsthand.¹³³

Although it reversed the grant of summary judgment on the hostile work environment claim, the court noted that Ziskie’s

126. *Id.* at 222.

127. *Id.* at 224.

128. *Id.* at 225.

129. *Id.* at 224.

130. *Id.* at 229.

131. *Id.* at 224 (quoting *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003)).

132. *Id.* at 224–25.

133. *Id.* at 225.

claim was weak.¹³⁴ On remand, she would have to show a triable issue as to whether her treatment was based on gender, and whether the conduct was sufficiently severe and pervasive to alter her work environment.¹³⁵ The court acknowledged the offensive conduct could be the result of Ziskie's undisputed abuse of sick leave and her penchant for recording all conceivably offensive statements in a diary, rather than because of her gender.¹³⁶

The court added that, although the environment was "coarse" and "boorish," Ziskie would have trouble showing that her perception of the work environment was reasonable under the circumstances, especially considering that "Title VII is not 'a general civility code.'"¹³⁷ To succeed on remand, Ziskie must show that her working environment reflected more than just "the kind of tensions that accompany any stressful workplace environment."¹³⁸

Following *Ziskie*, conduct that a plaintiff did not actually witness in the workplace and, therefore, did not contribute to the decision to commence litigation, can support the underlying claim and enable it to survive summary judgment. Obviously, the now-permissible use of "me too" evidence in hostile work environment cases, whether through affidavit or live testimony, might make it more difficult for employers to obtain summary judgment.

In *Caldwell v. Johnson*, a scientist working for the Environmental Protection Agency ("EPA") brought suit alleging a hostile work environment and retaliation.¹³⁹ Dr. Jane Caldwell claimed that while working in the Hazardous Pollutant Assessment Group at the EPA, male co-workers circulated pornographic pictures, made lewd jokes, and claimed they were having an affair with Dr. Caldwell.¹⁴⁰ She also claimed one of her male supervisors would stand uncomfortably close to her, once raising his leg on a chair near her face while wearing particularly short shorts.¹⁴¹ Finally, she claimed other male supervisors were openly hostile to

134. *Id.* at 226.

135. *Id.*

136. *Id.*

137. *Id.* at 228 (citation omitted).

138. *Id.*

139. 289 F. App'x 579, 581, 584 (4th Cir. 2008).

140. *Id.* at 581-82.

141. *Id.* at 581.

female employees generally¹⁴² and that she was told she would not be promoted if she continued to speak up at branch meetings.¹⁴³

Dr. Caldwell eventually contacted an Equal Employment Opportunity (“EEO”) counselor regarding the “disparate treatment and harassment” she attributed to her gender.¹⁴⁴ After that meeting, several supervisors were transferred to other departments, where they had no contact with Dr. Caldwell.¹⁴⁵ Nevertheless, Dr. Caldwell felt she was subjected to retaliation for meeting with the EEO counselor, claiming her supervisors impeded her promotion by “delay[ing] the approval and processing of her promotion package.”¹⁴⁶ Dr. Caldwell further claimed that someone tampered with her computer and smashed her taillight.¹⁴⁷

The District Court for the Middle District of North Carolina granted summary judgment for the EPA on all counts.¹⁴⁸ The Fourth Circuit upheld summary judgment on the claims for supervisor-related hostile work environment and co-worker-related hostile work environment,¹⁴⁹ but reversed the grant of summary judgment on the retaliation claim.¹⁵⁰ A major point of disagreement between the Fourth Circuit and the lower court was whether *Burlington Northern & Santa Fe Railway Co. v. White* ap-

142. *Id.* at 582.

143. *Id.*

144. *Id.*

145. *Id.* at 583.

146. *Id.*

147. *Id.*

148. *Id.* at 584.

149. *Id.* at 586. An employer faces strict liability on a supervisor-created hostile work environment claim if the employer takes “tangible employment action,” which includes “discharge, demotion, or undesirable reassignment.” *Id.* at 585 (citation omitted). If the employee fails to prove there was a “tangible employment action,” the employer is entitled to an affirmative defense if it can prove: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities” that they provided. *Id.* The court found Dr. Caldwell failed to show a “tangible employment action” because the court did not believe a mere delay in promotion based on conjecture or a change in buildings was sufficient. *Id.* In addition, the EPA took sufficient preventative measures when it processed Dr. Caldwell’s EEO claim and transferred her supervisor. *Id.* at 586. Dr. Caldwell’s claim for co-worker-created hostile work environment also failed because Dr. Caldwell could not show that the EPA was negligent in failing to take action after receiving knowledge of the conduct. *See id.* at 587. The EPA took prompt and adequate action by holding branch meetings and sending e-mails to discuss the problems. *Id.*

150. *Id.* at 592.

plied.¹⁵¹ The lower court believed *Burlington Northern* only applied to cases of private sector employment.¹⁵² The Fourth Circuit held, however, that *Burlington Northern* also applied to public sector employees.¹⁵³ “[L]imited construction” of the *Burlington Northern* decision “would fail to fully achieve the anti-retaliation provision’s ‘primary purpose,’ namely ‘[m]aintaining unfettered access to statutory remedial mechanisms.’”¹⁵⁴ In applying the “materially adverse” test of *Burlington Northern* to the present case, the court determined Dr. Caldwell would have to show the following to establish a prima facie case of retaliation: “(1) that she engaged in protected activity, (2) that her employer took *materially adverse* action against her, such that it could dissuade a reasonable worker from making or supporting a charge of discrimination, . . . and (3) that a causal relationship existed between the protected activity and the materially adverse activity.”¹⁵⁵ The Fourth Circuit remanded the case to the district court to decide what effect this test would have on the outcome.¹⁵⁶

The *Caldwell* decision lowers the burden for public sector plaintiffs alleging retaliation because it extends the lower standard for private sector plaintiffs articulated in *Burlington Northern* to federal employees. Now, to establish retaliation, a public sector employee does not have to show any adverse employment action; rather, he or she must show only that a reasonable employee would have found the challenged action “materially adverse.”¹⁵⁷ Significantly, a reasonable employee may find a challenged action “materially adverse” if he or she might have been “dissuaded . . . from making or supporting a charge of discrimination.”¹⁵⁸ Although materially adverse actions will often be adverse employment actions, public sector employees can now prosecute a retaliation claim in the absence of an adverse employment action.

151. *See id.* at 587, 592.

152. *See id.* at 587.

153. *Id.* at 592.

154. *Id.* at 591 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006)).

155. *Id.* at 592 (citing *Burlington Northern*, 548 U.S. at 67–68) (emphasis added).

156. *See id.*

157. *Id.* at 588 (citing *Burlington Northern*, 548 U.S. at 60, 67–68).

158. *Id.* (quoting *Burlington Northern*, 548 U.S. at 68).

B. *Sexual Harassment*

In a case involving alleged sexual harassment of a student by an employee at Virginia Tech, the Supreme Court of Virginia emphasized the weight of an administrative hearing officer's findings.¹⁵⁹ Aside from its bearing on factually analogous sexual harassment claims, this decision highlights the need to identify the specific law a hearing officer has contradicted when appealing his or her decision.¹⁶⁰

In *Virginia Polytechnic Institute v. Quesenberry*, the Supreme Court of Virginia reversed the Court of Appeals of Virginia, finding that the administrative hearing officer's decision was not contradictory to law.¹⁶¹ Although a grievant must show how a decision is contrary to law in order to appeal from an administrative hearing,¹⁶² the grievant in *Quesenberry* failed to even allege how the decision was contradictory to a specific law.¹⁶³

Quesenberry was employed by Virginia Tech as a business manager in the Communications Network Services Department.¹⁶⁴ In April 2005, he received a "Group II" written disciplinary notice for looking at pornographic material on a University computer, and received a four-day suspension.¹⁶⁵

In 2006, Quesenberry was issued a "Group III" written disciplinary notice and was permanently terminated.¹⁶⁶ A female student claimed she felt uncomfortable when having a discussion with Quesenberry about a calendar he planned on producing for a non-University-affiliated boxing club.¹⁶⁷ Quesenberry and another University employee discussed the calendar with the twenty-year-old female student who worked for a student-run organiza-

159. *See* Va. Polytech. Inst. & State Univ. v. Quesenberry, 277 Va. 420, 429, 674 S.E.2d 854, 858 (2009).

160. *Id.*

161. *Id.* at 431, 674 S.E.2d at 859.

162. *Id.* at 429, 674 S.E.2d at 858; *see also* VA. CODE ANN. § 2.2-3006(B) (Repl. Vol. 2008 & Supp. 2009).

163. 277 Va. at 429, 674 S.E.2d at 858.

164. *Id.* at 423, 674 S.E.2d at 855.

165. *Id.* at 423-24, 674 S.E.2d at 855.

166. *Id.* at 424, 674 S.E.2d at 855.

167. *Id.* at 424-25, 674 S.E.2d at 856. Quesenberry voluntarily coached a boxing club for disadvantaged youth. *Id.* at 424, 674 S.E.2d at 855. In order to raise money, the club planned on producing a calendar with pictures of scantily clad women in boxing scenarios. *Id.*, 674 S.E.2d at 855-56.

tion in the same building as the men's offices, telling her they needed models to pose for pictures wearing "short shorts" or bathing suits, and that the pictures would be "tastefully done."¹⁶⁸ The student reported that she felt uncomfortable during the meeting, began locking her office door, and started taking a less direct route to work to avoid contact with either man.¹⁶⁹

The administrative hearing officer concluded that Quesenberry failed to comply with a portion of the University's Anti-Discrimination and Harassment Policy, but reduced the infraction from "Group III" to "Group II," finding Quesenberry did not intentionally engage in inappropriate behavior.¹⁷⁰ The hearing officer upheld the termination, however, because Quesenberry had amassed two "Group II" infractions within three years.¹⁷¹ Finally, the hearing officer decided Quesenberry's actions did not rise to the level of sexual harassment because his conduct was not severe or pervasive.¹⁷²

The standard of review in Virginia Code section 2.2-3006(B) holds that a grievant may only appeal a decision from an administrative hearing officer when it is "contradictory to law."¹⁷³ The circuit court determined the hearing officer's finding was "contrary to law," and ordered Quesenberry's reinstatement and compensation for lost wages.¹⁷⁴ The circuit court also noted Quesenberry's conduct did not rise to the level of sexual harassment.¹⁷⁵ The court of appeals upheld the circuit court's decision, reviewing the case under a sexual harassment analysis based on Title VII case law.¹⁷⁶

The Supreme Court of Virginia reversed on grounds that Quesenberry failed to allege how the hearing officer's decision was contrary to any specific law.¹⁷⁷ The court believed the analysis of Quesenberry's case under Title VII was inappropriate, as the

168. *Id.*, 674 S.E.2d at 856.

169. *Id.* at 424-25, 674 S.E.2d at 856.

170. *Id.* at 425-26, 674 S.E.2d at 856.

171. *Id.* at 426, 674 S.E.2d at 856.

172. *Id.* at 425, 674 S.E.2d at 856.

173. *Id.* at 429, 674 S.E.2d at 858 (citing VA. CODE ANN. § 2.2-3006(B) (Repl. Vol. 2008)).

174. *Id.* at 426, 674 S.E.2d at 856.

175. *Id.*

176. *Id.* at 426-27, 674 S.E.2d at 857.

177. *Id.* at 429, 431, 674 S.E.2d at 858-59.

hearing officer stated explicitly that Quesenberry had not committed sexual harassment.¹⁷⁸

This decision reiterates the significant weight accorded to the findings of an administrative hearing officer, which are disturbed on appeal only if they are contradictory to law.¹⁷⁹ Indeed, a party appealing the decision of any administrative hearing officer must identify the law contradicted with precision in its petition for appeal.¹⁸⁰ As *Quesenberry* demonstrates, an appellant's failure in this regard can cause the appeal to fail from its inception. Thus, although the standard of review remains unchanged, the Supreme Court of Virginia essentially admonished the circuit court and court of appeals for engaging in a substantive review of the administrative hearing officer's findings in the absence of the appellant's recitation of the law(s) purportedly nullified during the administrative hearing.

V. ARBITRATION

Earlier this year, the United States Supreme Court resolved whether a labor union can choose mandatory arbitration through collective bargaining on behalf of its members. Prior to *14 Penn Plaza LLC v. Pyett*,¹⁸¹ there was considerable confusion regarding how *Gilmer v. Interstate/Johnson Lane Corp.*, which held that an employee may individually agree to compulsory arbitration,¹⁸² could be reconciled with *Alexander v. Gardner-Denver Co.*, which held that a collective bargaining agreement could not waive covered workers' rights to bring suit in the courts for federal causes of action.¹⁸³

In *14 Penn Plaza*, the Court held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate" claims brought under the ADEA "is enforceable as a matter of federal law."¹⁸⁴

178. *Id.* at 429–30, 674 S.E.2d at 858–59.

179. *See id.* at 429, 674 S.E.2d at 858.

180. *See id.*

181. *See* 556 U.S. ___, 129 S. Ct. 1456 (2009).

182. 500 U.S. 20, 33–35 (1991).

183. 415 U.S. 36, 49–51 (1974).

184. 556 U.S. at ___, 129 S. Ct. at 1474.

Respondents were union members and worked as night lobby watchmen and in other similar capacities in 14 Penn Plaza LLC's New York City office building.¹⁸⁵ The parties signed a collective bargaining agreement ("CBA"), negotiated in good faith by the union's Realty Advisory Board on Labor Relations, Inc.¹⁸⁶ Under the National Labor Relations Act ("NLRA"), the union is the respondents' exclusive bargaining representative, and the union has exclusive authority to bargain on behalf of the respondents with regard to their "rates of pay, wages, hours of employment, or other conditions of employment."¹⁸⁷

In August 2003, 14 Penn Plaza, with the union's consent, hired a unionized security contractor to provide licensed security guards for the building.¹⁸⁸ Therefore, the respondents were reassigned to jobs as porters and cleaners.¹⁸⁹ The respondents were distraught, claiming their reassignments "led to a loss in income, caused them emotional distress, and were otherwise less desirable than their former positions," and they asked the union to file grievances alleging, among other things, that 14 Penn Plaza "violated the CBA's ban on workplace discrimination by reassigning respondents on account of their age" in violation of the ADEA.¹⁹⁰

The union, however, withdrew the age discrimination claims, believing there was no legitimate objection to the reassignments, since the union consented to the contract for the new security personnel.¹⁹¹ The respondents received right-to-sue notices from the Equal Employment Opportunity Commission and brought suit against 14 Penn Plaza.¹⁹² The CBA signed by the parties, however, required union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures.¹⁹³ Accordingly, 14 Penn Plaza filed a motion to compel arbitration of the age discrimination claims.¹⁹⁴ The district court denied the motion, and

185. *Id.* at ___, 129 S. Ct. at 1461.

186. *Id.* The RAB is a multi-employer bargaining association of which 14 Penn Plaza is a member. *Id.*

187. *Id.* (quoting 29 U.S.C. § 159(a) (2006)).

188. *Id.* at ___, 129 S. Ct. 1462.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *See id.* at ___, 129 S. Ct. at 1464.

194. *Id.* at ___, 129 S. Ct. at 1462.

the Second Circuit affirmed, holding that provisions in CBAs requiring arbitration of ADEA claims are not enforceable.¹⁹⁵

The Supreme Court of the United States reversed on grounds that the parties “collectively bargained in good faith and agreed that employment-related discrimination claims,” including ADEA claims, would be resolved through arbitration.¹⁹⁶ “As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer,” and “[c]ourts generally may not interfere in this bargained-for exchange.”¹⁹⁷

The NLRA requires mandatory bargaining with regard to conditions of employment, and the Court found the freely negotiated contractual term concerning arbitration of employment discrimination claims qualified as a condition of employment.¹⁹⁸ In addition, the Court felt the arbitration provision unambiguously required the respondents to arbitrate their age-discrimination claims.¹⁹⁹ Because the Court found the ADEA did not remove age-discrimination grievances from the NLRA’s broad sweep, it held that the arbitration provision should be enforced.²⁰⁰

The *14 Penn Plaza* decision is significant because it reconciled the *Gardner-Denver* and *Gilmer* decisions and eliminated lingering confusion. In *Gardner-Denver*, the Court held that a collective bargaining agreement could not waive covered workers’ rights to a judicial forum for congressionally created causes of action.²⁰¹ In *Gilmer*, on the other hand, the Court held that an employee who had individually agreed to waive his right to a federal forum could be compelled to arbitrate a federal age-discrimination claim.²⁰² In *14 Penn Plaza*, the Second Circuit held that while an individual can freely choose compulsory arbitration, a labor union cannot collectively bargain for arbitration on behalf of its members.²⁰³

195. *Id.* at ___, 129 S. Ct. at 1462–63.

196. *Id.* at ___, 129 S. Ct. at 1464.

197. *Id.*

198. *Id.* (citing 29 U.S.C. § 159(a) (2006)).

199. *Id.* at ___, 129 S. Ct. at 1466.

200. *Id.*

201. 415 U.S. 36, 49–51 (1974).

202. 500 U.S. 20, 33–35 (1991).

203. *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 93–94 (2d Cir. 2007).

The Supreme Court, however, stated clearly that *Gilmer* applies to collective-bargaining situations, noting that “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.”²⁰⁴ The Court added that *14 Penn Plaza* does not contradict *Gardner-Denver*, as *Gardner-Denver* “did not involve the issue of the enforceability of an agreement to arbitrate statutory claims.”²⁰⁵ Instead, *Gardner-Denver* “involved the quite different issue [of] whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.”²⁰⁶ The arbitration provision at issue in *14 Penn Plaza* expressly covered both statutory and contractual discrimination claims.²⁰⁷

Of course, arbitration of ADEA claims “does not waive the statutory right to be free from workplace age discrimination.”²⁰⁸ Arbitration of ADEA claims only waives the right to seek relief from a court in the first instance.²⁰⁹ The Court noted that any concern that a union may subordinate an individual employee’s interests to the collective interests of all employees in the union is not an appropriate justification for reading a qualification into the ADEA that does not actually exist.²¹⁰ Predictably, the Court reasoned that Congress, not the judiciary, should amend the ADEA to address the conflict-of-interest concern identified in the *Gardner-Denver* line of cases.²¹¹

VI. RESTRICTIVE COVENANTS

Though it is regarded as an employer-friendly state recognizing only a very narrow exception to the employment-at-will doctrine, Virginia has long disfavored covenants not to compete.²¹² The Fairfax County Circuit Court bolstered this position in *Strategic*

204. *14 Penn Plaza*, 556 U.S. at ___, 129 S. Ct. at 1465.

205. *Id.* at ___, 129 S. Ct. at 1468 (quoting *Gilmer*, 500 U.S. at 35).

206. *Id.*

207. *Id.* at ___, 129 S. Ct. at 1469.

208. *Id.* In clarifying that arbitration does not waive such statutory rights, the Court shed light on dicta in the *Gardner-Denver* line of cases concerning the use of arbitration to assert statutory antidiscrimination rights. *See id.*

209. *Id.*

210. *Id.* at ___, 129 S. Ct. at 1472.

211. *Id.*

212. *See Modern Env'ts, Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002).

Enterprise Solutions, Inc. v. Ikuma, finding the non-competition, non-solicitation, and no-contact clauses at issue overbroad and unenforceable.²¹³

Defendant Akira Ikuma was an employee for Plaintiff Strategic Enterprise Solutions (“SE Solutions”), which provides consulting services to government and private sector clients, including the Department of Homeland Security (“DHS”).²¹⁴ On January 2, 2008, following almost eighteen months of employment, Ikuma informed SE Solutions of his intent to resign to work for Booz Allen Hamilton (“BAH”), which also provided services to DHS.²¹⁵ In May of 2008, “Ikuma began contacting employees of SE Solutions who were providing services to DHS,” informing the employees of job opportunities at BAH.²¹⁶ In response, SE Solutions initiated a lawsuit seeking, among other things, a declaratory judgment that the non-competition, non-solicitation, and no-contact clauses in the employment agreement (“Agreement”) Ikuma signed were enforceable.²¹⁷ SE Solutions also sought temporary and permanent injunctions against Ikuma.²¹⁸ Ikuma demurred to all causes of action.²¹⁹

The court began its analysis by reiterating the familiar standards governing the enforceability of non-competition agreements in Virginia.²²⁰ Restrictive covenants “are not favored in Virginia” and must be evaluated from the perspective of the employer, the employee, and public policy.²²¹ The restraint in the covenant must be “no greater than necessary to protect the employer in some legitimate business interest,” not “unduly harsh and oppressive in curtailing [the employee’s] legitimate efforts to earn a livelihood,” and must not be against “sound public policy.”²²² The court identified three factors Virginia courts use to assess the reasonableness of restrictive covenants: “(1) the duration of the restraint; (2) the geographic scope of the restraint;

213. No. 2008-8153, 2008 Va. Cir. LEXIS 144, at *7–12 (Cir. Ct. Oct. 7, 2008) (Fairfax County).

214. *Id.* at *1–2.

215. *Id.* at *2.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at *3.

220. *See id.* at *4–5.

221. *See id.*

222. *Id.* at *5.

and (3) the scope and extent of the activity being restricted.”²²³ Typically, such restrictive covenants are overbroad if they prohibit an employee from working for a competitor in *any* capacity.²²⁴

The Agreement between Ikuma and SE Solutions contained three paragraphs constituting restrictions on competition.²²⁵ The first paragraph was a non-compete clause prohibiting the departing employee from “actively engag[ing] (whether as an employee, individual, proprietorship, partner, stockholder, associate, or consultant) in any business in competition with Employer, as Employer’s business is constituted within one year preceding the date of termination, expiration, and/or nonrenewal of this Agreement.”²²⁶ The court found the scope of the restriction to be unreasonable because the clause was completely “devoid of any qualifying language regarding the employee’s position with the employer or with the competitor,” thereby effectively prohibiting Ikuma from working for a competing business in any capacity.²²⁷ The language of the non-compete paragraph was also unreasonable because it required an employee to know the entire scope of the employer’s business to determine the universe of competitors.²²⁸

The second paragraph was a non-solicitation clause prohibiting the departing employee from “*voluntarily or involuntarily, directly or indirectly, solicit[ing], call[ing] upon or otherwise communicat[ing]* with any customers of Employer for which Employer performed services or sold product[s].”²²⁹ The appropriate inquiry for assessing non-solicitation covenants is “whether or not the employer is protecting a legitimate business interest and whether or not this protection is overly burdensome on the employee.”²³⁰ The

223. *Id.* (citing *Simmons v. Miller*, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001)).

224. *Id.* at *5–6 (citing *Motion Control Sys., Inc. v. East*, 262 Va. 33, 37–38, 546 S.E.2d 424, 426 (2001)); *see id.* at *6–7 (citing *Omniplex World Servs. Corp. v. US Investigations Servs.*, 270 Va. 246, 249–50, 618 S.E.2d 340, 342 (2005); *Modern Env’ts v. Stinnett*, 263 Va. 491, 493–94, 561 S.E.2d 694, 695 (2002)).

225. *Id.* at *4.

226. *Id.* at *7.

227. *Id.* at *7–8. The court used the ever-present “janitor” example in its rationale: “Under this Agreement, Mr. Ikuma could not be employed by BAH as a janitor, solely because BAH is a competitor of SE Solutions.” *Id.* at *8.

228. *Id.* at *8.

229. *Id.* at *9–10.

230. *Id.* at *8–9. The test for reasonableness of non-solicitation clauses is the same as that for non-compete clauses. *Id.* at *8 (citing *Foti v. Cook*, 220 Va. 800, 805, 263 S.E.2d 430, 433 (1980)).

court held the language of the non-solicitation clause—particularly the phrase “or otherwise communicate with”—was not narrowly tailored, because it plainly prohibited Ikuma from communicating *in any way* with any customers of SE Solutions.²³¹ For that reason, the clause was overly broad and unenforceable.²³²

Finally, the court considered the no-contact clause in Ikuma’s Agreement (i.e., a provision prohibiting solicitation of current SE Solutions employees), the relevant parts of which read:

[D]uring the term of employment and for two years after the date of termination, expiration, and/or nonrenewal of this Agreement, Employee will not in any way, directly or indirectly . . . hire or engage any employee of Employer or any former employee of Employer whose employment with Employer ceased less than two (2) years before the date of such hiring or engagement.²³³

The court held that because this language “in no way limits its reach to keeping employees from competing directly with SE Solutions,” as required under Virginia law, it was overbroad and unenforceable.²³⁴

In its opinion, the court also noted that Virginia does not allow “blue penciling” of contracts.²³⁵ While the Supreme Court of Virginia has not expressly rejected reformation in the context of overly broad portions of restrictive covenants, “it is clear from the restrictive covenant jurisprudence in Virginia that the Court does not entertain the notion that these disfavored restraints on trade should be reformed by the judiciary, rather they construe them against the employer when any ambiguity arises.”²³⁶ Moreover,

231. *Id.* at *10 (“[I]f Mr. Ikuma saw a former DHS co-worker at the grocery store, and the former co-worker spoke to him casually, asking about his family, Mr. Ikuma would be prohibited from speaking to him under this clause.”).

232. *Id.* at *10; see *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 239 Va. 369, 373, 389 S.E.2d 467, 469–70 (1990) (upholding a restrictive covenant because it was narrowly tailored to cover only those services actually rendered by the former employee to specific customers of the employer).

233. *Id.* at *10–12.

234. *Id.* at *11–12, 15. By way of analogy, the court reasoned that under this paragraph, even though Employees A and B had never worked at SE Solutions at the same time and had never met one another, Employee A could not hire Employee B at a pizza parlor that Employee A opened after her employment with SE Solutions ended. *Id.* at *11–12.

235. *Id.* at *12–13. In other words, unlike many jurisdictions, Virginia courts will not re-write an overbroad or otherwise unenforceable restriction in a contract in order to make it reasonable where it is clear from the terms of the agreement that the provision is severable. *Id.*

236. *Id.* at *12–13 (citing *Modern Env’ts, Inc. v. Stinnett*, 263 Va. 491, 493–94, 561

circuit courts throughout Virginia “have refused to ‘blue pencil’ non-compete clauses.”²³⁷

Because the three paragraphs in Ikuma’s Agreement were overbroad and did not contain enforceable restrictions on competition, and because it does not blue pencil, the court found these provisions unenforceable as a matter of law.²³⁸ This decision signals that restrictive covenants such as these will be enforced only when they provide clear guidance to the departing employee as to what is and is not permitted, and are as narrowly tailored as possible to address an employer’s legitimate, protectable interest. To the extent the restrictive covenants are vague, broad, or punitive in nature, they will be struck in favor of the departing employee’s ability to earn a living.

In addition to addressing enforceability, Virginia courts have ruled recently on issues such as choice of law and proper execution of restrictive covenants. In *Senture, LLC v. Dietrich*, the Eastern District of Virginia analyzed whether Kentucky law should govern a restrictive covenant pursuant to a forum selection clause in an employment agreement.²³⁹

The two defendants, Joseph Dietrich and Thomas Swider, were employees of Senture, LLC, a Kentucky-based company that provides support for national security programs.²⁴⁰ When Dietrich and Swider left Senture, they went to work for SAIC Inc., a competitor.²⁴¹ Senture argued that Dietrich and Swider disclosed confidential information to SAIC, resulting in a decrease in business for Senture and “newfound success” for SAIC.²⁴² Senture filed suit against Dietrich and Swider alleging, among other things, that they breached the covenant not to compete and the confidentiality provisions of their employment agreements.²⁴³ Dietrich and Swider argued that although their employment agreements stated that Kentucky law would govern, the court

S.E.2d 694, 695 (2002)).

237. *Id.* at *13 (citing *Pais v. Automation Prods., Inc.*, 36 Va. Cir. 230, 239 (Cir. Ct. 1995) (Newport News City).

238. *See id.* at *15.

239. 575 F. Supp. 2d 724, 726 (E.D. Va. 2008).

240. *Id.*

241. *Id.*

242. *See id.*

243. *Id.*

should apply Virginia law to determine the validity of the restrictive covenants.²⁴⁴

Dietrich and Swider argued for Virginia law on grounds that the employment agreement was an “adhesion contract,” and because Kentucky law conflicts with Virginia public policy.²⁴⁵ The court rejected those arguments and applied Kentucky law.²⁴⁶ In so doing, the court summarized its position on forum selection clauses: they are “prima facie valid,” and “absent a showing that the provisions of the clause ‘are unfair or unreasonable, or are affected by fraud or unequal bargaining power,’ . . . or that the parties did not clearly intend for the designated law to govern the terms of the contract,” the court will honor the parties’ selection.²⁴⁷

Because (1) there was no evidence that Senture “did not clearly intend for Kentucky law to apply;” (2) Dietrich and Swider did not argue that the choice of Kentucky law was unreasonable; and (3) Dietrich and Swider did not argue that Senture’s “purpose in choosing Kentucky law was in any way illegal or fraudulent,” Virginia choice of law rules dictated that Kentucky law would apply unless it was contrary to Virginia public policy.²⁴⁸ Dietrich and Swider, however, failed to cite any public policy in Virginia prohibiting the court from using Kentucky law to determine the validity of the restrictive covenants in their employment agreements.²⁴⁹ Applying Kentucky law, the court found that the non-compete clause was not overly broad in its temporal scope of one year or in geographic scope—even though the restricted area encompassed the entire United States.²⁵⁰

244. *Id.*

245. *Id.*

246. *See id.* at 727.

247. *Id.* (quoting *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 342, 397 S.E.2d 804, 807 (1990); citing *Black v. Powers*, 48 Va. App. 113, 130, 628 S.E.2d 546, 555 (Ct. App. 2006)).

248. *Id.* The court rejected Dietrich and Snider’s argument that employment contracts are always “adhesion contracts” (that is, a “standard form contract, prepared by one party and presented to a weaker party”) and are inherently unfair. *Id.* at 727 n.1. According to the court, this argument was wholly without merit because, where “an employee has the freedom to consider employment elsewhere and is not bound to continue working for his current employer, an employment agreement will not be considered an adhesion contract.” *Id.*

249. *Id.* at 727.

250. *Id.* at 728.

In *Workflow Solutions v. Lewis*, the Norfolk Circuit Court established that, although the intent of the parties to be bound by restrictive covenants might be clear, proper execution of restrictive covenants is essential.²⁵¹ Defendant Mike Lewis resigned from his employment at Workflow Solutions, LLC (“Workflow”) in December 2003 due to threatened litigation by Workflow over alleged violations of restrictive covenants.²⁵² Subsequently, the parties signed an agreement stating:

[Mr. Lewis] shall be employed by [Workflow] . . . on an “at will” basis for a six-month “trial period,” after which the parties may continue if that is the mutual desire of [Workflow] and [Mr. Lewis]: *if employment continues, [Mr. Lewis] shall execute a new employment agreement continuing [the] restrictive covenants in the form attached as Exhibit A.*²⁵³

Exhibit A was the employment agreement Lewis signed prior to his resignation, which contained restrictive covenants, including a “non-solicitation of customers” provision.²⁵⁴

Lewis worked for Workflow from the date of the agreement through July 18, 2008—over four years.²⁵⁵ During that time, Workflow never presented Lewis with a new employment agreement containing the restrictive covenants as indicated in the March 2004 agreement.²⁵⁶ Despite this fact, Workflow sought an order from the court that would (1) force Lewis to sign an agreement containing the restrictive covenants and (2) enjoin Lewis from competing with Workflow or disclosing its confidential information.²⁵⁷

Workflow argued that even though it did not present (and Lewis did not sign) a new employment agreement containing restrictive covenants, Lewis was bound by the original restrictive covenants since he worked for longer than the six-month trial period.²⁵⁸ After underscoring Virginia’s reluctance to enforce

251. See No. CL08-4634, 2008 Va. Cir. LEXIS 186, at *8–9 (Cir. Ct. Dec. 12, 2008) (Norfolk City).

252. *Id.* at *1.

253. *Id.* at *1–2 (emphasis added).

254. *Id.* at *2.

255. *Id.* at *2–3.

256. *Id.* at *3.

257. *Id.*

258. *Id.* at *3–4.

restrictive covenants,²⁵⁹ the court held that “it cannot create or enforce a new agreement that was never presented to Lewis and that he did not sign, even though he benefited from working at Workflow.”²⁶⁰ Especially considering that restrictive covenants are not favored in Virginia, the court refused to “re-write the parties’ settlement agreement to create new restrictive covenants because the covenants . . . must be strictly construed.”²⁶¹ Thus, although the parties agreed in writing to execute and be bound by restrictive covenants at a discrete point in time, and the assent of the departing employee to some restrictions following four years of employment was clear, the court was unwilling to impose a prior version of restrictions based on the parties’ failure to execute a new contract with new restrictions.

VII. DEFAMATION

In early 2009, the Supreme Court of Virginia made summary judgment more difficult for those defending defamation claims. Specifically, a defendant can no longer obtain summary judgment by establishing the truth of the allegedly defamatory statements based on the plaintiff’s own admissions regarding the truth of the statements.²⁶² Summary judgment is only appropriate if a plaintiff admits the truth of the statements, as well as all “fair inferences, implications, and insinuations that can be drawn from” the statements.²⁶³

In *Hyland v. Raytheon Technical Services Co.*, the Supreme Court of Virginia held that “the factual portions of an allegedly defamatory statement may not be evaluated for truth or falsity in isolation, but must be considered in view of any accompanying opinion and other stated facts.”²⁶⁴ The plaintiff in *Hyland* brought

259. *See id.* at *6–9 (citing *Persinger & Co. v. Larowe*, 252 Va. 404, 405, 477 S.E.2d 506, 507 (1996) (holding that the defendant was not bound by a non-compete clause in an agreement that he never signed, even though he served as a partner and held a partnership interest for several months); *Profl Heating & Cooling, Inc. v. Smith*, 64 Va. Cir. 313, 313–14 (Cir. Ct. 2004) (Norfolk City) (sustaining defendant’s demurrer because defendant had not signed a second “No Piracy Agreement” after he returned to work for his employer for a second time)).

260. *Id.* at *9.

261. *Id.* at *9–10.

262. *See Hyland v. Raytheon Technical Servs. Co. (Hyland II)*, 277 Va. 40, 48, 670 S.E.2d 746, 751 (2009).

263. *Id.*

264. *Id.*

a defamation claim against her former employer, Raytheon Technical Services Company ("Raytheon"), and its president for five statements made by him concerning the plaintiff's job performance.²⁶⁵ The plaintiff worked for Raytheon for twenty-one years, and was a senior vice president and general manager of a particular division at the time of her termination.²⁶⁶

In 2000, despite her division having lost a bid for a large government contract, the plaintiff received a positive performance evaluation from the president.²⁶⁷ Then, in 2002, even though her division lost another large government contract bid, the president promoted the plaintiff as part of a reorganization.²⁶⁸ Sometime after 2002, however, the president learned of some negative comments the plaintiff made about him to an outside consulting firm hired by Raytheon to assess the job performance of executive-level employees.²⁶⁹ When it came time for the plaintiff's next performance assessment, the president gave her the first negative evaluation she ever received with the company, and eventually terminated her employment.²⁷⁰

The jury returned a verdict for the plaintiff, awarding her \$1,850,000.²⁷¹ On the first appeal, the Supreme Court of Virginia held that only two of the five statements submitted to the jury were actionable for defamation.²⁷² Because the court could not determine which of the five originally submitted statements served as the basis for the jury's award, the court ordered a new trial limited to consideration of the two actionable statements.²⁷³

265. *Id.* at 42–43, 670 S.E.2d at 748.

266. *Id.* at 42, 670 S.E.2d at 748.

267. *Id.* at 43, 670 S.E.2d at 748.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* (citing *Raytheon Technical Servs. Co. v. Hyland (Hyland I)*, 273 Va. 292, 296, 641 S.E.2d 84, 86 (2007)).

273. *Hyland I*, 273 Va. at 306, 641 S.E.2d at 92. The first actionable statement was the president's statement that, "Cynthia lead [sic] [Raytheon] 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." *Id.* at 304, 641 S.E.2d at 91. The president's second actionable statement was, "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 profit by 24%." *Id.* The court found that both of these statements were actionable because they were subject to empirical proof and

On remand, the circuit court granted Raytheon's motion for summary judgment, finding that the plaintiff's own admissions or concessions regarding the truth of the two allegedly defamatory statements proved they were true as a matter of law.²⁷⁴ The plaintiff appealed on the grounds that the court failed to consider each allegedly defamatory statement as a whole, which removed from consideration any inferences or implications arising from each statement in its entirety.²⁷⁵ The Supreme Court of Virginia agreed with the plaintiff and remanded the case again.²⁷⁶

On the second appeal, the court stated that although statements of opinion are not actionable as defamation, factual statements made in support of an opinion, or statements made by inference, implication, or insinuation, can form the basis of a defamation claim.²⁷⁷ For this reason, neither a court nor a jury may "isolate one portion of the statement at issue from another portion," but instead "must consider the statement as a whole."²⁷⁸

The court noted that it is the role of judges to determine, as a matter of law, whether an allegedly defamatory statement contains provably false factual statements or is merely a statement of opinion.²⁷⁹ Following this initial determination, it is ordinarily for the jury to resolve whether the plaintiff has, in fact, proven

were not mere opinions. *Id.* at 304–05, 641 S.E.2d at 91.

274. *Hyland II*, 277 Va. at 44–45, 670 S.E.2d at 749. In reaching this conclusion, the circuit court identified the president's first statement as having two separate factual components: (1) "[w]hether Hyland led the protest of the TSS contract award and the TSA procurement and was responsible for 'these visible losses,'" and (2) whether "losses from those projects created gaps in the company's plans and the financial performance of the business units which she oversaw." *Id.* at 45, 670 S.E.2d at 749. Because the plaintiff admitted that she "oversaw the efforts of the proposal team's support to the [TSS] protest," was the "Proposal Manager" in charge of acquiring the contract, and that the loss of the TSS contract "created a shortfall" and "left a gap in sales revenue," the circuit court found that the president's statement was true and thus, not defamatory as a matter of law. *Id.* at 45, 670 S.E.2d at 749–50. Similarly, with regards to the president's second statement, the circuit court determined that the factual component of the statement was "[w]hether the business unit missed its goals by the stated percentages," and not whether the plaintiff was to blame. *Id.* at 45, 670 S.E.2d at 750. Because the plaintiff conceded that the president's characterization of the *extent of losses* for 2002 was correct, the circuit court found that this factual component was also true, and as such, the statement was not defamatory. *Id.* at 45–46, 670 S.E.2d at 750.

275. *Id.* at 46, 670 S.E.2d at 750–51.

276. *Id.* at 49, 670 S.E.2d at 752.

277. *Id.* at 47, 670 S.E.2d at 750–51.

278. *Id.*, 670 S.E.2d at 751.

279. *Id.* at 48, 670 S.E.2d at 751.

that the statement is false.²⁸⁰ Consequently, the trial judge may only award summary judgment to a defendant on grounds that allegedly defamatory statements are true, only when a plaintiff unequivocally admits the truth of the statements, *including* the fair inferences, implications, and insinuations that can be drawn from the statements.²⁸¹ Although the plaintiff in *Hyland* conceded the truth of certain factual components of the president's statements, she did not concede the truth of the inferences or implications arising from these statements.²⁸² "By awarding summary judgment to Raytheon in the absence of such admissions, the circuit court deprived Hyland of the opportunity to present evidence to a jury to establish the falsity of the alleged defamatory statements" and to have the jury consider the harmful effect of the president's statements as a whole.²⁸³

VIII. SIGNIFICANT LEGISLATIVE DEVELOPMENTS

Few developments or changes in labor and employment law occurred in the General Assembly this past year. One significant development was a bill providing that military members' spouses who quit their jobs if the military member is transferred to a new location may be eligible for unemployment benefits.²⁸⁴ In addition, employers now face different requirements for paying employees through debit cards,²⁸⁵ and minors at least seventeen-years-old may drive or assist drivers of trucks and commercial vehicles if they meet several requirements.²⁸⁶ Finally, Virginia enacted new "mini-COBRA" legislation to ensure that the federal subsidy for COBRA premiums is also available to small health plans not covered by COBRA.²⁸⁷ However, a bill that would have had greater impact on Virginia employers—by prohibiting employers from asking existing or prospective employees about their arrest and

280. *Id.*

281. *Id.*

282. *Id.* at 48–49, 670 S.E.2d at 751–52.

283. *Id.* at 49, 670 S.E.2d at 752.

284. S.B. 1495, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of May 6, 2009, ch. 878, 2009 Va. Acts ___).

285. *See* VA. CODE ANN. § 40.1-29(B) (Cum. Supp. 2009).

286. VA. CODE ANN. § 40.1-100(A)(7) (Cum. Supp. 2009).

287. Act of Apr. 8, 2009, ch. 796, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 38.2-3541.1 (Cum. Supp. 2009)).

conviction records older than eight years or about non-violent felonies—failed to emerge from the House.²⁸⁸

A. *Unemployment Compensation for Military Spouses*

A new law passed by the Virginia General Assembly provides that good cause for leaving employment exists for individuals who leave voluntarily to accompany spouses on active duty in the United States military to a new location following a military-related assignment.²⁸⁹ Where good cause exists, the individual is eligible to receive unemployment benefits; to qualify, the individual's place of employment must not be readily accessible from the new location.²⁹⁰ This statute applies only if the state to which the spouse is transferred does not have a statute providing that an individual in a similar situation would be leaving work *without* good cause.²⁹¹ This law will become effective only if the federal government appropriates funds for this purpose.²⁹²

B. *Payment of Wages and Salaries by Debit Cards*

The General Assembly amended Virginia Code section 40.1-29 to allow employers to pay employees hired after January 1, 2010 by credit to a prepaid debit card or card account even if "such employee has not affirmatively consented" to that method of payment, but only if the employee fails to designate an account to which wages can be deposited through electronic automated fund transfer.²⁹³ To avail itself of this method of payment, the employer must

arrange[] for such card or card account to be issued through a network system through which the employee shall have the ability to make at least one free withdrawal or transfer per pay period, which withdrawal may be for any sum in such card or card account as the

288. See H.B. 1815, Va. Gen. Assembly (Reg. Sess. 2009).

289. See Act of May 6, 2009, ch. 878, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 60.2-528 (Cum. Supp. 2009)).

290. VA. CODE ANN. § 60.2-528(C)(9)(iii) (Cum. Supp. 2009).

291. *Id.* § 60.2-528(C)(9)(iv) (Cum. Supp. 2009).

292. *Id.* § 60.2-528(C)(9)(iv) ed. note (Cum. Supp. 2009).

293. Act of Mar. 30, 2009, ch. 728, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 40.1-29(B) (Cum. Supp. 2009)).

employee may elect, using such card or card account at financial institutions participating in such network system.²⁹⁴

For employees hired before January 1, 2010 and those who provide an account suitable for electronic automated fund transfer, employers must continue to provide full written disclosure and obtain affirmative consent before paying wages through a debit card.²⁹⁵ Prior to this amendment, employers could only pay employees through debit cards without consent if the employee (1) worked at a facility operating amusement devices under Virginia Code section 36-98.3 and (2) failed to provide an account.²⁹⁶

C. *Employment of Minors*

Finally, amendments to Virginia Code section 40.1-100 expand employment opportunities for children at least seventeen-years-old wanting to drive or assist those who drive trucks and commercial vehicles.²⁹⁷ Prior to the amendments, children seventeen years and older could drive (or assist those who drive) trucks and commercial vehicles with two axles or less.²⁹⁸ Although the amendment removes the axle limitation, it imposes a number of other requirements.²⁹⁹ The General Assembly also amended Virginia Code section 40.1-100 to allow seventeen-year-olds to drive (or assist those who drive) trucks and commercial vehicles on public highways if, among other requirements, the driving occurs during daylight hours, takes place within a thirty-mile radius of the employee's place of employment, and is only occasional and incidental to the employee's employment.³⁰⁰

D. *Virginia's Mini-COBRA Legislation*

The American Recovery and Reinvestment Act of 2009 amended the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") to provide a premium subsidy for certain

294. VA. CODE ANN. § 40.1-29(B) (Cum. Supp. 2009).

295. *Id.*

296. *Id.* § 40.1-29 (Repl. Vol. 2002).

297. Act of Mar. 27, 2009, ch. 218, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 40.1-100(A)(7) (Cum. Supp. 2009)).

298. VA. CODE ANN. § 40.1-100(A)(7) (Repl. Vol. 2002).

299. Act of Mar. 27, 2009, ch. 218, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 40.1-100(A)(7) (Cum. Supp. 2009)).

300. *Id.*

individuals who lose health coverage in connection with an involuntary termination.³⁰¹ This amendment affects all employers sponsoring a group health plan that have terminated or laid off an employee on or after September 1, 2008.³⁰² Because COBRA does not apply to small health plans where the employer sponsoring the plan has fewer than twenty employees,³⁰³ the General Assembly enacted Virginia Code section 38.2-3541.1 on April 8, 2009, to ensure this new premium subsidy would be available to small health plans not covered by COBRA.³⁰⁴ Virginia Code section 38.2-3541.1 requires that certain employees of small employers, whose group health insurance coverage does not provide for continuation of coverage under COBRA, be offered the option to continue their existing group health insurance coverage for up to nine months following termination or notification pursuant to the statute.³⁰⁵ Virginia employees are eligible for this premium assistance subsidy if they (1) are involuntarily terminated between September 1, 2008 and December 31, 2009; (2) have 2009 annual income less than \$145,000 for individuals and \$250,000 for joint filers; (3) have a right to continued coverage under the provisions of COBRA or Virginia's Mini-COBRA; and (4) are ineligible for Medicare or coverage under another group plan.³⁰⁶

IX. CONCLUSION

While there are several recent developments in labor and employment law in the federal arena, there are few significant changes at the state level, either judicially or legislatively. While employees bringing retaliation claims might enjoy expanded opportunities in federal court, employees advancing claims under the ADEA will be confronted with a higher burden to avoid summary judgment. With regard to non-competition agreements,

301. Pub. L. No. 115-5, 123 Stat. 115 (2009).

302. *See id.* § 3001(a)(3), 123 Stat. at 457.

303. *See* 29 U.S.C. § 1161(b) (2006).

304. Act of Apr. 8, 2009, ch. 796, 2009 Va. Acts ___ (codified as amended at VA. CODE ANN. § 38.2-3541.1 (Cum. Supp. 2009)).

305. VA. CODE ANN. § 38.2-3521.1(A)(1) (Cum. Supp. 2009).

306. *Id.* § 38.2-3521.1. This section incorporates the eligibility requirements of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 139C(b), 3001(a), 123 Stat. 115, 455-65 (2009).

although Virginia remains an employer-friendly state, Virginia courts continue to disfavor restrictive covenants. Finally, the General Assembly passed few laws that will impact the labor and employment field this past year.