

Labor & Employment Law Forum

Volume 3 | Issue 2

Article 2

1-1-2013

The ABCs of Common Law Wrongful Termination Claims in the Washington Metropolitan Region

R. Scott Oswald

Michael Vogelsang Jr

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/lelb>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Oswald, R. Scott, and Michael Vogelsang, Jr. "The ABCs of Common Law Wrongful Termination Claims In The Washington Metropolitan Region." *Labor & Employment Law Forum* 3, no. 2 (2013): 197-262.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Labor & Employment Law Forum* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

THE ABCS OF COMMON LAW WRONGFUL TERMINATION CLAIMS IN THE WASHINGTON METROPOLITAN REGION

R. SCOTT OSWALD & MICHAEL L. VOGELSANG, JR.*

I. INTRODUCTION

While there are numerous statutes protecting employees' job security, legal gaps still exist that render employees vulnerable in many ways. This is especially true given the at-will nature of most employment in the United States. To fill these gaps, most courts—including those of Maryland, Virginia, and the District of Columbia— created common law tort actions for wrongful discharge in violation of public policy. Though the elements of these claims are generally similar, each jurisdiction establishes important limitations that employment attorneys must understand. The available sources of public policy vary and there are many statutory remedies primed to preempt related common law tort actions. The damages available under wrongful termination do not suffer from the same caps as some statutory claims, and the statutes of limitations fall in terms of years instead of days. Nevertheless, some plaintiffs can still strategically benefit from bringing actions under both the common law and state or federal statutes.

This article outlines the history of the “wrongful termination in violation of public policy” tort, with a specific focus on Maryland, Virginia, and Washington, D.C.¹ Following the historical background is a discussion of the elements of wrongful termination claims in those three jurisdictions, including the various potential sources of public policy.² After a brief description of potential defenses, including preemption and available damages, I conclude with practical advice and tips for litigating these types of claims.³

* R. Scott Oswald is the Managing Principal at The Employment Law Group, PC in Washington, D.C. where they litigate wrongful termination, discrimination, whistleblower retaliation, and other employment-related actions on behalf of employees. Michael Lee Vogelsang, Jr., is a Litigation Associate at The Employment Law Group.

¹ See *infra* Part II-III (discussing the history and origins of wrongful discharge claims in Maryland, Virginia and the District of Columbia).

² See *infra* Part IV-VI (discussing the specific elements of wrongful discharge in Maryland, Virginia, and the District of Columbia, and the similarities and differences between the claims in each jurisdiction).

³ See *infra* Part VII-XII (describing litigation in wrongful discharge cases including defenses and damages stratified by offenses).

II. HISTORY OF THE AT-WILL DOCTRINE AND PUBLIC POLICY EXCEPTION

The doctrine of at-will employment first appeared as a statement in a legal treatise by Horace C. Wood, *Master and Servant* § 134.⁴ In older cases, courts frequently referred to the at-will doctrine as “Wood’s Rule.” Not long after Wood’s treatise appeared, various courts began citing the rule in his treatise.⁵ Thus, the rule quickly became accepted law.⁶ The employment at-will doctrine is still law in the majority of states in the country.⁷

The preference of *laissez-faire* capitalism and economic expansion of the Industrial Revolution arguably influenced the creation of the at-will doctrine.⁸ The new rule also afforded American courts a means by which to develop their own common law rule and reject the English rule, which held that an employment contract for an indefinite period extended for one year unless there was reasonable cause for discharge.⁹

The at-will doctrine was almost universal at the beginning of the twentieth century.¹⁰ The Supreme Court even temporarily afforded it constitutional protection.¹¹ However, the Court retreated from this position

⁴ H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT. COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES 272 (1877) (affirming that American hirings are presumed to be at-will and indefinite unless the servant can prove otherwise).

⁵ See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 886-87 (Mich. 1980) (describing Wood’s rule as one which creates a higher burden on the servant to prove the existence of an express contract for an agreed upon term in order to sustain a claim of wrongful termination).

⁶ See, e.g., *McCullough Iron Co. v. Carpenter*, 11 A. 176, 178-179 (Md. 1887) (“[Wood’s treatise] is an American authority of high repute”); *East Line & R.R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888) (stating that the generally accepted rule of employment length, absent an unambiguous contract, is “at-will.”); *Martin v. N.Y. Life Ins. Co.*, 42 N.E. 416, 417 (N.Y. 1895) (“we think the rule is correctly stated by Mr. Wood, and it has been adopted in a number of states.”); *Greer v. Arlington Mills Mfg. Co.*, 43 A. 609, 610 (Del. Super. Ct. 1899) (“Wood . . . very clearly states the difference between the rule which obtains in this country and the one in England, and I can find it nowhere more intelligently and satisfactorily stated.”); *Harrod v. Wineman*, 125 N.W. 812, 813 (Iowa 1910) (“in this country it is held by an overwhelming weight of authority that a contract of indefinite employment may be abandoned at will by either party without incurring any liability to the other for damages. The cases are too numerous to justify citation.”).

⁷ See, e.g., Michael J. Phillips, *Disclaimers of Wrongful Discharge Liability: Time for a Crackdown?*, 70 WASH. U. L. Q. 1131, 1132 (1992) (arguing that all states recognize at-will employment as dominating the employment field, and some even refuse to recognize the exceptions discussed in this Article).

⁸ *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 837 (Wis. 1983).

⁹ *Id.*

¹⁰ See *id.* (describing the dedication of the courts to the at-will employment doctrine throughout the U.S.).

¹¹ See *Adair v. United States*, 208 U.S. 161, 175 (1908) (holding unconstitutional an

in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*.¹²

After President Roosevelt's New Deal economic programs, "Government regulation in the workplace increased dramatically."¹³ "Congress and state legislatures recognized the need to curtail harsh application of the at-will doctrine and stabilize labor relations."¹⁴ Just as the United States began to understand the negative side effects and social costs of the Industrial Revolution, so would courts realize that the at-will doctrine could not operate blindly and unchecked.¹⁵

Eighty-two years after Wood first introduced the at-will doctrine, courts began to carve out certain exceptions to the doctrine.¹⁶ They permitted an action for wrongful discharge, more commonly referred to as wrongful termination, when an employer's decision to dismiss an employee conflicted with some fundamental public policy of the state.¹⁷ The courts held that they should not allow an employer to benefit, at the expense of an employee, from a violation of an important public policy.¹⁸ The first court decision to recognize the public policy exception to the employment at-will doctrine was *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396*.¹⁹ The court in *Petermann* held that an employer cannot discharge an at-will employee because he failed to commit perjury upon its request.²⁰ Doing so would promote illegal conduct and inhibit the performance of justice, neither of which would serve the public good. Judge Fox thus held that it would be contrary to public policy to allow an employer to fire an

act passed by Congress that made it an offense for an interstate carrier to unilaterally discharge an employee because of his membership in a labor organization); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (holding unconstitutional a Kansas state law making it unlawful for employers to forbid employees from becoming or remaining members of a labor organization).

¹² See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (stating that Congress acted within its sphere of constitutional authority when it enacted the National Labor Relations Act with the purpose of preventing employers from engaging in unfair labor practices.).

¹³ See *Brockmeyer*, 335 N.W.2d at 837.

¹⁴ *Id.*

¹⁵ See, e.g., *Peterman v. Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 396*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) ("the right to discharge an employee under [an employment] contract may be limited by statute.").

¹⁶ *Id.*

¹⁷ See, e.g., *id.* (finding that the courts could not condone the at-will termination of an employee by his or her employer based on the former's refusal to commit a felonious act, as it would be contrary to public policy).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

employee because the latter refused to commit a criminal act.²¹ Despite this landmark decision, the *Petermann* case stood alone and ignored for many years.²²

Other state courts in the United States did not begin to affirm the public policy exception to the at-will doctrine until almost two decades after the *Petermann* opinion.²³ One of the first bases for successful wrongful termination claims was in a workers' compensation statute. In *Frampton v. Central Indiana Gas Company*,²⁴ the court held that an employee fired for exercising his statutory right to file a workmen's compensation claim was entitled to damages.²⁵ In *Kelsay v. Motorola, Inc.*,²⁶ the court stressed that Illinois's workers' compensation statute was a public policy of the state and would only be effective if wrongfully discharged employees could maintain a personal action for damages.²⁷ In 1978 and 1979, Pennsylvania courts confirmed causes of action for wrongful termination for taking time off work for jury duty and for refusing to take a polygraph test.²⁸

Two of the most influential wrongful termination cases came out in 1980. That year, the California Supreme Court, in *Tameny v. Atlantic Richfield Company*,²⁹ accepted the reasoning in *Petermann* and found that an employer cannot discharge an employee for refusing to participate in an

²¹ *Id.*

²² *See, e.g.*, *Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588, 591 (Minn. Ct. App. 1986) (listing the state cases recognizing the public policy exception following *Petermann*).

²³ *See, e.g., id.*

²⁴ 291 N.E.2d 425 (Ind. 1973).

²⁵ *See id.* at 428 (proclaiming that a retaliatory discharge following a claim brought under the Indiana Workmen's Compensation Act is not acceptable and employees terminated on this basis will have a private cause of action).

²⁶ 384 N.E.2d 353 (Ind. 1979).

²⁷ *See id.* at 359 (stating that retaliatory discharge for filing of a workers' compensation claim is a great offense against Indiana's public policy, and that requiring greater damages than compensation to the discharged employee may not suffice to discourage the retaliatory practice so that punitive damages may be necessary to maintain deterrence); *see also Sventko v. Kroger Co.*, 245 N.W.2d 151, 153 (Mich. Ct. App. 1976) (holding that an employer is not free to discharge an employee for a reason conflicting with public policy, including sex, race, religion, and retaliation for participation in public social welfare programs); *Brown v. Transcon Lines*, 588 P.2d 1087, 1094-95 (Or. 1978) (holding that an employee discharged on the basis of his application for workers' compensation benefits was entitled to file for common law remedies for wrongful discharge).

²⁸ *See Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 120-21 (Pa. Super. Ct. 1978) (holding that the availability for citizens to partake in jury duty is a recognized and important public good, protected against at-will termination of employment and that the plaintiff has a right to a stated cause of action for wrongful discharge under Pennsylvania law); *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1365 (3d Cir. 1979) (holding that an at will employee fired for refusing to take a polygraph test was entitled to sue his employer for wrongful discharge under Pennsylvania law).

²⁹ 610 P.2d 1330 (Cal. 1980).

illegal scheme to fix retail gasoline prices.³⁰ With language very similar to that of *Petermann*, the court held that employers are not allowed to make an employee's employment contingent on the demand that an employee engage in illegal conduct.³¹ Moreover, it held that if the employer attempts to do so and discharges the employee for refusing, the employee may bring a personal action for wrongful discharge against the employing company.³²

Also in 1980, the New Jersey Supreme Court composed its landmark ruling in *Pierce v. Ortho Pharmaceutical Corp.*³³ It found that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy."³⁴ With this background, it was not long until courts in and around Washington, D.C. joined the trend in confirming the public policy exception to the employment at-will doctrine.

III. ORIGINS OF WRONGFUL TERMINATION ACTIONS IN MARYLAND, VIRGINIA, AND THE DISTRICT OF COLUMBIA

The first wrongful termination case in the region developed in Maryland.³⁵ After providing an extensive overview of case law on the topic from around the county, the Maryland Court of Appeals adopted a new cause of action for wrongful termination in violation of public policy in *Adler v. American Standard Corporation* (hereinafter referred to as an "Adler claim").³⁶ Though the court confirmed the ability to make a wrongful termination claim in the state of Maryland, it found that the plaintiff did not meet his burden when asserting that claim.³⁷ Adler reported illegal practices in the management of the company but failed to make the case that the activities he reported were truly illegal (against public policy).³⁸ Chief Judge Robert C. Murphy recognized that modern economic

³⁰ See *id.* at 1336-37 (holding that an employer may not coerce his employee to commit illegal acts on his behalf and threaten discharge in the process).

³¹ *Id.*

³² *Id.*

³³ 417 A.2d 505 (N.J. 1980).

³⁴ *Id.* at 512.

³⁵ See *Adler v. Am. Standard Corp.*, 432 A.2d 464 (Md. 1981).

³⁶ See *id.* at 471 (explaining that a judicial decision can create a new cause of action, especially when the court finds that current available remedies do not suit the needs of the public).

³⁷ See *id.* at 471 (describing Adler's claim as "too vague, too conclusory, [and] too general" to meet the prima facie burden of demonstrating that the conduct clearly contradicted public policy).

³⁸ *Id.*

conditions differed significantly from those that existed during the birth of the at-will doctrine. He considered:

When terminated without notice, an employee is suddenly faced with an uncertain job future and the difficult prospect of meeting continuing economic obligations. But this circumstance, of itself, hardly warrants adoption of a rule that would forbid termination of at will employees whenever the termination appeared “wrongful” to a court or a jury. *On the other hand, an at will employee’s interest in job security, particularly when continued employment is threatened not by genuine dissatisfaction with job performance but because the employee has refused to act in an unlawful manner or attempted to perform a statutorily prescribed duty, is deserving of recognition.* Equally to be considered is that the employer has an important interest in being able to discharge an at will employee whenever it would be beneficial to his business. Finally, *society as a whole has an interest in ensuring that its laws and important public policies are not contravened.* Any modification of the at will rule must take into account all of these interests.³⁹

In defense of its ability to create a new cause of action in Maryland, the court opined that the at-will doctrine is “subject to modification by judicial decision where this Court finds that it is no longer suitable to the circumstances of our people.”⁴⁰ Changing circumstances compel courts to adopt new rules and create new law.⁴¹ The developing economic and social landscape of the United States required such a change in Maryland law.

Virginia was next to recognize a cause of action for wrongful termination.⁴² With little fanfare, the Supreme Court of Virginia confirmed the public policy exception to the employment at-will doctrine in its 1985 decision of *Bowman v. State Bank of Keysville* (hereinafter referred to as a

³⁹ *Id.* at 41-43 (emphasis added).

⁴⁰ *Id.* (citing *Condore v. Prince George’s Co.*, 289 Md. 516 (1981); *Kline v. Ansell*, 287 Md. 585 (1980)).

⁴¹ *See, e. g.*, *Harris v. Jones*, 281 Md. 560380 A.2d 611, 611-12 (Md. 1977) (discussing the trending majority of state’s recognition of intentional emotional distress as a basis for tort liability and analyzing the case to determine whether Maryland would join those cases recognizing the tort); *Deems v. Western Maryland. Ry. Co.*, 247 Md. 95231 A.2d 514, 521 (Md. 1967) (discussing the history of finding that a man’s right to sue for the loss of his wife’s consortium was originally based on the belief that the woman was the husband’s property, and admitting that, evolving views of women’s rights may require a modification of this common law rule to allow women to sue as well.

⁴² *See* *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985) (deciding to adopt the public policy exception and apply it when an employer discharged an at-will employee who was also a shareholder for exercising his right to vote).

“*Bowman* claim”).⁴³ In *Bowman*, the bank and its board of directors discharged employees who exercised their rights as shareholders in questioning the manner in which the bank obtained proxies.⁴⁴ Ruling in favor of the plaintiffs, Justice A. Christian Compton applied the public policy exception to at-will termination, discussing a trend of state recognition of the need for this exception.⁴⁵ The court qualified that the exception would only be narrowly applied in future at-will violation cases.⁴⁶

Interestingly, the U.S. District Court for the District of Columbia, not the District of Columbia Court of Appeals, first espoused the public policy exception to the at-will employment doctrine in Washington, D.C. In *Ivy v. Army Times Publishing Company*,⁴⁷ the Court of Appeals refused to rehear an unpublished memorandum opinion that dismissed an employee’s complaint.⁴⁸ Following *Taylor v. Greenway Restaurant, Incorporated*⁴⁹ and *Pfeffer v. Ernst*,⁵⁰ the panel held that either party could terminate an employment contract of indefinite duration for any reason.⁵¹ It refused to create an exception to this rule for terminations made in violation of public policy.

In 1986, the District Court for the District of Columbia adopted the Supreme Court of New Jersey’s decision in *Pierce*, holding that D.C. acknowledged the public policy exception to at-will employment termination.⁵² It compared the public policy exception for at-will employment with D.C.’s public policy exception to at-will eviction in landlord-tenant law, and reasoned that these causes of action should be treated similarly.⁵³ Two years later, however, the District Court in *Hall v. Ford*⁵⁴ found that the decision of the D.C. Court of Appeals in *Ivy* confirmed that the District of Columbia did not, in fact, recognize a cause

⁴³ 331 S.E.2d 797 (Va. 1985).

⁴⁴ *Id.* at 799.

⁴⁵ *Id.* at 800 (citing to multiple courts in other jurisdictions that have also recognized the public policy exception).

⁴⁶ *Id.* at 801.

⁴⁷ 428 A.2d 831 (D.C. 1981).

⁴⁸ *See id.* at 831 (refusing to rehear the case without any supporting reasoning in the court’s one paragraph opinion).

⁴⁹ *Taylor v. Greenway Rest. Inc.*, 173 A.2d 211 (D.C. 1961) (holding that a bartender hired at a weekly rate could be terminated at any time and at the will of either party).

⁵⁰ *Pfeffer v. Ernest*, 82 A.2d 763 (D.C. 1951) (stating that employment contracts defining an employment time period are legally terminated at the will of either employee or employer).

⁵¹ *Ivy*, 428 A.2d at 831.

⁵² *Newman v. Legal Services Corp.*, 628 F. Supp. 535, 539 (D.D.C. 1986).

⁵³ *Id.*

of action for wrongful termination and disapproved the decision in *Newman*.⁵⁵

With the decision of *Adams v. George W. Cochran & Company*,⁵⁶ the D.C. Court of Appeals finally recognized a cause of action for wrongful termination.⁵⁷ In the *Adams* case, the defendant wrongfully discharged the plaintiff after he refused to drive a truck that did not have an inspection sticker on its windshield.⁵⁸ The court ruled in favor of the plaintiff.⁵⁹ After reviewing the history of wrongful termination in other jurisdictions, including the landmark *Petermann* and *Tameny* decisions, the court determined that it should “adopt a public policy exception to the general rule that an at-will employee may not sue a former employer in tort for wrongful discharge.”⁶⁰ Similar to the Virginia Supreme Court’s decision in *Bowman*, the *Adams* court warned that they would confine the application of the public policy exception to very narrow cases where an employee’s refusal to violate the law was the exclusive cause for employment termination.⁶¹

In 1997, the D.C. Court of Appeals expanded the *Adams* public policy exception.⁶² In *Carl*, the plaintiff, a part-time nurse, alleged that her employer terminated her because she advocated for patients’ rights and against her employer’s interests and served as an expert witness in medical malpractice cases.⁶³ Ms. Carl did not violate any law, as *Adams* requires.⁶⁴ Nevertheless, the court in *Carl* held that *Adams* did “not foreclose any additional ‘public policy’ exceptions to the general rule that employment contracts are always at will unless they expressly provide otherwise.”⁶⁵

⁵⁴ 856 F.2d 255 (D.C. Cir. 1988).

⁵⁵ *See id.* at 267 (discussing past case law in the District of Columbia and finding that no public policy exception to the at-will employment doctrine has been recognized in the jurisdiction).

⁵⁶ *Adams v. George W. Cochran & Co.*, 597 A.2d 28 (D.C. 1991).

⁵⁷ *See id.* at 33 (adopting the public policy exception to the general at-will employment rule in a case where a company discharged its employee for refusing to break the law).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 34 (confining the application of the exception even further by attributing to the employee the burden of proof that discharge was solely because of the refusal to break the law).

⁶² *See Carl v. Children’s Hosp.*, 702 A.2d 159, 189 (D.C. 1997) (ruling that the courts could expand the public policy exception recognized in *Adams* when appropriate) (hereinafter referred to as a “*Carl* claim”).

⁶³ *Id.* at 160 (specifying that Ms. Carl testified before the Council of the District of Columbia and testified as an expert witness for the plaintiff during the aforementioned medical malpractice cases).

⁶⁴ *See id.* at 162 (conceding that the specific exception set forth in *Adams* may not apply to the plaintiff because her retaliatory firing was not illegal under the D.C. Code).

⁶⁵ *Id.* at 160.

Specifically, the Court decided that the past interpretation of the public policy exception in *Adams* did not preclude this court from applying it to other public policy exceptions when appropriate.⁶⁶ The court commended Judge Schwelb's interpretation of *Adams* in *Gray v. Citizens Bank*,⁶⁷ and concluded that retaliatory termination of an employee for refusing to break the law was not the sole illustration of the public policy exception.⁶⁸ Rather, the courts should be careful to construe the public policy exception narrowly to preserve the rule.⁶⁹ The court thus held that nothing in *Adams* precluded an application of the public policy exception to other sets of facts.⁷⁰

Therefore, employees in D.C. do not have to refuse to engage in illegal conduct in order to have a cause of action for wrongful termination in violation of public policy.

IV. "A" IS FOR *ADLER*: ELEMENTS OF WRONGFUL TERMINATION IN MARYLAND

While *Adler* is the seminal case that confirmed a cause of action for wrongful termination in Maryland, subsequent decisions established the principal types of wrongful termination claims and the elements of a *prima facie* case. Maryland courts hold that the public policy exception to the at-will doctrine applies in three distinct sets of circumstances: (1) where an employee refused to violate the law, (2) where an employee exercised a specific legal right, and (3) where an employee fulfilled a statutory duty.⁷¹

⁶⁶ *See id.* (deciding that the restrictive view in *Adams* can be expanded).

⁶⁷ *Gray v. Citizens Bank*, 602 A.2d 1096, 1098 (D.C. 1992) (Schwelb, J., concurring).

⁶⁸ *See id.* (deciding that the public policy exception should not be so narrowly construed as to allow for only one type of case, but that that question was not presented in *Adams*).

⁶⁹ *See id.* (stating that courts should be conscientious when applying the exception and construe it narrowly).

⁷⁰ *See id.* (holding that when it is warranted, the public policy exception could be applied to situations outside of the *Adams* context).

⁷¹ *See, e.g.,* *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 761 (Md. 1991) (giving legal redress for retaliatory discharge for suing a co-worker for sexual harassment culminating in assault and battery); *Ewing v. Koppers Co.*, 537 A.2d 1173, 1175 (Md. 1988) (holding that discharging an employee because they filed a workers' compensation claim was against Maryland public policy); *Bleich v. Florence Crittenton Serv. of Baltimore, Inc.*, 632 A.2d 463, 471 (Md. Ct. Spec. App. 1993) (holding that carrying out a statutory duty to report child abuse or neglect is required by teachers and that Maryland protects those teachers from any dismissal or discipline for reporting such abuse); *Kessler v. Equity Management, Inc.*, 572 A.2d 1144, 1148 (MD. Ct. Spec. App. 1990) (holding that firing an employee for refusing to commit the tort of invasion of privacy of a third-party was against public policy).

A. Refusing to Engage in Illegal Activity

The *Adler* tort protects employees who were terminated because they refused to engage in illegal activity. Cases construing this form of protected conduct include:

1. Recognizing an *Adler* claim where an employee was discharged after refusing to engage in sexual intercourse with her supervisor and thus “becom[ing] her boss’s prostitute.”⁷²

2. A human resources director alleging that she was terminated because she refused to submit a false insurance claim for health insurance on behalf of an individual who no longer worked for the company, an act that would amount to health care benefit fraud.⁷³

3. Recognizing an *Adler* claim where a resident manager of an apartment complex was terminated because she refused to violate tenants’ constitutional right to privacy by carrying out instructions to enter tenants’ apartments and look through their private papers in their absence.⁷⁴

4. Terminating an employee because she refused her supervisor’s inducements to engage in prostitution.⁷⁵

B. Exercising a Statutory Right

Terminating an employee for exercising her statutory rights can also give rise to an *Adler* claim. Cases construing this form of protected conduct include:

1. Terminating a teacher for exercising his First Amendment right by speaking out about a guard’s unnecessary use of force to stop a fight between inmates;⁷⁶

⁷² See *Insignia Residential Corp. v. Ashton*, 755 A.2d 1080, 1081 (Md. 2000) (upholding the lower courts’ ruling and agreeing that retaliatory discharge was against public policy when it applied to an employee who refused to commit acts of prostitution).

⁷³ See *Magee v. Dan Sources Tech. Serv., Inc.*, 769 A.2d 231, 258 (Ct. Spec. App. Md. 2001) (holding that the employee provided sufficient evidence to establish a nexus between the decision to discharge her and the public policy against health care benefit fraud).

⁷⁴ See *Kessler*, 572 A.2d at 1148 (holding that it was a violation of public policy to fire an employee for refusing to commit the tort of invasion of privacy on behalf of her employer).

⁷⁵ See, e.g., *Perry v. FTData, Inc.*, 198 F. Supp. 2d 699 (D. Md. 2002) (holding that it was against public policy for an employer to discharge an employee for refusing to commit prostitution).

⁷⁶ See, e.g., *De Bleecker v. Montgomery Cnty*, 438 A.2d 1348, 1354 (Md. 1982) (holding that retaliatory discharge for constitutionally protected speech can give rise to a private cause of action).

2. Terminating an employee for refusing to submit to a polygraph test in violation of Maryland Annotated Code Article 100, Section 95, which prohibits lie detector tests as a condition of employment;⁷⁷ and

3. Discharging an employee solely because the employee filed a workers' compensation claim.⁷⁸

C. Fulfilling a Statutory Obligation

Adler protects at-will employees who fulfill a statutory obligation of reporting suspected criminal behavior to law enforcement.⁷⁹ Under this form of protected conduct, the employee must demonstrate that she had a legal obligation or duty to report the employer's unlawful conduct.⁸⁰ Note that in *Wholey v. Sears Roebuck*,⁸¹ the court cautioned against construing this form of protected conduct broadly because the legislature has not created a general whistleblower protection statute protecting employees who investigate and internally report suspected criminal activity.⁸² Cases construing this form of protected conduct include:

1. Recognizing an *Adler* claim where a former teacher at a childcare facility claimed she was terminated for reporting instances of child abuse to a state childcare licensing agency.⁸³

2. A physicist alleging that his employment was terminated because he intended to "blow the whistle" on the hospital's practice of billing Medicare for complex radiation calculation plans when less complex and less expensive calculations were actually being performed, but who had no statutory duty to report the hospital's billing irregularities, failed to state

⁷⁷ See, e.g., *Moniodis v. Cook*, 494 A.2d 212, 216 (Ct. Spec. App. Md. 1985) (stating that express legislative prohibition of termination of an employee for refusing a polygraph is violation of public policy).

⁷⁸ See, e.g., *Ewing v. Koppers Co.*, 537 A.2d 1173, 1175 (Md. 1988) (holding that discharging an employee because they filed a workers' compensation claim was against Maryland public policy).

⁷⁹ See *Makovi v. Sherwin Williams Co.*, 561 A.2d 179, 182-83 (Md. 1989) (discussing the cases reviewed in *Adler* and sorting them into three categories of: 1) Refusing to Commit an Unlawful Act; 2) Performing an Important Public Obligation; and 3) Exercising a Statutory Right or Privilege).

⁸⁰ See, e.g., *Wholey v. Sears Roebuck*, 803 A.2d 482, 494 (Md. 2002) (defining the Legislatures intent as protection for reporting witnesses to be protected for complying with this civil obligation).

⁸¹ 803 A.2d 482 (Md. 2002).

⁸² See *id.* at 496 (describing the protection as limited to private employees reporting the illegal activity externally).

⁸³ See, e.g., *Bleich v. Florence Crittenton Serv. of Baltimore, Inc.*, 632 A.2d 463, 469-70 (Ct. Spec. App. Md. 1993) (describing the plaintiffs' claims as relying on the statutory reporting obligation).

Adler claim.⁸⁴

3. Employees alleging that their employer closed the plant in retaliation for their cooperation in a state and federal prosecution for the employer's toxic waste dumping, could not maintain an *Adler* claim because CERCLA provides its own procedure for employees to seek relief for such retaliation.⁸⁵

D. Elements of an Adler Claim

In order to establish a case of wrongful termination, the employee must prove by a preponderance of the evidence that (1) her employer terminated her; (2) her termination violated a clear mandate of public policy; and (3) there is a causal nexus between the employee's conduct and the employer's decision to fire the employee.⁸⁶

V. "B" IS FOR *BOWMAN*: ELEMENTS OF WRONGFUL TERMINATION IN VIRGINIA

While Virginia first recognized an exception to the at-will employment doctrine in *Bowman*, the Virginia Supreme Court in *Rowan v. Tractor Supply Co.*⁸⁷ confirmed that the "narrow" exception applies in only three discreet circumstances: (1) the exercise of a statutory right, (2) the violation of statutory protections, and (3) the refusal to engage in criminal conduct.⁸⁸ Justice Lacy reasoned:

While virtually every statute expresses a public policy of some sort, we continue to consider this exception to be a "*narrow*" exception and to hold that "termination of an employee in violation of the policy underlying any one [statute] does not automatically give rise to a common law cause of action for wrongful discharge." In *only three circumstances have we concluded that the claims were sufficient to constitute a common law action for wrongful discharge under the*

⁸⁴ See, e.g., *Thompson v. Mem'l Hosp. at Easton, Md., Inc.*, 925 F. Supp. 400, 410 (D. Md. 1996) (stating that because the plaintiff did not work in the billing department and had no statutory obligation to report the billing irregularities, his claims were "vague, conclusory and speculative").

⁸⁵ See, e.g., *Miller v. Fairchild Indus., Inc.*, 629 A.2d 1293 (Ct. Spec. App. Md. 1993) (holding that the employer had not acted illegally by closing the plant, because private actors are not bound by constitutional restraints protecting free speech rights).

⁸⁶ See, e.g., *King v. Marriot Int'l, Inc.*, 866 A.2d 895, 901 (Ct. Spec. App. Md. 2005) (discussing the qualifications for bringing a wrongful termination claim).

⁸⁷ *Rowan v. Tractor Supply Co.*, 63 S.E.2d 709 (Va. 2002).

⁸⁸ *Id.* at 711.

*public policy exception.*⁸⁹

The first instance, as was the case in *Bowman*, is when an employer violates a policy enabling an employee's exercise of a statutorily created right."⁹⁰

The second scenario that gives rise to a wrongful termination claim is when an employer violates a public policy explicitly expressed in statute and when the employee is a clear member of the class of persons the statute intends to protect.⁹¹ The *Bailey* and *Lockhart* cases involved discharges based on the public policy expressly stated in former Va. Code § 2.1-715.4 (currently codified in § 2.2-3900).⁹² That statute provided, in relevant part, that it is Virginia's policy to safeguard everyone from unlawful discrimination in employment based on gender.⁹³ The employees in these cases alleged their employer terminated them because of their gender.⁹⁴

The third and final circumstance is when an employer discharges an employee for refusing to engage in a criminal act. The court in *Rowan* recognized that "although criminal statutes do not contain explicit statements of public policy, the protection of the general public from lawless acts is an unquestioned policy underlying such statutes."⁹⁵ Therefore, allowing the employment-at-will doctrine to "serve as a shield for employers who seek to force their employees, under the threat of discharge, to engage in criminal activity" is the highest violation of public policy.⁹⁶ In *Mitchem*, the court upheld the plaintiff's wrongful termination claim based on her refusal to engage in a sexual relationship with her supervisor and violate laws against fornication and lewd and lascivious behavior.⁹⁷

⁸⁹ *Id.* at 111 (emphasis added) (internal citations omitted).

⁹⁰ *See Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985) (holding that an employer may not threaten to discharge an employee to control their vote as a shareholder in a corporation).

⁹¹ *See Bailey v. Scott-Gallagher, Inc.*, 480 S.E.2d 502, 505 (Va. 1997) (holding that the employer's discrimination against the plaintiff because she was a woman and a working mother was against public policy as embodied in the Virginia Human Rights Act); *see also Lockhart v. Commonwealth Educ. Sys. Corp.*, 439 S.E.2d 328, 332 (Va. 1994) (holding that discrimination and wrongful discharge based on race and gender are against public policy and fit into the narrow exception described in *Bowman*).

⁹² *Bailey*, 480 S.E.2d at 505; *Lockart*, 439 S.E.2d at 332.

⁹³ VA. CODE ANN. § 2.2-3900 (West 2011).

⁹⁴ *See Bailey*, 480 S.E.2d at 505 (explaining that the plaintiff had been terminated during her pregnancy because her employer found she was no longer a "dependable" worker); *Lockart*, 439 S.E.2d at 332 (describing how one of the plaintiffs was terminated because she refused the sexual advances of one of the managers).

⁹⁵ *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 711 (Va. 2002).

⁹⁶ *Id.* (citing *Mitchem v. Counts*, 523 S.E.2d 246, 252 (2000)).

⁹⁷ *Mitchem*, 523 S.E.2d at 249.

There is no single case that sets out the *prima facie* elements of a wrongful termination claim under *Bowman*. However, reviewing the court decisions that followed *Bowman*, the necessary steps are the same as those in Maryland. A plaintiff must establish (1) that her employer terminated her, (2) that her termination violated a public policy of the Commonwealth of Virginia, and (3) that there is a causal link between her termination and the named public policy violation.⁹⁸

VI. "C" IS FOR *CARL*: ELEMENTS OF WRONGFUL TERMINATION IN D.C.

Although the D.C. Court of Appeals first acknowledged the existence of a cause of action for wrongful termination in *Adams*, most employment litigators refer to the action as a *Carl* claim because of the latter decision's expansion of the narrow exception *Adams* created.⁹⁹ As explained above, *Carl* held that an employee's refusal to violate the law was not the only circumstance under which an employee can assert a wrongful termination claim.¹⁰⁰

As in Maryland and Virginia, D.C. courts recognize three separate categories of protected conduct under the exception to the employment at-will doctrine: (1) refusing to engage in illegal activity; (2) exercising a constitutional or statutory right; and (3) reporting criminal conduct to supervisors or outside agencies.¹⁰¹ In *Fingerhut v. Children's National Medical Center*,¹⁰² the plaintiff (1) refused to participate in his employer's bribe of a D.C. Government official, (2) performed his legal duty as a security officer to inform government agencies of the bribe, and (3) reported the bribe to both law enforcement and internal management.¹⁰³ The court found that all of these activities afforded Fingerhut the ability to defeat his employer's motion to dismiss.¹⁰⁴

The *Adams* and *Carl* decisions established the first two categories of actions. In *Adams*, the court held that the exception applies when an employer terminates an employee because of the employee's refusal to violate the law.¹⁰⁵ In *Carl*, the Court of Appeals affirmed that an employee's exercise of her right to free speech, by means of her testimony against her employer in malpractice cases, also serves as the basis of a

⁹⁸ See *Shaw v. Titan Corp.*, 498 S.E.2d 696, 699 (Va. 1998); see also *Eslami v. Global One Comm'n, Inc.*, 48 Va. Cir. 17, 18 (1999).

⁹⁹ See also *Fingerhut v. Children's Nat. Med. Ctr.*, 738 A.2d 799, 805 (D.C. 1999).

¹⁰⁰ *Carl v. Children's Hosp.*, 702 A.2d 159, 160 (D.C. 1997).

¹⁰¹ See *Fingerhut*, 738 A.2d at 803.

¹⁰² 738 A.2d 799 (D.C. 1999).

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 806–07.

¹⁰⁵ See *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991).

wrongful termination claim.¹⁰⁶

When originally asked to extend the exception to the employment at-will doctrine to employees who report illegal activities, the Court of Appeals refused to recognize such an expansion.¹⁰⁷ However, *Carl* specifically overruled the decision in *Gray* and held that the court is free to recognize additional public policy exceptions.¹⁰⁸ In dismissing a plaintiff's *Carl* claim, the court ruled in *Wallace v. Skadden, Arps, Slate, Meagher & Flom*,¹⁰⁹ that the plaintiff "failed to demonstrate the existence of a legal obligation to report to her superiors the improper conduct which she claims to have observed."¹¹⁰ The inference, therefore, is that a cause of action for wrongful termination does exist upon the showing of such a duty to report. *Fingerhut* confirmed this third category of claims in its decision the following year.¹¹¹

However, not all whistleblowing enjoys protection from retaliation under the public policy exception.¹¹² So far, the third category of wrongful termination actions in D.C. appears to protect only the reporting of crimes and the reporting of conduct when there are legal obligations to report such conduct.

Though there is no case on point regarding *Carl* claims, the D.C. Whistleblower Protection Act protects disclosures that the employee "reasonably believes" to evidence one or more of the circumstances delineated in D.C. Code § 1-615.52(6)(A)-(E).¹¹³ Also, as with discrimination reprisal cases, it is not necessary that the employee be correct in her disclosure. It is sufficient that the disclosing employee "reasonably believes" that the disclosure is of an illegal, inappropriate, unhealthy or unsafe practice.¹¹⁴ While these cases refer to statutory, rather

¹⁰⁶ See *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997).

¹⁰⁷ See *Gray v. Citizens Bank of Washington*, 602 A.2d 1096, 1097 (D.C. 1992) (concluding that only the en banc court was free to expand the public policy exception recognized in *Adams* and dismissing plaintiff's complaint on this basis).

¹⁰⁸ See *Carl*, 702 A.2d at 160 (holding that the *Adams* decision did not bar the court from expanding the scope of the public policy exception, even when the court was not en banc, as was the case in *Gray*).

¹⁰⁹ 715 A.2d 873 (D.C. 1998).

¹¹⁰ *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873 (D.C. 1998).

¹¹¹ *Fingerhut v. Children's Nat. Medical Center*, 738 A.2d 799 (D.C. 1999).

¹¹² See, e.g., *Elliott v. Healthcare Corp.*, 629 A.2d 6, 8 (D.C. 1993) (affirming the dismissal of a plaintiff's claim for abusive discharge for reporting maintenance deficiencies to corporate managers).

¹¹³ D.C. Code § 1-615.52(6)(A)-(E) (protecting disclosures of information by employees when about gross mismanagement, gross misuse or waste of public resources or funds, abuse of authority in connection with the administration of a public program or the execution of a public contract, violation of a federal, state, or local law, or a substantial and specific danger to the public health and safety).

¹¹⁴ See *id.*; see also *Zirkle v. District of Columbia*, 830 A.2d 1250, 1260 (D.C. 2003)

than common law causes of action, they are the most analogous to wrongful termination claims.

D.C. courts do not explicitly outline the elements necessary to sustain a cause of action for wrongful termination. However, by reading the numerous cases deciding such claims, the requirements are the same in D.C. as they are in the other two jurisdictions. A discharged at-will employee may sue her former employer for wrongful termination when the sole reason for the discharge is the employee's refusal to violate the law, as expressed in a statute or municipal regulation.¹¹⁵ Current case law suggests that an employee may prevail if the employee can show that her protected activity was the "primary" or "substantial" reason for the discharge.¹¹⁶ The *Wallace* court affirmed the dismissal of an employee's wrongful termination claim because she could not demonstrate that her employer terminated her "solely, or even substantially for engaging in conduct protected by such an exception."¹¹⁷ In either standard, the burden of proof is on the employee.¹¹⁸ The claimant must demonstrate (1) that her employer discharged her employment, (2) that the discharge was a violation of public policy, and (3) that a causal relationship exists between the discharge and public policy violation.¹¹⁹

VII. TORT v. CONTRACT LEGAL BASES

Some jurisdictions analyze wrongful termination claims under a tort theory, while others base the cause of action under contract law. Most jurisdictions view the action as one in tort. The generally accepted reason for recognizing the cause of action as a tort is that the action "vindicates an otherwise civilly unremedied public policy violation."¹²⁰

States that consider wrongful termination to be a contract claim

(citing *Horton v. Dep't of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995)) (stating that the determination "hinges not upon whether the order was ultimately determined to be illegal, but whether appellant reasonably believed that it was illegal.").

¹¹⁵ *Zirkle*, 830 A.2d at 1260.

¹¹⁶ See, e.g., *Wallace*, 715 A.2d at 885 ("discharged solely, or perhaps even primarily,"); *Davis v. Gables Residential/H.G. Smithy*, 525 F.Supp.2d, F.Supp.2d 87, 103 (D.D.C. 2007) ("sole or substantial reason"); *Mastrangelo v. Nat'l R.R. Passenger Corp.*, CIV. 01-0582 (TFH), 2006 WL 416181 *5 (D.D.C. Feb. 22, 2006) ("solely, or at least substantially").

¹¹⁷ *Wallace*, 715 A.2d at 886 n. 25.

¹¹⁸ *Id.*

¹¹⁹ See *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991); see also *Bible Way Church of Our Lord Jesus Christ of Apostolic Faith of Washington, D.C. v. Beards*, 680 A.2d 419, 433 (D.C. 1996).

¹²⁰ Richard E. Kaye, *Cause of Action for Termination of At-Will Employee in Violation of Public Policy*, 24 CAUSES OF ACTION 2D 227 (2004 & Supp. March 2012) (citing *Porterfield v. Mascari II, Inc.*, 374 Md. 402 (2003)).

understand it is an implied term of every contract of employment that neither party may require another party to do what the law forbids.¹²¹ Courts can also use contract law to limit the size of an award to a prevailing plaintiff.¹²² Maryland, Virginia, and D.C. courts all recognize wrongful termination in violation of public policy as a tort action.¹²³

VIII. ELEMENT ONE: EMPLOYMENT CONTRACTS AND CONSTRUCTIVE DISCHARGE

The first step in any wrongful termination action is to establish that an employer discharged an at-will employee. Both Maryland and D.C. courts acknowledge that employees who sign a collective bargaining agreement or other form of employment contract still retain the protection of the public policy exception.¹²⁴ To varying degrees, all three jurisdictions permit injured plaintiffs to assert that their employers constructively discharged their employment in lieu of proving involuntary termination.¹²⁵

A. Employment Contracts

Maryland courts hold that even employees who sign an employment contract with their employer can file a wrongful termination suit. In *Ewing v. Koppers Co., Inc.*,¹²⁶ the court held that a union member subject to a collective bargaining agreement could have a wrongful termination action against his employer who terminated him for filing a workers' compensation claim.¹²⁷ In reaching this decision, the judge reasoned:

The tort action as we have recognized it is not intended to reach every wrongful discharge. It is applicable only where the

¹²¹ See *Island v. Buena Vista Resort*, 103 S.W.3d 671, 680 (Ark. 2003) (citing *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984)).

¹²² See *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 386-87 (Ark. 1988) (fixing the measure of compensatory damages in a public policy wrongful discharge action to the sum of wages the employee would have earned under the employment contract had she not been discharged).

¹²³ See *Adler v. Am. Standard Corp.*, 432 A.2d 464, 471 (Md. 1981); see also *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985); *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991).

¹²⁴ *Infra* VIII. A. Employment Contracts.

¹²⁵ *Infra* VIII. B. Constructive Discharge.

¹²⁶ 537 A.2d 1173 (Md. Ct. App. 1988).

¹²⁷ *Id.* at 1174-75.

discharge contravenes some clear mandate of public policy. Thus, the public policy component of the tort is significant, and recognition of the availability of this cause of action to all employees, *at will and contractual*, will foster the State's interest in deterring particularly reprehensible conduct. Moreover, it would be *illogical to deny the contract employee access to the courts equal to that afforded the at will employee*. We hold that a *cause of action for abusive discharge exists in favor of employees who serve under contract as well as those who serve at will*.¹²⁸

However, in that particular case, the court found that an arbitrator's decision during the plaintiff's union grievance preempted his ability to bring a common law tort claim.¹²⁹ Citing *Ewing*, the Maryland Court of Appeals confirmed the availability of wrongful termination claims to union employees in *Allen v. Bethlehem Steel Corp.*¹³⁰

Twenty years later, the D.C. Court of Appeals followed Maryland's lead. In *Byrd v. VOCA Corp. of Washington, D.C.*,¹³¹ the court found the reasoning in *Ewing* persuasive. Referencing the decisions of California and Washington courts, Judge Wagner opined:

The Maryland court's reasoning is persuasive. Denying contract workers the public policy wrongful discharge remedy tends to "ignore . . . the fundamental distinction between tort and contract actions." The duty giving rise to the tort remedy is not derived from the covenants of contract, but rather from the *employer's obligation to conduct its affairs in conformity with fundamental public policy*. Recognition of the cause of action will, as the Maryland court observed, "foster the State's interest in deterring particularly reprehensible conduct."¹³²

The court in *Byrd II*, citing heavily to the *Finch v. Holladay-Tyler Printing, Inc.*¹³³ decision, also confirmed that Section 301(a) of the National Labor Relations Act ("NLRA") does not preempt tort actions for wrongful discharge so long as the court need not interpret the terms of the collective bargaining agreement.¹³⁴ Consequently, tort claims are separate

¹²⁸ *Id.* at 1175 (emphasis added).

¹²⁹ *Id.* at 1179.

¹³⁰ *Allen v. Bethlehem Steel Corp.*, 547 A.2d 1105 (Md. Ct. Spec. App. 1988).

¹³¹ 962 A.2d 927 (D.C. 2008).

¹³² *Byrd*, 962 A.2d at 934 *remanded to* No. 2004-CA-004412-B, 2011 D.C. Super. Ct. LEXIS 8 (Sept. 13, 2011) ("*Byrd II*") (internal citations omitted).

¹³³ 586 A.2d 1275 (Md. 1991).

¹³⁴ *Byrd II*, No. 2004-CA-004412-B at 67-68; *see also* *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988).

and independent from the collective bargaining agreement.¹³⁵

Maryland and D.C. courts agree that the public policy basis of the wrongful termination tort rises above any concerns in contract law. While there may be issues with preemption depending upon the terms of the contract in question, the existence of any written agreement between an employer and employee does not automatically foreclose the possibility of a tort claim.

B. Constructive Discharge

Many states allow an employee to assert that the employer engaged in conduct that compelled the employee to resign.¹³⁶ In such circumstances, the employee can demonstrate a constructive discharge even though the employer did not terminate the employee. Constructive discharge is one method of establishing an illegal adverse employment decision in many civil rights and other employment law claims.

1. Maryland

In Maryland, employees do not need to prove their employers involuntarily terminated their employment in order to allege wrongful termination. Constructive discharge is sufficient to satisfy the first element of the prima facie case.¹³⁷ Evidence, for example, that the plaintiff resigned after the employer offered the choice between resignation and termination will establish the requisite discharge for a wrongful termination claim.¹³⁸ However, the plaintiff will need to show that the employer intended to induce her resignation.¹³⁹ Specifically:

¹³⁵ See *Byrd II*, 2004-CA-004412-B at 36.

¹³⁶ See, e.g., *Gormley v. Coca-Cola Enterprises*, 2005-NMSC-003, 109 P.3d 280, 282 (N.M. 2005) (“constructive discharge is a doctrine that permits an employee to recast a resignation as a de facto firing, depending on the circumstances surrounding the employment relationship and the employee’s departure.”); *LeGalley v. Bronson Cmty. Sch.*, 339 N.W.2d 223, 225 (Mich. 1983) (“A constructive discharge occurs ‘when the employer deliberately makes an employee’s working conditions so intolerable that the employee is forced into an involuntary resignation.’”).

¹³⁷ See, e.g., *Beye v. Bureau of Nat. Affairs*, 477 A.2d 1197, 1201 (Md. Ct. Spec. App. 1984) (“The law is not entirely blind . . . [i]t therefore recognizes the concept of ‘constructive discharge’; in a proper case, it will overlook the fact that a termination was formally effected by a resignation if the record shows that the resignation was indeed an involuntary one, coerced by the employer.”).

¹³⁸ *Kessler v. Equity Mgmt. Inc.*, 572 A.2d 1144, 1152 (Md. Ct. Spec. App. 1990).

¹³⁹ See *Beye*, 477 A.2d 1197, 1204 (holding that a plaintiff’s burden to prove constructive discharge and an employer’s intent to coerce a resignation is not met where plaintiff only contends that he was led to resign because he suffered from

[W]here a resignation is purportedly prompted by working conditions, the applicable standard to determine if the resignation is, in effect, a constructive discharge, is whether the employer has *deliberately caused* or allowed the employee's working conditions to become *so intolerable that a reasonable person in the employee's place would have felt compelled to resign*.¹⁴⁰

It is the responsibility of the employee to prove constructive discharge and the employer's intent to provoke the resignation.

2. D.C.

Involuntary termination is also not the only form of discharge in D.C. A constructive discharge will suffice to bring a tort action for wrongful termination.¹⁴¹

Establishing constructive discharge before D.C. courts is less troublesome than in Maryland. Specifically, an employee need not prove the employer intended to compel the employee to resign. In D.C., "A constructive discharge occurs when the employer deliberately makes working conditions intolerable and drives the employee into an involuntary quit."¹⁴² However, nothing requires the employer to have intended to force the termination.¹⁴³ Working conditions rise to the requisite level of intolerableness if they "would lead a reasonable person to resign."¹⁴⁴ There is also no requirement that an employee remain in an "intolerable workplace" for a particular period of time.¹⁴⁵

3. Virginia

The Virginia Supreme Court has yet to address the issue of whether an

private, non-employment related attacks from fellow employees).

¹⁴⁰ *Id.* at 1203 (emphasis added).

¹⁴¹ See *Arthur Young & Co. v. Sutherland*, 631 A.2d 354 (D.C. 1993) (affirming a jury verdict finding in favor of an employee's tort claim that her constructive discharge constituted wrongful termination); see also *Darrow v. Dillingham & Murphy, LLP*, 902 A.2d 135, 138 (D.C. 2006) (holding that constructive discharge is a sufficient basis for a wrongful termination action).

¹⁴² *Atlantic Richfield Co. v. D.C. Comm. on Human Rights*, 515 A.2d 1095, 1101 (D.C. 1986).

¹⁴³ *Id.* (citations omitted).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

employment discharge can be constructive.¹⁴⁶ Virginia Circuit Court judges have reached different conclusions on the issue.¹⁴⁷

In *Jones v. Professional Hospitality Resources, Inc.*,¹⁴⁸ the plaintiff alleged that the defendant constructively discharged her by giving her less desirable tasks and reducing hours after she complained of unwanted sexual advances.¹⁴⁹ The court granted the defendant's motion for summary judgment, holding that the tort of wrongful discharge in violation of Virginia public policy does not extend to constructive discharge.¹⁵⁰ The court stated:

The at-will employment relationship permits termination of services by the employer or the employee, for any reason. *When the employee chooses to resign, no special rule applies.* It is only when the employer *actually terminates* the employee in violation of some established public policy *that the narrow exception is applied.*¹⁵¹

However, the Virginia Supreme Court has recognized other causes of action premised upon “constructive” conduct. For example, the court created the doctrine of constructive desertion, which recognizes a ground for divorce in favor of a party even though the guilty party did not actually desert the marriage.¹⁵² Moreover, the court has judicially crafted constructive evictions of tenants¹⁵³ and constructive fraud.¹⁵⁴

With this background, Virginia state and federal courts hold that “an employee who can meet the high burden of proving a constructive

¹⁴⁶ See *Barron v. Netversant-Northern Virginia, Inc.*, 68 Va. Cir. 247 (2005) (citing to appellate court decisions to support a constructive discharge claim and noting the unresolved split in the state appellate circuits on the matter of whether constructive discharge can be used as a basis for a wrongful termination claim).

¹⁴⁷ Compare *Jones v. Professional Hospitality Resources, Inc.*, 35 Va. Cir. 458 (1995) and *Wright v. Donnelly & Co.*, 28 Va. Cir. 185 (1992) (holding that Virginia does not recognize the tort of wrongful constructive discharge), with *Dowdy v. Bower*, 37 Va. Cir. 432 (1995), and *Molina v. Summer Consultants, Inc.*, No. 152715, 1996 WL 1065653 (Va. Cir. Ct. 1996) (holding that Virginia does recognize the tort of wrongful constructive discharge).

¹⁴⁸ 35 Va. Cir. 458 (1995).

¹⁴⁹ *Id.* at 458-59.

¹⁵⁰ *Id.* at 460-62.

¹⁵¹ *Id.* at 460 (emphasis added).

¹⁵² *Brooks v. Brooks*, 106 S.E.2d 611 (Va. 1959); *Williams v. Williams*, 50 S.E.2d 277 (Va. 1948).

¹⁵³ *Cavalier Square Ltd. P'ship v. Virginia Alcoholic Beverage Control Bd.*, 435 S.E.2d 392, 395 (Va. 1993).

¹⁵⁴ *Mortarino v. Consultant Eng'g Services, Inc.*, 467 S.E.2d 778, 782 (Va. 1996); *Evaluation Research Corp. v. Alequin*, 439 S.E.2d 387, 390 (Va. 1994).

discharge does have standing to pursue a *Bowman* wrongful discharge claim.¹⁵⁵ The Honorable Randall G. Johnson ruled in *Peyton v. United Southern Aluminum Products, Inc.*,¹⁵⁶ that constructive discharge is a viable cause of action in Virginia.¹⁵⁷ The Honorable Stanley P. Klein in *Behsudi* also held that Virginia law should recognize wrongful constructive discharge in the workplace.¹⁵⁸

In *Behsudi*, the court cited to a Fourth Circuit case when outlining the elements of constructive discharge:

The United States Court of Appeals has recognized constructive discharge in the workplace. In *Bristow v. The Daily Press, Inc.*, the Fourth Circuit held that “a constructive discharge occurs when ‘an employer deliberately makes an employee’s working conditions intolerable and thereby forces him to quit his job.’” “In order to satisfy the Fourth Circuit test, a plaintiff must allege and prove two elements to establish a constructive discharge: (1) the deliberateness of the employer’s action; and (2) the intolerableness of the working conditions. Under this test, deliberateness only exists if the employer intended to force the employee to quit. Intolerableness of working conditions is reached only when a reasonable person “in the employee’s position would have felt compelled to resign.”¹⁵⁹ When the countervailing policies and authorities are fully considered, this Court finds that wrongful constructive discharge in the workplace should be recognized under Virginia law.¹⁶⁰

In order to sustain a cause of action for wrongful constructive discharge, the *Behsudi* court held that a plaintiff must allege and prove by clear and convincing evidence: (1) that the employer’s conduct was “so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;” and (2) that the conduct compelling the resignation violated a Virginia public policy embodied in an existing statute.¹⁶¹ The availability of constructive discharge when asserting a *Bowman* claim remains unsettled. To the extent Virginia courts accept the theory, they

¹⁵⁵ *Gochenour v. Beasley*, 47 Va. Cir. 218, 222 (1998).

¹⁵⁶ 49 Va. Cir. 187 (1999).

¹⁵⁷ *Id.*

¹⁵⁸ *Johnson v. Behsudi*, 52 Va. Cir. 533, 538 (1997).

¹⁵⁹ *Id.* (citations omitted).

¹⁶⁰ *Behsudi*, 52 Va. Cir. at 538 (internal citations omitted).

¹⁶¹ *Id.* (citing *Russo v. White*, 400 S.E.2d 160, 160 (1991); *Ruth v. Fletcher*, 377 S.E.2d 412, 412 (1989); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806 (1996)).

follow the stricter standard of requiring a showing of intent on behalf of the employer.

IX. ELEMENT TWO: SOURCES OF PUBLIC POLICY

The primary analysis courts conduct on any wrongful termination claim is if the public policy violation the plaintiff alleges cites to a viable basis for the cause of action. In addition to there being various sources of public policy, each jurisdiction also establishes general limitations and requirements when pleading wrongful termination claims.

A. General Limitations and Pleading Requirements

1. Maryland

Adler defined “public policy” as a “principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.”¹⁶² In Maryland, the public policy cited in support of a cause of action for wrongful discharge must represent a “clear mandate of public policy.”¹⁶³ The public policy in question must be a “preexisting, unambiguous, and particularized pronouncement” that directs, prohibits, or protects the conduct in question.¹⁶⁴ In *Wholey*, the court explained:

A public policy *must be clearly mandated* to serve as a basis for a wrongful discharge action because that “limits judicial forays into the wilderness of discerning ‘public policy’ *without clear direction from a legislature or regulatory source.*” “When a plaintiff fails to demonstrate that his or her grievance is anything more than a private dispute regarding the employer’s execution of normal management operating procedures, there is no cause of action for [wrongful] discharge.”¹⁶⁵

¹⁶² *Adler v. Am. Standard Corp.*, 432 A.2d 464, 472 (Md. 1981).

¹⁶³ *Id.* at 471; *see also* *Porterfield v. Mascari II, Inc.*, 823 A.2d 590, 602 (Md. Ct. App. 2003).

¹⁶⁴ *Porterfield v. Mascari II, Inc.*, 788 A.2d 242, 245 (Md. Ct. Spec. App. 2002) (citing *Sears, Roebuck & Co. v. Wholey*, 139 A.2d 642, 661 (Md. Ct. App. 2001)), *aff’d*, 823 A.2d 590 (Md. Ct. App. 2003).

¹⁶⁵ *Wholey*, 139 A.2d at 650.

In other words, the public policy must be a specific, discrete, written mandate and not an assumption or inference regarding the public good.

While there is no heightened pleading requirement for an *Adler* claim, a plaintiff must plead with specificity the public policy the employer violated by discharging the plaintiff.¹⁶⁶ “A complaint must plead with particularity the source of the public policy and the alleged violation.”¹⁶⁷

A plaintiff must also show that her conduct advanced the public interest supported by the policy or that the defendant’s conduct impaired that interest.¹⁶⁸ However, it is unlikely that an employee must demonstrate an actual violation of public policy. The motivation behind an employee’s conduct is also irrelevant. In *Lawson v. Bowie State Univ.*,¹⁶⁹ the Maryland Court of Appeals held that the personal motivation of a whistleblower under Maryland Annotated Code, State Personnel & Pensions § 5-305 is not grounds for denying whistleblower protections.¹⁷⁰ Though *Lawson* refers to a specific Maryland whistleblower statute, the rationale is applicable to other similar causes of action, such as those under *Adler*.

While some jurisdictions have held that when the cited statute establishing a public policy does not expressly cover an employee or an employer no claim will lie, Maryland disagrees with this rule. For example, the court in *Molesworth v. Brandon*¹⁷¹ determined that an employee can maintain a claim against an employer that was too small for coverage under the Maryland Fair Employment Practices Act (“FEPA”).¹⁷² Exempt employers simply need not adhere to the administrative process of the Act. They are not, however, exempt from the policy announced.

In some circumstances, a plaintiff may be able to ground a claim on a public policy conferring rights on another person, not just the plaintiff personally.¹⁷³ However, Maryland courts will not hold an employer liable

¹⁶⁶ See *Denro*, 605 A.2d at 1022 (holding that plaintiff failed to set forth with sufficient specificity the allegations necessary to demonstrate that her employer discharged her for refusing to violate two federal criminal statutes).

¹⁶⁷ *Porterfield*, 788 A.2d at 245 (citing *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 764-65 (Md. Ct. Spec. App. 1991); *Denro*, 605 A.2d at 1022).

¹⁶⁸ See *Porterfield v. Mascari II, Inc.*, 823 A.2d 590 (Md. Ct. App. 2003) (holding that termination of employee for suggesting that she may want to seek advice of counsel before responding to unfavorable work evaluation did not violate the public policy generally favoring access to counsel).

¹⁶⁹ 26 A.3d 866 (Md. Ct. App. 2011).

¹⁷⁰ *Id.* at 877; see also *Horton v. Dep’t of Navy*, 66 F.3d 279 (Fed. Cir. 1995) (holding that a government employee’s personal and vindictive motive in reporting his supervisor’s misconduct is not relevant to the issue of whether the disclosure is a protected disclosure under the Whistleblower Protection Act).

¹⁷¹ 672 A.2d 608 (Md. Ct. App. 1996).

¹⁷² *Id.*

¹⁷³ See *Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144 (Md. Ct. Spec. App. 1990) (holding that termination of apartment complex manager for refusal to “snoop” in tenants’ apartments violated public policy because manager’s “snooping” would have

when the policy identified by the plaintiff primarily benefits the defendant.¹⁷⁴ Nevertheless, only an “important” or a “strong” public policy is actionable in Maryland.¹⁷⁵ For example, a public policy favoring self-defense is inadequate to support the claim of an employee discharged for fighting.¹⁷⁶

2. Virginia

Virginia courts define “public policy” as the underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general. Therefore, the exception is not so broad as to make actionable those discharges of at-will employees that violate only private rights or interests.¹⁷⁷ In *Miller*,¹⁷⁸ the Virginia Supreme Court held that the private rights established by the employer’s internal regulations had no impact upon any public policy. The plaintiff should attempt to show that the right asserted benefits society as a whole rather than the plaintiff individually.¹⁷⁹

Furthermore, the employee stating a claim for wrongful termination in violation of public policy must be an intended beneficiary of the public policy in question.¹⁸⁰ In *Dray v. New Market Poultry Products, Inc.*,¹⁸¹ employee April Dray was a quality control inspector at a plant that processed and distributed poultry.¹⁸² Dray believed that the plant was not

violated tenants’ right to privacy under federal constitution).

¹⁷⁴ See *Wholey v. Sears Roebuck*, 803 A.2d 482, 497-98 (Md. Ct. App. 2002) (holding that employer’s discharge of store employee for investigating suspected theft by a store manager did not violate public policy since plaintiff had no public duty to investigate the theft and only a duty to protect the store’s property which primarily benefited the defendant).

¹⁷⁵ *Id.* at 499 (holding that the public policy must be strongly supported by binding authority).

¹⁷⁶ See *Bagwell v. Peninsula Reg. Med. Ctr.*, 665 A.2d 297, 312 (1995) (holding that acting in self-defense is not protected by public policy).

¹⁷⁷ See *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918 (Va. 1987).

¹⁷⁸ *Id.* at 915.

¹⁷⁹ *Id.* at 919.

¹⁸⁰ *City of Virginia Beach v. Harris*, 523 S.E.2d 239, 245 (Va. 2000) (citing *Dray v. New Market Poultry Prod., Inc.*, 518 S.E.2d 312, 313 (Va. 1999)) (holding that the plaintiff police officer was attempting to use the criminal code as a shield to protect himself, not the public, from the consequences of his decision to charge his supervisor with obstruction of justice despite the captain’s order to take no further action); see also *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709 (Va. 2002) (holding that the goal of the obstruction of justice penalties is not to protect individuals from intimidation, but to protect the public from a flawed legal system due to impaired prosecution of criminals).

¹⁸¹ 518 S.E.2d 312 (Va. 1999).

¹⁸² *Id.*

following proper sanitary rules and was distributing adulterated poultry.¹⁸³ Dray informed government inspectors and was ultimately fired. Dray brought a wrongful termination claim, asserting that her employer violated the public policy underlying the Virginia Meat and Poultry Products Inspection Act.¹⁸⁴ The Court held that Dray had not stated a claim for wrongful discharge because the statute in question only intended to establish an intrastate regulatory mechanism for commerce, not protect “the public good” generally.¹⁸⁵ The Commonwealth’s public policy regarding inspections of meat and poultry products did not create a protected class of which Ms. Dray was a member.¹⁸⁶

As in Maryland, a public policy sufficient to support a claim for wrongful termination in Virginia must be clear and explicit.¹⁸⁷ There is no room for courts to interpret, extrapolate, or assume the legislature’s creation of a public policy. The language of the statute in question should be unambiguous. Similarly, the plaintiff should endeavor to establish with as much specificity as possible the public policy in question and the employer’s violative conduct.¹⁸⁸

Recently, on November 1, 2012, the Supreme Court of Virginia held that a plaintiff could bring a wrongful discharge claim against an individual who was not the plaintiff’s actual employer, such as a supervisor or manager, but who participated in the wrongful firing of the plaintiff.¹⁸⁹ In a complaint before the U.S. District Court for the Western District of Virginia, Angela VanBuren alleged that both her employer, Virginia Highlands Orthopedic Spine Center, LLC, and her supervisor, Dr. Stephen Grubb, terminated her employment because she refused to engage in criminal conduct, specifically adultery in violation of Va. Code § 18.2-365 and open and gross lewdness and lasciviousness in violation of Va. Code § 18.2-345. The U.S. Court of Appeals for the Fourth Circuit certified the issue of individual liability under the tort for wrongful discharge to the Supreme Court of Virginia.

In support of its holding that individual employees can be held liable for their own conduct, the Court cited to previous decisions where Virginia courts held individual supervisors and managers culpable for their actions

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See* Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806 (Va. 1996) (holding that to succeed in a wrongful discharge action, employee must identify a statutory basis for the identified public policy and that in the case of a dealership employee’s refusal to repair an automobile because he felt the repair would be unsafe, no such statute existed).

¹⁸⁸ *Id.*

¹⁸⁹ VanBuren v. Grubb, 120348, 2012 WL 5358706 (Va. Nov. 1, 2012).

effecting the termination under review.¹⁹⁰ Though not discussed in those previous decisions, the legal theory behind individual liability is the well-settled rule in Virginia that “employers and employees are deemed to be jointly liable and jointly suable for the employee's wrongful act.”¹⁹¹ Under tort law, agents and employees are personally liable for their own torts.

3. D.C.

In expanding the “very narrow” exception to the employment at-will doctrine *Adams* created, *Carl* held that future requests to recognize such exceptions should be only on a “case-by case basis.”¹⁹² The court ruled it would “consider seriously only those arguments that reflect a clear mandate of public policy—i.e., those that make a clear showing, based on some identifiable policy that has been ‘officially declared’ in a statute or municipal regulation, or in the Constitution, that a new exception is needed.”¹⁹³ Furthermore, there must be a “close fit” between the policy cited and the employer’s conduct at issue.¹⁹⁴ With that background, the court in *Carl* rejected the plaintiff’s attempt to glean a public policy exception from the rules of evidence and other sources related to expert testimony in medical malpractice cases.¹⁹⁵ Analogous to the decisions in Maryland and Virginia, an employee in D.C. asserting a wrongful termination claim will need to proffer a written, explicit public policy basis and demonstrate that she is logically among those the public policy purports to protect.

D.C. courts have been more lenient with regard to the pleading requirements in wrongful termination actions. There is no case that requires a plaintiff to plead the public policy an employer allegedly violated with specificity. In *Freas v. Archer Services, Inc.*,¹⁹⁶ the court found that though the plaintiff did not plead a specific statutory provision in his original complaint, “a complaint is sufficient so long as it fairly puts the defendant on notice of the claim against him.”¹⁹⁷ The test of sufficiency is not

¹⁹⁰ See *Bowman*, 229 Va. at 540; see also *Lockhart*, 247 Va. at 106.

¹⁹¹ *Thurston Metals & Supply Co. v. Taylor*, 230 Va. 475, 483–84; see also *Miller v. Quarles*, 242 Va. 343, 347, 410 S.E.2d 639, 642 (1991) (“Both principal and agent are jointly liable to injured third parties for the agent's negligent performance of his common law duty of reasonable care under the circumstances.”).

¹⁹² *Carl v. Children’s Hosp.*, 702 A.2d 159, 164 (D.C. 1997).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ 716 A.2d 998 (D.C. 1998).

¹⁹⁷ *Id.* at 1002 (citing D.C. Super. Ct. R. Civ. §§ 8(a), (e); *Scott v. District of*

whether the plaintiff cited to a specific statute, but whether she informed the defendant of the nature of her civil action.¹⁹⁸ The *Freas* court ruled that because the defendant had the opportunity to litigate the issue raised by the public policy in question during its own motion to dismiss, it necessarily had knowledge of the public policy basis of the plaintiff's claim.¹⁹⁹

B. Sources of Public Policy and Relationship with Other Statutes

Despite courts' attempts to narrow and limit the scope of the public policy exception to the at-will doctrine, the various sources of public policy courts accept when reviewing wrongful termination claims continue to expand. As described in *Adler*:

Nearly 150 years ago Lord Truro set forth what has become the classical formulation of the public policy doctrine that to which we adhere in Maryland: "Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law."²⁰⁰

. . . But beyond this relatively indeterminate description of the doctrine, jurists to this day have been *unable to fashion a truly workable definition of public policy*. *Not being restricted to the conventional sources of positive law (constitutions, statutes and judicial decisions)*, judges are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own *personal experience and intellectual capacity*. . . . *Inevitably, conceptions of public policy tend to ebb and flow with the tides of public opinion*, making it difficult for courts to apply the principle with any degree of certainty.²⁰¹

The public policies outlined below are only a sample of the most popular and most cited sources.

Columbia, 493 A.2d 319, 323 (D.C.1985)).

¹⁹⁸ *Id.*

¹⁹⁹ *Freas*, 716 A.2d at 1002; *see also* Moore v. Moore, 391 A.2d 762 (D.C. 1978) ("parties have impliedly contested a matter . . . [where] the party contesting the [matter] received actual notice of the injection of the unpleaded matters, as well as an adequate opportunity to litigate such matters and to cure any surprise from their introduction").

²⁰⁰ Egerton v. Earl Brownlow, 4 H.L. Cas. 1, 196 (1853).

²⁰¹ *Adler v. Am. Standard Corp.*, 432 A.2d 464, 471-72 (Md. 1981) (citations omitted) (emphasis added).

1. State Statutes and Constitutions

The clearest undisputed source of public policy is state statute. State legislative and regulatory acts are the most obvious manifestations of public policy within a state.²⁰² These include statutorily created rights, criminal prohibitions, and liabilities for tort violations.²⁰³ In some states, the only public policies courts recognize as sufficient to support a wrongful discharge claim are those articulated in the state's statutes, constitution, and administrative regulations.

While this is not the case in Maryland, the majority of wrongful termination cases in Maryland do cite to state statutes and regulations.²⁰⁴ *Adler* also protects employees who report crimes to government agencies.²⁰⁵

In *Carl*, the D.C. Court of Appeals specifically recognized that an employee could anchor a wrongful termination suit "either in the Constitution or in a statute or regulation."²⁰⁶ Applying that standard, the court concluded that Carl made a sufficient showing to justify a public

²⁰² See *Adler*, 432 A.2d at 472 (citing *Patton v. United States*, 281 U.S. 276, 306 (1930)) ("The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.").

²⁰³ See, e.g., *Wholey v. Sears Roebuck*, 803 A.2d 482, 495 (Md. Ct. App. 2002) (holding that retaliating against an employee who reported a crime as a witness is a criminal offense and therefore a sufficient basis for a public policy in a wrongful termination action); *Kessler, v. Equity Mgmt., Inc.*, 572 A.2d 1144, 1149 (Md. Ct. Spec. App. 1990) (recognizing the existence of a public policy pertaining to the tort of invasion of privacy as having its source in both statutory and constitutional provisions).

²⁰⁴ See, e.g., *Wholey*, 803 A.2d at 57-60 (MD. CODE ANN. Art. 27, §§ 760-762 (now MD. CODE ANN. CRIM. LAW §§ 9-301 to 9-304)); *Insigna Residential Corp. v. Ashton*, 755 A.2d 1080, 1087 (Md. Ct. App. 2000) (citing MD. CODE ANN. Art. 27 § 15 (repealed 2001)); *Molesworth v. Brandon*, 672 A.2d 608, 616 (Md. Ct. App. 1996) (citing MD. CODE ANN. Art. 49B § 14 (repealed 2009)); *Watson v. People Sec. Life Ins. Co.*, 588 A.2d 760, 767 (Md. Ct. App. 1991) (citing MD. CODE ANN. Art. 49B § 14-18 (repealed 2009)); *Ewing v. Koppers Co., Inc.*, 537 A.2d 1173, 1175 (Md. Ct. App. 1988) (citing MD. CODE ANN. Art. 101, § 39A (now MD. CODE ANN., LAB. & EMPL. § 9-1105)); *Bleich v. Florence Crittenton Serv. of Balt.*, 632 A.2d 463, 469 (Md. Ct. Spec. App. 1993) (citing MD. CODE ANN. §§ 5-502(b), 5-702(1), 5-704(a)); *Kessler*, 572 A.2d at 1149-50 (citing MD. CODE ANN. Art. 101, § 39A(a); MONTGOMERY COUNTY CODE §§ 26(q), 29; MD. CODE ANN., REAL PROP. §§ 8-301 through 8-332, 8-401); *Moniodis v. Cook*, 494 A.2d 212, 216-17 (Md. Ct. Spec. App. 1985) (citing MD. CODE ANN. Art. 100, § 95).

²⁰⁵ See, e.g., *Bleich*, 632 A.2d 463, 469-71 (citing MD. CODE ANN., FAM.LAW §§ 5-502(b), 5-702(1), 5-704(a)(2) (holding that a teacher's allegations that her employer terminated her for sending a letter to the state licensing specialist to report child abuse or neglect were sufficient to support a wrongful discharge claim).

²⁰⁶ *Carl v. Children's Hosp.*, 702 A.2d 159, 162 (D.C. 1997).

policy exception based on D.C. Code § 1-224 (now codified as D.C. Code § 1-301.43), which prohibits intimidating witnesses.²⁰⁷ The *Adams* court cited to the municipal prohibition against operating a vehicle without a valid inspection sticker as a valid source of public policy.²⁰⁸

The first recognition of the public policy exception to the at-will doctrine in Virginia cited to a shareholder's statutory right to vote without coercion.²⁰⁹ In *Mitchem v. Counts*,²¹⁰ the Supreme Court of Virginia upheld the plaintiff's assertion that her employer wrongfully terminated her employment after she refused to perform sexual acts in violation of Virginia Code Annotated §§ 18.2-344 and 345, which prohibit fornication and lewd and lascivious cohabitation.

2. Workers' Compensation

Many different types of statutes may express a public policy sufficient to support a wrongful termination claim. One class of such statutes includes those that explicitly regulate the employment relationship. The clearest example is a statute that prohibits an employee's discharge under specified circumstances, such as in retaliation for filing a workers' compensation claim. This falls within the category of exercising a statutory right, which all three states recognize. Wrongful termination claims based on employees seeking workers' compensation benefits were among the first wave of such actions after courts first recognized the common law tort.

In order for a Maryland plaintiff to show that she came within the ambit of the public policy protecting workers, she must show that she filed a claim for monetary benefits arising from an injury sustained during employment.²¹¹ In *Ewing*, the Court of Appeals of Maryland ruled:

Discharging an employee solely because that employee filed a worker's compensation claim *contravenes the clear mandate of Maryland public policy*. The Legislature has made a strong statement to that effect in making such conduct a criminal offense, and our perception of the magnitude of the *public interest in preserving the full benefits of the worker's compensation system* to employees, and deterring employers from encroaching upon

²⁰⁷ *Id.* at 165.

²⁰⁸ *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 33 (D.C. 1991) (citing D.C. MUN. REGS. tit. 18, § 602).

²⁰⁹ See *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985) (citing VA. CODE 1950, § 13.1-32).

²¹⁰ 523 S.E.2d 246, 251 (Va. 2000).

²¹¹ See *Finch v. Holladay-Tyler Printing, Inc.*, 586 A.2d 1275, 1278 (Md. Ct. App. 1991); see also *Wholey v. Sears Roebuck*, 803 A.2d 482, 491-92 (Md. Ct. App. 2002).

those rights, is equally strong.²¹²

However, because of the language of Maryland's workers' compensation statute, section 9-1105 of the Labor and Employment Article of the Maryland Annotated Code,²¹³ an employee must prove that the sole reason for the discharge was the employee's filing of a workers' compensation claim.²¹⁴ Section 9-1105 states, in part, "An employer may not discharge a covered employee from employment *solely* because the covered employee files a claim for compensation under this title."²¹⁵ This is a higher standard of causation than the "motivating factor" test outlined later in this paper.²¹⁶

An employer's termination of an employee for being absent from work due to a work-related injury also comes within the protection of the public policy safeguarding the right to workers' compensation benefits. This is not the case in Maryland when the employer applies an absence-discharge policy without regard to an employee's workers' compensation status. *See Kern*, 66 Md. App. 441.²¹⁷ When making this conclusion, the court held that "an employee's protection from discharge in retaliation for claiming statutory benefits does not include protection for excessive absence from work due to work-related injury."²¹⁸ Once an employee becomes disabled and is no longer qualified to perform her job duties, an employer may terminate that employee when the period of disability is not determinable. In such cases, the inability of the employee to perform assigned responsibilities, not the receipt of workers' compensation benefits, serves as the reason behind termination.

Virginia's workers' compensation statute is substantially similar to Maryland's. The statute reads, "No employer or person shall discharge an employee solely because the employee intends to file or has filed a claim under this title or has testified or is about to testify in any proceeding under this title."²¹⁹ It also requires the same "sole reason" causation standard.²²⁰

²¹² *Ewing v. Koppers Co., Inc.*, 537 A.2d 1173, 1175 (Md. Ct. App. 1988) (emphasis added).

²¹³ MD. CODE ANN., LAB. EMPL. § 9-1105.

²¹⁴ *Kern v. South Baltimore General Hosp.*, 504 A.2d 1154 (Md. Ct. Spec. App. 1986); *Ewing*, 537 A.2d at 1175.

²¹⁵ § 9-1105 (emphasis added).

²¹⁶ *See infra* at 55, 56.

²¹⁷ *See Kern v. South Balt. Gen. Hosp.*, 504 A.2d 1154 (Md. Ct. Spec. App. 1986).

²¹⁸ *Id.* at 452.

²¹⁹ VA. CODE ANN. § 65.2-308(a).

²²⁰ *See Jordan v. Clay's Rest Home, Inc.*, 483 S.E.2d 203 (Va. 1997) ("So the timing of these events and the employer's knowledge that the employee was "reporting" the injury, without more, does not raise an inference that the plaintiff was fired solely because she intended to file a workers' compensation claim. Otherwise, a question of fact on this issue would arise in every case merely upon proof that an employee had

However, unlike the Maryland statute, the Virginia Code provides employees with a private right of action in state circuit court.²²¹ Consequently, a claim of retaliation for asserting workers' compensation rights does not fall within the gamut of a common law *Bowman* claim.²²² The Virginia legislature passed section 65.2-308 in 1991, six years after *Bowman*. While there are no cases holding that the statutory cause of action under section 65.2-308(b) preempts a common law *Bowman* claim, there is no evidence that anyone attempted to assert a wrongful termination claim based on workers' compensation rights prior to the enactment of section 65.2-308(b).

Like Virginia, D.C. courts recognize a statutory cause of action for retaliatory discharge for filing, or attempting to file, a workers' compensation claim.²²³ Section 32-1542 subjects an employer who violates the section to paying between \$100 and \$1,000, and further provides that the employee receives reinstatement and compensation for lost wages.²²⁴ To establish a claim, an "employee must prove that she made or attempted to make a claim for worker's compensation" and that her employer discharged her in retaliation for making the claim.²²⁵ An employee's attempt to make a claim for benefits is neither confined to the formal filing of a worker's compensation claim nor limited to claims for money.²²⁶ Nevertheless, not "every act by an employee ostensibly in pursuance of compensation benefits constitutes a claim or attempted claim for compensation."²²⁷

Unlike Virginia, the D.C. Court of Appeals explicitly ruled that the statutory provisions of D.C.'s Workers' Compensation Act preclude an employee from asserting a common law wrongful termination claim under *Adams* and *Carl*.²²⁸ In so holding, the *Nolting* court reasoned:

. . . [W]e are dealing here with a statutory provision which not only creates the wrong but also contains a specific remedy to compensate the person suffering that wrong. No such statute was involved in *Adams*; there was no administrative or other remedy

been fired after a work-related injury.").

²²¹ See Va. Code Ann. § 65.2-308(b).

²²² See *Shaw v. Titan Corp.*, 498 S.E.2d 696, 700 (Va. 1998); see also *Dunn v. Bergen Brunswick Drug Co.*, 848 F. Supp. 645, 649 (E.D. Va. 1994).

²²³ See *Abramson Associates, Inc. v. Dist. of Columbia Dept. of Employment Services*, 596 A.2d 549, 552 (D.C. 1991); see also District of Columbia Workers' Compensation Act § 43, D.C. CODE § 32-1542 (1980) (formerly D.C. CODE § 36-342).

²²⁴ *Id.*

²²⁵ *Lyles v. District of Columbia Dep't of Employment Servs. (Lyles II)*, 572 A.2d 81, 83 (D.C. 1990).

²²⁶ *Id.*; *Dyson v. District of Columbia Dep't of Employment Servs.*, 566 A.2d 1065, 1067 (D.C. 1989).

²²⁷ *Dyson*, 566 A.2d at 1067.

²²⁸ See *Nolting v. Nat'l Capital Group, Inc.*, 621 A.2d 1387, 1387 (D.C. 1993).

available to the plaintiff. The injury to the plaintiff in Adams would have gone uncompensated if the court had refused to recognize a public policy tort. In the case sub judice, appellant does not stand in that same position; she is not facing a situation in which the only possibility for compensation for her claimed injury is the recognition by this court of a public policy tort expansive enough to cover her situation.²²⁹

The issue of preclusion is outlined in more detail later in this paper.²³⁰

While all three jurisdictions protect employees from retaliation for exercising their rights under state workers' compensation laws, only Maryland permits the use of those statutes in common law tort actions for wrongful termination. Both Virginia and D.C. require plaintiffs to pursue their statutory remedies in lieu of seeking tort damages.

3. Jury Service

Courts usually predicate recognition of a wrongful discharge claim for jury service on the characterization of jury service as an important public obligation or service.²³¹ As with workers' compensation rights, Maryland, Virginia, and D.C. have all passed statutes prohibiting employers from terminating an employee for complying with a court order to serve on a jury.²³²

In Maryland, "An employer may not deprive an individual of employment or coerce, intimidate, or threaten to discharge an individual because the individual loses employment time in responding to a [jury] summons...or attending, or being in proximity to, a circuit court for jury service under this title."²³³

Section 18.2-465.1 of the Virginia Annotated Code states, "Any person who is summoned to serve on jury duty...shall neither be discharged from employment, nor have any adverse personnel action taken against him,...as a result of his absence from employment due to such jury duty."²³⁴

The statute in D.C. not only prohibits an employer from threatening or otherwise coercing an employee because the employee serves as a juror,

²²⁹ *Id.* at 1389 (emphasis added).

²³⁰ *See infra* at 38, 60, 61.

²³¹ *See, e.g.*, *Sheets v. Knight*, 308 Or. 220 (1989).

²³² MD. CODE ANN., CTS. & JUD. PROC. § 8-501; VA. CODE ANN. § 18.2-465.1; D.C. CODE § 11-1913.

²³³ MD. CODE ANN., CTS. & JUD. PROC. § 8-501.

²³⁴ VA. CODE ANN. § 18.2-465.1.

but also provides a cause of action for the recovery of wages lost if an employer discharges an employee for serving as a jury.²³⁵

There are no state cases in any of the three jurisdictions regarding the use of jury duty protective statutes as the public policy basis of a wrongful termination suit. The only citations to any of the statutes listed above are from federal court decisions in Virginia discussing section 18.2-465.1 of the Virginia Annotated Code.

In *Sewell v. Macado's, Inc.*,²³⁶ the U.S. District Court for the Western District of Virginia refused to answer the question if the jury service statute permits a claim of wrongful termination.²³⁷ It reasoned, “[A] federal court exercising diversity jurisdiction only is permitted to rule upon the state law as it currently exists and not to surmise or suggest its expansion.”²³⁸ Conversely, the Eastern District of Virginia cited to section 18.2-465.1 as one of the few bases on which an employee could assert a *Bowman* claim.²³⁹ The U.S. Court of Appeals for the Fourth Circuit inferred its support of the theory when it affirmed a lower court decision that the plaintiff did not allege that her employer terminated her because she would be absent from work, but because her employer did not like the fact she was testifying against another employee.²⁴⁰ While these cases are not binding on Virginia state courts, they mirror the trend across the country that, by either statute or common law, employers cannot terminate employees because of their jury service obligations.

4. Internal Policies and Suing the Employer

In most jurisdictions, an employer's internal policies do not rise to the level of a public policy that can form the basis of a wrongful termination claim. Even if the employer terminates an employee after a false accusation of conduct that violates company policy, the employee cannot generally challenge the termination as repugnant to public policy.

This is the state of the law in both Maryland and Virginia. In *Beery v. Maryland Medical Laboratory, Inc.*,²⁴¹ the plaintiff claimed her employer terminated her after a co-worker wrongly accused her of violating the

²³⁵ D.C. CODE § 11-1913.

²³⁶ No. Civ.A. 7:04CV00268, 2004 WL 2237074 (W.D. Va. Oct. 4, 2004).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *White v. Fed. Exp. Corp.*, 729 F. Supp. 1536, 1549 (E.D. Va. 1990) *aff'd*, 939 F.2d 157 (4th Cir. 1991); *Oakley v. May Dept. Stores Co.*, 17 F. Supp. 2d 533, 536 (E.D. Va. 1998).

²⁴⁰ *Rowan v. Tractor Supply Co.*, 108 F. App'x. 110, 112 (4th Cir. 2004).

²⁴¹ 597 A.2d 516 (Md. Ct. Spec. App. 1991).

company's policy against theft.²⁴² According to the court, even if the plaintiff had been guilty of the theft, her termination would have been appropriate. "Firing her on the basis of a fellow employee's unsubstantiated allegations, without proof and, indeed, without fully investigating the matter, may very well have been improper-even foolish-but can hardly be said to contravene any clear mandate of public policy."²⁴³

The Virginia Supreme Court similarly held that an employer's contravention of its own rules does not violate public policy.²⁴⁴ Thus, when an employer terminates an employee for violating the employer's rules or because she expresses a disagreement with such rules, the employer will not be liable.²⁴⁵ In *Miller*, the plaintiff appeared as a witness on behalf of an employee before an internal grievance review panel.²⁴⁶ Two weeks later, the employer terminated the plaintiff for unsatisfactory performance.²⁴⁷ The court reasoned:

In the present case, the plaintiff argues that the employer's act in discharging her was done in retaliation for her exercise of the *right given to all employees by SEVAMP's "Personnel and Administrative Procedures" manual* to file grievances and to testify freely before grievance review panels. But such a retaliatory act would impinge *only upon private rights established by the employer's internal regulations*. It would have *no impact upon any public policy* established by existing laws for the protection of the public generally.²⁴⁸

There is no D.C. court decision regarding the viability of a *Carl* claim based on an employer's own internal policies. However, given the limitation of wrongful termination claims to violations of a "clear mandate of public policy," such as those "officially declared in a statute or municipal regulation," there is no reason to believe D.C. courts would rule differently than their counterparts in Maryland and Virginia.²⁴⁹

Absent a statute expressing a clear mandate of public policy, there ordinarily is no violation when an employer discharges an at-will employee

²⁴² *Id.* at 519.

²⁴³ *Id.* at 523.

²⁴⁴ See *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915 (Va. 1987) (refusing to recognize a public policy violation based on a right to file grievances as the right was primarily created by the employer's handbook).

²⁴⁵ *Id.* at 919.

²⁴⁶ *Id.* at 916.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 919 (emphasis added).

²⁴⁹ *Carl v. Children's Hosp.*, 702 A.2d 159, 164 (D.C. 1997).

in retaliation for that employee's suit against the employer.²⁵⁰ In *Watson*,²⁵¹ the Court of Appeals of Maryland agreed with other states, holding, "There is no clear mandate of public policy which would make actionable Peoples' discharge of Watson if that discharge were motivated solely by Watson's initial claims against Peoples."²⁵² However, "a retaliatory discharge in response to an employee's seeking legal redress against a co-worker because of . . . assault and battery" does satisfy the requirement of a clear mandate of public policy under *Adler*.²⁵³ There are no known cases in Virginia or D.C. on this issue.

5. Discrimination

No one can argue that safeguards against discrimination in the workplace reflect a valid and enforceable public policy. To this effect, Congress and the legislatures in Maryland, Virginia, and D.C. have all passed statutes prohibiting employers from discriminating against their employees.²⁵⁴ However, those same statutes provide specific relief for discriminatory and retaliatory discharges that, in many cases, preclude common law tort actions.

Title VII of the Civil Rights Act of 1964 ("Title VII"),²⁵⁵ provides in section 2000e-2 that "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin."²⁵⁶ Section 2000e-3 also prohibits employers from retaliating against an employee for opposing a discriminatory action or making a charge of discrimination.²⁵⁷ Congress later passed the Age Discrimination in Employment Act of 1967 ("ADEA"),²⁵⁸ and Americans with Disabilities Act of 1990 ("ADA"),²⁵⁹ to protect employees from discrimination and retaliation based on age and

²⁵⁰ See *Kavanagh v. KLM Royal Dutch Airlines*, 566 F. Supp. 242 (N.D. Ill. 1983); *Meredith v. C.E. Walther, Inc.*, 422 So.2d 761 (Ala. 1982); *Becket v. Welton Becket & Assocs.*, 114 Cal.Rptr. 531 (Cal. Ct. App. 1974); *Alexander v. Kay Finlay Jewelers*, 506 A.2d 379, 380 (N.J. Sup. Ct. App. Div. 1986).

²⁵¹ *Watson v. People Sec. Life Ins. Co.*, 588 A.2d 760 (Md. Ct. App. 1991).

²⁵² *Id.* at 765-66.

²⁵³ *Id.* at 767.

²⁵⁴ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1991); Md. Code Ann., State Gov't § 20-601 to 20-609 (2009); D.C. CODE § 2-1402.11 to 2-1402.12 (2006); VA. CODE ANN. § 2.2-3900 to 2.2-3902 (2001) (formerly VA. CODE § 2.1-715); VA. CODE ANN. § 51.5-41 (1985).

²⁵⁵ 42 U.S.C. 42 U.S.C. §§ 2000e to 2000e-17.

²⁵⁶ 42 U.S.C. § 2000e-2.

²⁵⁷ 42 U.S.C. § 2000e-3.

²⁵⁸ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1967).

²⁵⁹ Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12117 (2008).

disability, respectively. The U.S. Equal Employment Opportunity Commission (“EEOC”), the federal agency responsible for enforcing these acts, has established administrative procedures that claimants must follow to assert their rights under these statutes.

Maryland, Virginia, and D.C. each have their own local antidiscrimination statutes. These statutes cover the same protected classes, and often more, than those of their federal counterparts. Maryland passed the Fair Employment Practices Act (“FEPA”)²⁶⁰ in 1965. D.C. enacted the Human Rights Act (“DCHRA”)²⁶¹ in 1977. Virginia created the Virginia Human Rights Act (“VHRA”)²⁶² and Virginians with Disabilities Act (“VDA”)²⁶³ in 1987 and 1985, respectively. Since these statutes contain their own administrative and legal remedies, they are generally not able to serve as a basis for common law wrongful termination claims.

Maryland courts hold that the source of the policy against discrimination, such as hostile work environment sexual discrimination, is statutory and “exclusively statutory.”²⁶⁴ The court reasoned that state statutes provide the remedies for their violation. Thus, the wrongful termination tort would not reach an employer’s retaliation if the employee based her suit on discrimination, hostile work environment, or other prohibited acts.²⁶⁵ In *Makovi v. Sherwin-Williams Co.*, the plaintiff filed a tort action for wrongful termination after receiving the EEOC’s notice of her right to sue.²⁶⁶ Makovi alleged that her employer based her dismissal on sex discrimination in violation of federal law and FEPA.²⁶⁷ The court held that the tort of wrongful termination is unavailable where a statute that carries its own remedy expresses the public policy to be vindicated.²⁶⁸ Because Title VII and FEPA provided a remedy for Makovi’s alleged employment discrimination, “the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation,

²⁶⁰ MD. CODE ANN., STATE GOV’T § 20-601 to 20-609 (2009) (original version at MD. CODE ANN., Art. 49B).

²⁶¹ D.C. CODE § 2-1402.11 to 2-1402.12 (2006).

²⁶² VA. CODE ANN. § 2.2-3900 to 2.2-3902 (2001) (original version at VA. CODE § 2.1-715).

²⁶³ VA. CODE ANN. § 51.5-41 (1985).

²⁶⁴ *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 766 (Md. Ct. App. 1991).

²⁶⁵ *See id.* (citing *Chappell v. Southern Maryland Hosp., Inc.*, 578 A.2d 766 (Md. Ct. App. 1990)) (holding that the existence of statutory federal and state remedies for discharge of an employee in retaliation for reporting allegedly illegal discrimination claims preempt tort claim for abusive discharge); *Makovi v. Sherwin-Williams Co.*, 561 A.2d 179 (Md. Ct. App. 1989).

²⁶⁶ *Makovi*, 561 A.2d at 180.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 609.

[did] not apply.”²⁶⁹

Despite *Makovi*, the Maryland Court of Appeals “left open the prospect of an action for abusive discharge lying when the discharge violated a mandate of public policy *independent of the employment discrimination laws.*”²⁷⁰ In *Insignia Residential Corp. v. Ashton*,²⁷¹ the plaintiff argued her employer wrongfully terminated her employment because she refused to acquiesce to a form of *quid pro quo* sexual harassment that would have amounted to an act of prostitution under Maryland Annotated Code, Article 27, Section 15.²⁷² The court explained:

Preclusion under *Makovi*, we iterated, applies only when the public policy sought to be vindicated “is expressed in a statute which carries its own remedy for vindicating that public policy.” Preclusion was not mandated, however, simply because the assault and battery arose out of workplace sexual harassment. We explained that public policy, manifested in both the civil and criminal law, provided sanctions against the harmful and offensive touching of the person, whether or not sexually motivated, long before either Title VII or Art. 49B was enacted, and that, had those statutes never been enacted, that independent mandate of public policy would have supported [a plaintiff’s] recourse against the co-worker. Thus, we noted, there were “multiple sources of public policy, some within and some without Title VII and [Art. 49B]” and that, “[b]y including prior public policy against sexual assaults, the anti-discrimination statutes reinforce that policy; they do not supersede it.”²⁷³

Watson, the precursor to *Ashton*, similarly held that discharging an employee for pursuing legal action for workplace sexual harassment is against public policy.²⁷⁴

Various federal court decisions in D.C. hold that antidiscrimination laws, such as the DCHRA, can serve as the public policy basis of a common law wrongful termination claim.²⁷⁵ These rulings, however, are not binding on

²⁶⁹ *Id.* at 626.

²⁷⁰ *Insignia Residential Corp. v. Ashton*, 755 A.2d 1080, 1084 (Md. Ct App. 2000) (emphasis added).

²⁷¹ *Id.* at 1080.

²⁷² *Id.* at 1081 (citing MD. CODE ANN., Art. 27 § 15 (2000) (current version at MD. CODE ANN., CRIM. LAW § 11-301)).

²⁷³ *Id.* at 1086 (emphasis added) (citation omitted) (citing *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 768 (Md. Ct. App. 1991)).

²⁷⁴ *Watson*, 588 A.2d at 766.

²⁷⁵ See *MacNabb v. MacCartee*, 804 F. Supp. 378, 381 (D.D.C. 1992) (citing *Buttell v. Am. Podiatric Med. Assoc.*, 700 F. Supp. 592, 600 (D.D.C. 1988) (“Discrimination based on age, like discrimination based on race or gender, is a violation of the clear mandates of public policy”); *Alder v. Columbia Historical Soc’y*, 690 F. Supp. 9, 17 (D.D.C. 1988) (“[P]laintiff’s claims [of race and gender discrimination], if proven,

D.C. “state” courts.²⁷⁶

Contravening the holdings of the U.S. District Court for D.C., the D.C. Court of Appeals held that the DCHRA preempts the public policy exception to the employment at-will doctrine. In *Carl*, the seminal case in D.C. on the common law tort, the court opined:

The Council [of D.C.], of course, has shown that it knows how to cover a field; we would be entirely off base if we were not to conclude that the Council had preempted, for example, the legal fields represented by the exhaustive list of Human Rights Act prohibitions against discrimination in employment, or the comprehensive Rental Housing Act rules governing evictions of tenants at will, or the detailed Workers Compensation Act provisions addressing on-the-job injuries.²⁷⁷

In *McManus v. MCI Communications Corp.*,²⁷⁸ the court confirmed that it already rejected the argument that a wrongful termination claim does not rise when there is an alleged statutory violation.²⁷⁹ Having previously concluded that the employer did not violate the employee’s rights under the DCHRA, the *McManus* court ruled there was no room to make the argument again under *Carl*.²⁸⁰

Virginia court decisions mirror those of Maryland and D.C. In *Doss v. Jamco*,²⁸¹ the Virginia Supreme Court held that “in amending the [VHRA] by adding subsection D to Code section 2.1-725 in 1995,²⁸² the General Assembly plainly manifested its intention to alter the common law rule with respect to ‘[c]auses of action based upon the public policies reflected in [the VHRA].’”²⁸³ Subsection D states, “Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those

would appear to implicate a statutorily expressed public policy, defendants’ motion to dismiss the wrongful discharge claim is denied”).

²⁷⁶ Though D.C. is not a state, it maintains its own court of general jurisdiction, the Superior Court of D.C., and appellate court, the D.C. Court of Appeals. For issues of local, not federal, law, the D.C. Court of Appeals is the highest court and court of last resort in D.C.

²⁷⁷ *Carl v. Children’s Hosp.*, 702 A.2d 159, 171 (D.C. 1997) (emphasis added).

²⁷⁸ 748 A.2d 949 (D.C. 2000) (regarding a wrongful discharge claim based on racial and personal appearance discrimination).

²⁷⁹ *McManus*, 748 A.2d at 957.

²⁸⁰ *Id.* (citing *Freas v. Archer Servs., Inc.*, 716 A.2d 998, 1002 (D.C. 1998) (“there is no need to apply the *Carl* rationale because the legislative policy [in the statute allegedly violated] is explicit and may apply directly to [appellee’s] alleged discharge of [appellant]”).

²⁸¹ *Doss v. Jamco*, 482 S.E.2d 441 (Va. 1997).

²⁸² VA. CODE ANN. § 2.1-725 (1995) (current version at VA. CODE ANN. § 2.2-2639(D) (2011)).

²⁸³ *Doss*, 492 S.E.2d at 446.

actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances.”²⁸⁴

Following *Doss*, the court next addressed the scope of the VHRA in *Conner v. National Pest Control Association*.²⁸⁵ There, the plaintiff alleged that she had asserted a valid cause of action for wrongful termination because, in addition to the public policy against gender discrimination in the VHRA, her employer’s conduct violated the same public policy embodied in sources other than the VHRA, such as Title VII.²⁸⁶ The court disagreed, holding that “the General Assembly eliminated a common law cause of action for wrongful termination based on any public policy which is reflected in the VHRA, regardless of whether the policy is articulated elsewhere.”²⁸⁷ However, in line with the *Ashton* decision in Maryland, Virginia courts permit wrongful termination claims related to, but not specifically covered by, the VHRA.²⁸⁸

6. Public and Occupational Health

While safeguarding the health of the public at large should be a clear source of public policy, court rulings on the issue are mixed. Most states, including Maryland and Virginia as well as D.C., maintain numerous statutory provisions that intend to protect the health of their residents. Those explicit statutes can serve as the public policy basis of a wrongful termination claims. Absent an explicit mandate, however, most courts refuse to recognize a general public policy exception.

In *Hrehorovich v. Harbor Hosp. Ctr., Inc.*,²⁸⁹ the Court of Special Appeals of Maryland denied an employee’s wrongful termination claim based on the state’s interest in promoting a health care system that provides financial and geographic access to quality health care at a reasonable cost to all citizens.²⁹⁰ The employee, a doctor and Director of Medicine, raised concerns regarding the hospital’s refusal to pursue certain goals of a previously expressed strategic plan, reductions in the hospital work force, delays in X-ray and laboratory reporting, and lack of effective mechanisms

²⁸⁴ § 2.2-2639(D).

²⁸⁵ 513 S.E.2d 398 (Va. 1999).

²⁸⁶ *Id.* at 399. (“Specifically, Conner relied on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e”).

²⁸⁷ *Id.* at 400.

²⁸⁸ See *Mitchem v. Counts*, 523 S.E.2d 246 (Va. 2000) (holding that an employer’s termination of an employee for refusing to engage in a sexual relationship violated the Commonwealth’s public policies against fornication and lewd and lascivious behavior embodied in Code §§ 18.2-344 and 345).

²⁸⁹ 614 A.2d 1021 (Md. Ct. Spec. App. 1992).

²⁹⁰ *Id.* at 1033-34.

for communication between the hospital and its staff.²⁹¹ After bringing those issues to the attention of the Medical Executive Committee, the hospital terminated the complainant.²⁹² In denying the employee's *Adler* claim, the court found, "While a quality health care system accessible to all is undoubtedly a desirable goal, appellant's assertion that it represents a well-established public policy finds no support in any specific Maryland legislation."²⁹³

The *Hrehorovich* court cited primarily to *Lee*²⁹⁴ as the basis of its decision. In *Lee*, the employer discharged the employee after the employee protested deviations from proper testing procedures and attempts to deceive a Federal Aviation Administration ("FAA") inspector.²⁹⁵ The employee alleged that her termination contravened a federal public policy of "promotion of maximum achievable safety in air transportation."²⁹⁶ The court concluded that the employee's dispute with her employer was private, notwithstanding her allegation of an "amorphous [public] policy concern" of safety in air transportation.²⁹⁷

On July 19, 2011, the Court of Appeals of Maryland affirmed the dismissal of a wrongful termination claim based on violations of federal regulations on drug labeling;²⁹⁸ the Federal Trade Commission Act²⁹⁹ and the Maryland Consumer Protection Act.³⁰⁰ Debra Parks alleged that Alpharma's marketing of Kadian, a slow-release form of morphine, as compatible with other opiates and failure to note on the drug's label that it should not be taken with alcohol posed a danger to public health.³⁰¹ The Court held that the federal and local statutes and regulations cited did not create a clear mandate of public policy.³⁰²

²⁹¹ *Id.* at 1024.

²⁹² *Id.*

²⁹³ *Id.* at 1034.

²⁹⁴ *Lee v. Denro*, 605 A.2d 1017 (Md. Ct. Spec. App. 1992).

²⁹⁵ *Id.* at 1020.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 1024-25 (concluding that the employee failed to prove that she was discharged in violation of a clear mandate of public policy of the state and that the discharge was nothing more than a private employer-employee dispute).

²⁹⁸ *See Parks v. Alpharma, Inc.*, 25 A.3d 200, 203 (Md. 2011) (dismissing Parks' claim for failure to state a claim upon which relief could be granted because Parks failed to prove her employer violated a clear mandate of public policy necessary to sustain a cause of action for wrongful termination).

²⁹⁹ Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58 (2006).

³⁰⁰ Md. Code Ann., Com. Law § 13-301 (2011).

³⁰¹ *Parks*, 25 A.3d at 206 (describing Parks's claim that the pharmaceutical company fired her in retaliation for expressing her concerns about the lack of appropriate warnings on the drug's label).

³⁰² *Id.* at 214-16 (citing *Wholey v. Sears, Roebuck*, 803 A.2d 482, 490-91 (Md. Ct. App. 2002)).

The Consumer Protection Act . . . does not provide the specificity of public policy that we have required to support a wrongful discharge claim. The extent of the public policy mandate contained in the Act supports the breadth of its enforcement, but undermines its utility in the context of a wrongful discharge claim, for, as said in *Wholey*, “policies should be reasonably discernible from prescribed constitutional or statutory mandates,” to ensure that our decisions to extend the tort of wrongful discharge emanate solely from “clear and articulable principles of law.”³⁰³

Again, the Court wanted a specific expression of public policy, not a broad or general mandate attempting to protect the public good.³⁰⁴

Regarding occupational safety, Maryland relies upon statutory causes of action. The Maryland Occupational Safety and Health Act (“MOSHA”) promulgates state safety and health regulations in the workplace and incorporates corresponding federal regulations.³⁰⁵ Under section 5-604(b) of the Labor and Employment Article of the Maryland Annotated Code:

An employer or other person may not discharge or otherwise discriminate against an employee because the employee: (1) files a complaint under or related to this title; (2) brings an action under this title or a proceeding under or related to this title or causes the action or proceeding to be brought; (3) has testified or will testify in an action under this title or a proceeding under or related to this title; or (4) exercises, for the employee or another, a right under this title.³⁰⁶

An employee who believes her employer discharged or otherwise discriminated against her in violation of this act can only submit a written complaint to the Commissioner of Labor and Industry.³⁰⁷ Consequently, common law wrongful termination claims under *Adler* are unavailable for employees who raise occupational safety and health concerns.³⁰⁸

Nothing in MOSHA purports to give an employee any private right of action in court for violation of a health and safety standard. Indeed, even for a violation of § 43, *expressly*

³⁰³ *Parks*, 25 A.3d at 214.

³⁰⁴ *Id.*

³⁰⁵ MD. CODE ANN. § 5-101 to 5-1001 (2011).

³⁰⁶ § 5-604(b).

³⁰⁷ § 5-604(c)(1).

³⁰⁸ *Id.*

prohibiting an employer from discharging or discriminating against employees for exercising rights under MOSHA, the remedy afforded is a *complaint to the Commissioner*, who alone is authorized to file an action to restrain the violation “and for other appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.”³⁰⁹

Maryland federal courts set the stage for this decision. In *Meadows v. Container Research Corp.*,³¹⁰ Judge Young held that “the exclusive remedy for a MOSHA related wrongful discharge” was under section 5-604 and that a tort action under *Adler* did not exist for such a discharge.³¹¹

Similarly, the Virginia General Assembly provides a statutory cause of action for any employee terminated for filing a safety or health complaint. Under section 40.1-51.2:1 of the Virginia Annotated Code, regarding the safety and health of working conditions:

No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.³¹²

Under statute, an employee must first submit a complaint to the Commissioner of Labor and Industry.³¹³ Only if the Commissioner refuses to issue a charge against the employer can the employee seek redress from the courts.³¹⁴ Given this statutory cause of action, there is no need to rely upon *Bowman* and the common law tort of wrongful termination. However, there is no statute or case that specifically precludes a *Bowman* claim based on this section of the Virginia Code.

In D.C., health regulations without statutory remedies can serve as the basis of a *Carl* claim. In *Washington v. Guest Services, Inc.*,³¹⁵ the Court of

³⁰⁹ *Silkworth v. Ryder Truck Rental, Inc.*, 520 A.2d 1124 (Md. Ct. Spec. App. 1987).

³¹⁰ *Id.* at 1127.

³¹¹ *Meadows v. Container Research Corp.*, No. Y-82-3353, 1983 U.S. Dist. LEXIS 17371 (D. Md. 1983).

³¹² VA. CODE ANN. § 40.1-51.2:1 (2011); *see also* *Ligon v. Cnty. of Goochland*, 689 S.E.2d 666, 669 (Va. 2010) (explaining Virginia courts generally do not recognize a common law tort claim for retaliatory discharge, but the State has provided a statutory remedy for employees discharged for filing a safety or health complaint).

³¹³ § 40.1-51.2.2 (“The employee shall be prohibited from seeking relief under this section if he fails to file such complaint within the 60-day time period.”).

³¹⁴ *Id.*

³¹⁵ 718 A.2d 1071 (D.C. 1998).

Appeals retroactively applied the holding in *Carl* and overruled the Superior Court's grant of summary judgment to the employer:

The *health and food regulations* which we have cited...are *expressions of a clear public policy* proscribing, in the interest of public health, the preparation, service or sale of adulterated or contaminated food. Conduct that imperils the health and safety of the elderly residents of a retirement home, who, as a group, are particularly vulnerable to the kind of practice here alleged, is obviously *contrary to the public policy of this jurisdiction*, and Guest Services has not seriously argued the contrary.³¹⁶

The plaintiff in *Washington* instructed a coworker to cease spraying stainless steel cleaner in the area where the plaintiff was preparing food for the employer's elderly residents.³¹⁷ The plaintiff also informed her coworker that her actions were in violation of several laws and regulations.³¹⁸ The plaintiff's supervisor overheard this conversation and terminated the plaintiff the next day for insubordination.³¹⁹ The court found that foreclosing such a cause of action would undermine the purposes of food and health regulations.³²⁰

As in Maryland and Virginia, the Council of the District of Columbia also establishes local laws regarding occupational safety and health.³²¹ Also in line with the other two jurisdictions, D.C. law prohibits employers from retaliating against employees because they filed complaints or participated in proceedings under applicable laws.³²² Aggrieved employees may file retaliation complaints with the D.C. Occupational Safety and Health

³¹⁶ *Id.* at 1080 (emphasis added).

³¹⁷ *Id.* at 1072.(explaining that Washington worked as a cook in a retirement home and knew that the stainless steel cleaner was poisonous and that many of the residents were in ill health, and was therefore concerned about the health implications from having the spray come in contact with the food).

³¹⁸ *Id.* at 1023.

³¹⁹ *Id.* at 1072-1073 (describing how Washington's employer had told the co-worker to spray the cleaner and thought that Washington's order to her co-worker to stop spraying was insubordination).

³²⁰ *Id.* at 1080 (“[T]o permit an employee to be fired for such actions would undermine the purposes of the food and health regulations and would frustrate the public policy of which these regulations are an expression.”).

³²¹ D.C. CODE §§ 32-1101 to 32-1124 (2011).

³²² See § 32-1117(a) (“No person shall discharge or discriminate against an employee because an employee has filed a complaint, instituted or caused to be instituted a proceeding pursuant to this chapter, testified or is about to testify in a proceeding, exercised a right afforded by this chapter on behalf of the employee or others, or performed any duty pursuant to this chapter”).

Commission.³²³ Employees may seek judicial review of the Commission's decision by the D.C. Court of Appeals.³²⁴ Though there is no case on point, D.C. courts will likely not entertain common law wrongful termination claims citing only to D.C. occupational safety and health regulations.

7. State and Federal Wage Claims

In general, state and federal statutes regarding minimum wage and overtime cannot serve as the basis of a wrongful termination claim. However, Maryland courts recently found a small corollary to this rule.

In *Chappell*,³²⁵ the Maryland Court of Appeals ruled that the existence of remedy under Federal Fair Labor Standards Act ("FLSA") precluded an at-will employee from making a common law tort claim for retaliation.³²⁶ The court also determined that the availability of a civil remedy under the FLSA when there was no similar remedy under Maryland law also precluded the possibility of an *Adler* claim.³²⁷ The Court of Special Appeals reaffirmed the *Chappell* decision in *Shabazz v. Bob Evans Farms*.³²⁸

In a recent decision, the U.S. District Court for the District of Maryland added an interesting twist to the preemption doctrine. In *Randolph v. ADT Security Services, Inc.*,³²⁹ the court refused to dismiss the plaintiffs' wrongful termination claim despite their simultaneous FLSA retaliation count.³³⁰ Judge Chasanow opined:

Thus, it may be that, if Plaintiffs have a viable cause of action under the FLSA, the tort of abusive discharge would not be available to them. Counts I [FLSA Retaliation] and II [Wrongful

³²³ § 32-1117(b) (providing that an employee who believes that he or she has been discharged or otherwise discriminated against must file the complaint within 60 days of the discriminatory violation).

³²⁴ § 32-1117(d) ("An employer or employee aggrieved by a decision rendered by the Commission pursuant to this action is entitled to review by the District of Columbia Court of Appeals in accordance with § 2-510."); *see infra* Section X.A. regarding preemption. *See also infra* Section XI A.

³²⁵ *Chappell v. S. Maryland Hosp., Inc.*, 578 A.2d 766 (Md. 1989).

³²⁶ *Id.* at 774 (holding specifically that the existence of civil remedies under federal and state law precluded the application of a tort remedy to his discharge action).

³²⁷ *See id.* at 773-74; *see also* *Magee v. Dansources Technical Servs., Inc.*, 769 A.2d 231 (Md. Ct. Spec. App. 2001).

³²⁸ *Shabazz v. Bob Evans Farms, Inc.*, 881 A.2d 1212, 1224 (Md. Ct. Spec. App. 2005). (holding that the statutory remedy created by Article 49B (the Maryland statute prohibiting employer discrimination), provided an exclusive remedy and precluded a tort claim against individual supervisors for back pay).

³²⁹ 701 F. Supp. 2d 740 (D. Md. 2010).

³³⁰ *Id.* at 749.

Termination], then, *would then be considered alternative theories of recovery*.³³¹

While this decision does not overrule the holding that federal and state statutory remedies preclude state common law claims, under the theory of alternate pleading, it permits plaintiffs to defeat a motion to dismiss potentially preempted claims.³³²

8. Federal Statutes and Regulations

The ability to cite to state statutes and regulations as sources of public policy is well settled and uncontroverted. Various courts recognize that federal public policy may properly form the basis for a wrongful termination suit in state court.³³³ Maryland and D.C. courts concur.³³⁴ The courts in other jurisdictions, such as Virginia, do not extend the sources of public policy to include federal statutes and regulations.

Maryland federal court, in the similarly titled *Adler v. Am. Standard Corp.* (“*Adler II*”),³³⁵ found that federal statutes could serve as the basis for a wrongful termination claim because no Maryland state court ruled otherwise.³³⁶ Conversely, the U.S. Court of Appeals for the Fourth Circuit found that federal regulations do not constitute Maryland public policy for the purpose of an *Adler* wrongful termination claim.³³⁷ While these federal decisions are not binding on state courts, they are representative of the mixed decisions of the Court of Special Appeals of Maryland.

³³¹ *Id.* at 748.

³³² *See id.*

³³³ *See, e.g., Adler v. Am. Standard Corp.*, 538 F. Supp. 572, 579 (D. Md. 1982) (citing *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1117-19 (E.D. Pa. 1979); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1331 (Cal. 1980); *Harless v. First National Bank*, 246 S.E.2d 270, 272-73 (W.Va. 1978)) (holding that in an abusive discharge action under Maryland law, violations of federal law may form the basis for the public policy contravened by the discharge).

³³⁴ *Adler* 538 F. Supp. at 572; *De Bleecker v. Montgomery Cnty, Md*, 438 A.2d 1348 (Md. 1982); *Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144 (Md. Ct. Spec. App. 1990); *Lee v. Denro*, 605 A.2d 1017 (Md. Ct. Spec. App. 1992); *Wholey v. Sears, Robuck*, 803 A.2d 482 (Md. Ct. Spec. App. 2002); *King v. Marriott Int'l, Inc.*, 866 A.2d 895 (Md. Ct. Spec. App. 2005); *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999); *MacIntosh v. Bldg. Owners and Managers Ass'n Int'l*, 355 F. Supp. 2d 223 (D.C. Cir. 2005).

³³⁵ *Adler*, 538 F. Supp. at 572.

³³⁶ *Adler*, 538 F. Supp. at 578-79 (citing *Maine v. Thiboutot*, 448 U.S. 1 (1980)). *rev'd on other grounds Adler v. Am. Standard Corp.*, 830 F.2d 1303 (4th Cir. 1987).

³³⁷ *See Szaller v. Am. Nat'l Red Cross*, 293 F.3d 148 (4th Cir. 2002) (holding employer did not violate a clear mandate of Maryland public policy by allegedly discharging employee for reporting alleged violations by the employer of Food and Drug Administration regulations addressing the proper collection of blood).

When creating the common law tort of wrongful termination in violation of public policy, the *Adler I* court cited to cases that confirmed applicability of federal public policies.³³⁸ Specifically, the court outlined:

In *Harless v. First National Bank*, discharge of an at will bank employee in retaliation for the employee's efforts to force the bank to comply with state and *federal consumer credit laws* was held to be actionable because the discharge contravened a "substantial public policy principle" the protection of consumers covered by the state and *federal legislation*.³³⁹

However, the court neither outright confirmed nor denied that federal statutes constitute public policy in Maryland. It simply pointed out that it did not "confine...itself to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of this State."³⁴⁰ This ambiguity led to some confusion in Maryland state and federal courts. However, a review of pertinent case law leads to the conclusion that the definition of public policy does include federal laws.

Some Maryland state courts reviewed federal statutes as the basis of a public policy exception without stating that they did, in fact, constitute a public policy of Maryland. In a footnote in *Lee*,³⁴¹ the Court of Special Appeals of Maryland admitted, "We assume without deciding that an employee can base a claim for wrongful discharge under Maryland law on an asserted violation of public policy exhibited by violation of federal statutes."³⁴² The plaintiff argued that his employer violated federal fraud and obstruction of justice statutes, specifically, sections 1001 and 1505 of the title 18 of the United States Code.³⁴³ Ruling on the substance of those claims, the court found that the plaintiff did not state a claim for wrongful termination because she did not allege how her employer affirmatively attempted to silence her or persuade her to lie to an FAA inspector.³⁴⁴ Though the court stated that an employee could use a federal statute as the public policy basis of a wrongful termination claim, it disclaimed that it did

³³⁸ *Adler v. Am. Standard Corp.*, 432 A.2d 464, 468 (Md. 1981) (citing *Tameny*, 610 P.2d at 1330; *Harless*, 246 S.E.2d at 275-76).

³³⁹ *Id.* (emphasis added) (citing *Harless*, 246 S.E.2d at 275).

³⁴⁰ *Id.* at 472; *see also* *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760 (Md. 1991).

³⁴¹ *Lee v. Denro, Inc.*, 605 A.2d 1017 (Md. Ct. Spec. App. 1992).

³⁴² *Id.* at 1021. (citing *Phipps v. Clark Oil and Refining Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986).

³⁴³ *Lee*, 605 A. 2d at 1021-22.

³⁴⁴ *Lee*, 605 A. 2d at 1022.

not decide the matter and limited its assumption to a footnote.³⁴⁵ Such opinions are dicta and do not create binding precedent.

In *King*, the same court held that “ERISA section 510, 29 U.S.C. § 1140, provides a remedy for employees who are terminated for reporting corporate wrongdoing to the proper authorities...[and] does not provide protection for intra-employment conduct...[or] a remedy to appellant.”³⁴⁶ If ERISA, a federal statute, did not qualify as a public policy in Maryland, there would have been no need for the court to review the content of the federal statute to determine if it applied to the appellant’s assertions.

However, Maryland courts were not always so coy and subtle in expanding application of *Adler* to include federal public policy. In *Magee*, the plaintiff argued that her discharge was in retaliation for her refusal to violate the healthcare fraud provisions of section 24 and 1347 of title 18 of the United States Code.³⁴⁷ This federal statute makes it a crime to knowingly defraud a healthcare benefit program.³⁴⁸ Because the court found no civil remedy that would provide the plaintiff redress for retaliation, it held she could state a claim under the public policy exception.³⁴⁹ In response to the defendant’s argument that the federal statutes did not rise to the level of an applicable public policy, Judge Akins opined:

We disagree. This criminal statute could not be clearer; it constitutes a strong and clear public policy mandate against filing fraudulent health insurance claims. Thus, Magee’s evidence of health care benefit fraud satisfied the second “unvindicated public policy mandate” element of an abusive discharge cause of action.³⁵⁰

Given these three decisions, there is sufficient support that Maryland accepts federal statutes as public policy within the state, so long as those federal statutes do not carry their own remedial measures.

Constitutional provisions and principles also provide clear public policy mandates applicable to wrongful discharge claims.³⁵¹ In *DeBleecker*,³⁵² the

³⁴⁵ *Lee*, 605 A. 2d at 1021.

³⁴⁶ *King v. Marriott Int’l, Inc.*, 866 A.2d 895 (Md. Ct. Spec. App. 2005) (citing *King v. Marriott Int’l, Inc.*, 337 F.3d 421, 428 (4th Cir. 2003)).

³⁴⁷ *Magee v. Dansources Technical Servs., Inc.*, 769 A.2d 231, 257 (Md. Ct. Spec. App. 2001).

³⁴⁸ 18 U.S.C. § 24 (2012); 18 U.S.C. § 1347 (2012).

³⁴⁹ *Magee*, 769 A.2d at 257.

³⁵⁰ *Id.*

³⁵¹ See *Wholey v. Sears Roebuck*, 803 A.2d 482, 492 (Md. Ct. App. 2002) (“Constitutional provisions and principles also provide clear public policy mandates, under which a termination may be grounds for a wrongful discharge claim.”).

Maryland Court of Appeals held that the employment at-will doctrine was inapplicable if the discharge was a result of an employee's exercise of his constitutionally protected First Amendment rights.³⁵³ Similarly, the Court of Special Appeals of Maryland recognized a public policy exception based on a citizen's right to privacy in *Kessler*.³⁵⁴ *Kessler*'s employer, an apartment complex, terminated *Kessler* after she refused to enter the apartments of tenants whose rent was overdue to "snoop" through private papers in search of information regarding their place of employment, wages, etc.³⁵⁵ The court held that there existed both statutory and constitutional protections against such invasions of privacy.³⁵⁶

The inability to cite to federal statute as the source of a public policy exception to the at-will doctrine is clear in Virginia. A *Bowman* claim must rest upon Virginia public policy, not federal statute.³⁵⁷ In *Bailey*,³⁵⁸ the Virginia Supreme Court opined:

That contention makes interesting rhetoric, but it disregards the settled law that any narrow exception to Virginia's employment-at-will doctrine *must be based on a specific Virginia statute* in which the General Assembly has established a public policy that the employer has contravened. And, as I have said, there is no Virginia statute expressly prohibiting defendant's conduct.³⁵⁹

In *Lawrence*, to which *Bailey* cites, the court explained:

In *Bowman* and *Lockhart*, the plaintiffs, who were permitted to pursue causes of action against their former employers, identified

³⁵² *De Bleecker v. Montgomery Cnty.*, Maryland, 438 A.2d 1348, 1353 (Md. 1982).

³⁵³ *Id.* at 1352-53. *De Bleecker* was employed by Montgomery County as a teacher at a detention center, and alleged he was dismissed for speaking out about a guard's use of violent force to quell an altercation. *De Bleecker* alleged this was a violation of his constitutional right to free speech. *Id.* at 1349.

³⁵⁴ *Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144, 1150-1151 (Md. Ct. of Spec. App. 1990).

³⁵⁵ *Id.* at 1146-47.

³⁵⁶ *Id.* at 1149.

³⁵⁷ *Oakley v The May Dep't Stores Co.*, 17 F. Supp. 2d 533, 535-36 (E.D. Va. 1998); *McCarthy v. Texas Instruments, Inc.*, 999 F. Supp. 2d 823, 829 (E.D. Va. 1998); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 809 (Va. 1996); *see also Doss v. Jamco, Inc.*, 492 S.E.2d 441, 443-44 (Va. 1997); *Bailey v. Scott-Gallaher*, 480 S.E.2d 502, 505 (Va. 1997).

³⁵⁸ *Bailey*, 480 S.E.2d at 505.

³⁵⁹ *Id.* at 506 (emphasis added) (citations omitted) (citing *Lawrence v. Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 809 (Va. 1996); *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918-19 (Va. 1987); *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985)).

specific Virginia statutes in which the General Assembly had established public policies that the former employers had contravened. Unlike the plaintiffs in *Bowman* and *Lockhart*, Brooks *does not have a cause of action for wrongful discharge because he is unable to identify any Virginia statute establishing a public policy* that Lawrence Chrysler violated. We also reject Brooks' attempt to expand the narrow exception we recognized in *Bowman* by relying upon so-called "common law duties of the dealership."³⁶⁰

Though *Bowman* does not explicitly state that Virginia statutes are the only sources of public policy, the Virginia Supreme Court clarified in its subsequent decisions that *Bowman's* reliance on a specific Virginia statute as the basis of the public policy exception tailored the cause of action to derive from only state laws.³⁶¹

Conversely, D.C. federal courts have consistently cited to federal statutes and regulations as potential sources of public policy in wrongful termination actions. In *Liberatore v. Melville Corp.*,³⁶² the U.S. Courts of Appeals for the District of Columbia Circuit reversed summary judgment in favor of the defendant on a claim where the plaintiff alleged his employer terminated him because he threatened to report the temperature control problem in his pharmacy to the U.S. Food and Drug Administration ("FDA").³⁶³ The plaintiff cited to FDA regulations at 21 C.F.R. § 210.1(b) and § 211.142(b), as well as the Food, Drug, and Cosmetic Act.³⁶⁴ The jury subsequently found for the plaintiff.³⁶⁵ More recently, in *MacIntosh v. Building Owners and Managers Association International*,³⁶⁶ the D.C. federal court denied the defendant's motion to dismiss the plaintiff's wrongful termination count that cited to the False Claims Act³⁶⁷ as the basis of her *Carl* claim.³⁶⁸ The court held:

[Defendant] contends that plaintiff has not pointed to any specific statute or regulation and has thus failed to establish a "clear

³⁶⁰ *Lawrence*, 465 S.E.2d at 809.

³⁶¹ *Oakley*, 17 F. Supp. at 535-36; *McCarthy*, 999 F. Supp. at 829; *Lawrence*, at 809; *see also Doss*, 492 S.E.2d at 443-44; *Bailey*, 480 S.E.2d at 505.

³⁶² *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999).

³⁶³ *Id.* at 1327-28. The trial court dismissed *Libatore's* wrongful discharge action for failure to state a claim within the public policy exception set forth in *Adams. Id.* at 28 (citing *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991)).

³⁶⁴ 31 U.S.C. § 3729(a) (2012).

³⁶⁵ *Liberatore*, 168 F.3d at 1328.

³⁶⁶ *MacIntosh v. Bldg. Owners and Managers Ass'n Int'l*, 355 F. Supp. 2d 223 (D.C. Cir. 2005).

³⁶⁷ 31 U.S.C. § 3729(a) (2012).

³⁶⁸ *MacIntosh*, 355 F. Supp. 2d at 228.

mandate of public policy” justifying an exception to the at-will doctrine. In response, *plaintiff identifies a federal statute*, the False Claims Act, 31 U.S.C. § 3729(a) (2000), that criminalizes using false records or documents to induce the Government to pay a fraudulent claim. Because plaintiff alleged that BOMA fired him for refusing to inflate BOMA’s contractor expenses, *plaintiff has pointed to a clear mandate of public policy as expressed in a federal criminal statute*, satisfying both the broad standard announced in *Carl* and the narrower rule from *Adams*.³⁶⁹

Most recently, in *Myers v. Alutiiq Int’l Solutions*,³⁷⁰ the D.C. District Court held that the plaintiff’s reporting of wrongdoing in connection with government contracting fell within the public policy exception to an at-will employment relationship.³⁷¹ It found that the federal statute at issue³⁷² reflected a “clear public policy of encouraging government employees to come forward and report possible problems in federal programs.”³⁷³ The *Myers* court also cited to the Federal Acquisition Regulations (“FAR”)³⁷⁴

The Superior Court of D.C. and the D.C. Court of Appeals have not addressed the issue whether federal statutes can serve as the public policy basis for a *Carl* claim. While there is no reason to infer that D.C. courts would not follow in the steps of its federal counterparts, D.C. local and federal courts have disagreed with each other in the past regarding the recognition of the common law tort.³⁷⁵ Given the expansive interpretation D.C. courts have afforded *Carl*, it is safe to assume, for the time being, that federal statutes and regulations qualify as sources of public policy for wrongful termination claims.

C. Other Sources of Public Policy

The above sections outline current case law on some of the sources of public policy for wrongful termination actions in Maryland, Virginia, and D.C. The topics above are by no means an exhaustive list of possible

³⁶⁹ *Id.* at 228 (emphasis added).

³⁷⁰ *Myers v. Alutiiq Int’l Solutions, LLC.*, No. 10-2041, 2011 U.S. Dist. LEXIS 102013 (D.D.C. Sept. 12, 2011).

³⁷¹ *Myers*, 2011 U.S. Dist. LEXIS 102013 at 14.

³⁷² 5 U.S.C. § 2302 (2008).

³⁷³ *Id.* at 12.

³⁷⁴ *Id.* (citing 48 C.F.R. §§ 9.505, 3.101-1, and 3.903).

³⁷⁵ Compare *Ivy v. Army Times Pub. Co.*, 428 A.2d 831 (D.C. Cir. 1981) and *Newman v. Legal Servs Corp.*, 628 F. Supp. 535, 539 (D.D.C. 1986); see also *Hall v. Ford*, 856 F.2d 255, 267 (D.C. Cir. 1988).

sources of public policy, but include the most common sources. Because the cause of action for wrongful termination is a common law claim, courts can expand and reinterpret the elements and bases over time.

The Court of Appeals of Maryland confirmed this sentiment.

While it is possible that a clear mandate of public policy may exist in the absence of a constitutional, statutory, or regulatory pronouncement, this possibility “should be accepted as the basis of judicial determination, if at all, only with the upmost circumspection.” *Townsend v. L.W.M. Mgmt., Inc.*, 64 Md.App. 55, 61-62, 494 A.2d 239 (1985) (quoting *Patton v. United States*, 281 U.S. 276, 306 (1930)); see also *Bagwell*, 106 Md.App. at 495-96, 665 A.2d 297 (“[R]ecognition of an otherwise undeclared public policy as a basis for judicial decision involves the application of a very nebulous concept to the facts of the case, a practice which should be employed sparingly, if at all.” (citations and internal quotation marks omitted)); *Lee*, 91 Md.App. at 831, 605 A.2d 1017 (noting that, although “Maryland appellate courts have decided several cases involving [wrongful] discharge claims since *Adler*, they have never found such a claim to be stated absent a discharge which violates a public policy set forth in the constitution, a statute, or the common law.”)³⁷⁶

In *Adler* itself, the court pointed out that it did not “confine . . . itself to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of [the] State.”³⁷⁷ While Maryland and D.C. may be more prone to expanding the definition of what constitutes public policy, the courts in Virginia remain firm in their conviction that only Virginia statutes can form the public policy basis of a wrongful termination claim.

Some of the most influential alternate sources of public policy are codes of professional ethics. New Jersey remains one of the only jurisdictions to confirm that such codes qualify as an expression of public policy.³⁷⁸ Maryland, in *Makovi*, recognized that a code of professional ethics could

³⁷⁶ *Sears, Roebuck & Co. v. Wholey*, 779 A.2d 408, 412 (Md. Ct. Spec App. 2001) *aff'd sub nom.* *Wholey v. Sears Roebuck*, 803 A.2d 482, 495 (Md. Ct. App. 2002) (citations omitted).

³⁷⁷ *Adler v. Am. Standard Corp.*, 432 A.2d 464, 472 (Md. 1981); see also *Watson v. People Sec. Life Ins. Co.*, 588 A.2d 760, 766-67 (Md. Ct. App. 1991).

³⁷⁸ See *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980) (holding that “in certain instances, a professional code of ethics may contain an expression of public policy” but excluding codes of ethics designed only to serve the interests of a profession (as opposed to a public interest) and codes only concerned with technical regulations).

constitute a source of public policy.³⁷⁹ However, the court simply stated generally that some courts have recognized a cause of action for employees fired for “refusing to violate a professional code of ethics.”³⁸⁰ In *Carl*, the D.C. Court of Appeals held that an employer’s termination of an employee for acting in accordance with his or her personal moral beliefs does not violate public policy.³⁸¹ The court ruled that the a specific statute protecting the right to testify before the legislature—not the general public policy protecting the right to speak out—provided a concrete policy supporting a wrongful termination claim. However, the court in *Wallace* appeared to regard the Rules of Professional Conduct for members of the D.C. bar as theoretically sufficient to create an applicable public policy.³⁸² The court ultimately found that no such rule required the plaintiff’s whistleblowing conduct in that case.³⁸³

There are some creative avenues available to bring wrongful termination claims based on codes of professional conduct and ethics in Virginia. For example, plaintiffs can argue that Virginia’s recognition of the American Nursing Association’s (“ANA”) Code of Ethics establishes that code as a viable public policy basis for a *Bowman* claim. Section 54.1-100 of the Virginia Annotated Code, confirms the Commonwealth’s authority to regulate certain professions in order to protect the public interest.³⁸⁴ Nursing is an example of such a profession. Consequently, the Virginia Board of Nursing maintains the ability to revoke a nurse’s license for “practicing in a manner contrary to the standards of ethics.”³⁸⁵ The Virginia Department of Health, Public Health Nursing program recognizes the ANA Code of Ethics as a basis for its standards of practice. Therefore, the Virginia Annotated Code, within its sections 54.1-100 and 54.1-3007, and along with the regulations of the Virginia Department of Health, incorporate the ANA Code of Ethics by reference. A plaintiff nurse terminated for refusing to violate the ANA Code of Ethics can use these references to support her wrongful termination claim under *Bowman*.

³⁷⁹ *Makovi v. Sherwin-Williams Co.*, 561 A.2d 179, 182 (Md. Ct. App. 1989)..

³⁸⁰ *Id.* (citing *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1937 (1983)).

³⁸¹ *Carl v. Children’s Hosp.*, 702 A.2d 159 (D.C. 1997).

³⁸² *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 883 (D.C. Ct. App. 1998).

³⁸³ *Id.* at 886.

³⁸⁴ VA. CODE ANN. § 54.1-100 (1988) (“The right of every person to engage in any lawful profession, trade or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when it is clearly found that such abridgment is necessary for the preservation of the health, safety and welfare of the public.”).

³⁸⁵ VA. CODE ANN. § 54.1-3007 (2005).

While there is no case law on point, this theory, and similarly creative arguments, are worth testing before a judge.

X. ELEMENT THREE: STANDARD OF CAUSATION

The standard of causation in wrongful termination claims in Maryland, Virginia, and D.C. is not overtly clear. A plaintiff can argue in all three jurisdictions that she need only demonstrate that the defendant's public policy violation was a "motivating factor" in its decision to terminate her. However, only Virginia courts provide a clear determination that this is the proper standard. In Maryland and D.C., plaintiffs must infer the standard from other case law.

In Maryland, the plaintiff must establish that the defendant's motivation for terminating her violated public policy.³⁸⁶ The Court of Special Appeals, in its decisions in *Townsend v. L.W.M. Mgmt., Inc.*,³⁸⁷ and *Bagwell*,³⁸⁸ held that a plaintiff must show that the reason for an employee's discharge was "wrongful." In *Townsend*, the court concluded that the mere reliance on the results of the polygraph test, even if the employer had wrongfully required the employee to take the test, did not violate public policy.³⁸⁹ "Even if some unlawful animus contributed to the ultimate employment decision, liability does not necessarily attach," particularly where the decision would have been the same with or without the animus.³⁹⁰ Put another way:

The question is not whether discharging [the employee for his arguably improper conduct] was fair, justified, sensible, reasonable, or appropriate. Rather, the question is whether it was wrongful, i.e., whether it violated a clear mandate of public policy. Absent that type of violation, employers can discharge at-will employees for no reason or even for a bad reason.³⁹¹

Case law regarding mixed cases and other forms of retaliatory discharge hold that the plaintiff need only show that the unlawful motive was "a motivating factor" for the discharge.³⁹² The *Heller* court considered the

³⁸⁶ See, e.g., *Porterfield v. Mascari II, Inc.*, 823 A.2d 590 (Md. Ct. App. 2003).

³⁸⁷ *Townsend v. L.W.M. Mgmt., Inc.*, 494 A.2d 239, 247 (Md. Ct. Spec. App. 1985).

³⁸⁸ *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 311 (Md. Ct. Spec. App. 1995).

³⁸⁹ *Townsend*, 494 A.2d at 247.

³⁹⁰ *Brandon v. Molesworth*, 655 A.2d 1292, 1306 (Md. Ct. Spec. App. 1995).

³⁹¹ *Shapiro v. Massengill*, 661 A.2d 202, 215 (Md. Ct. Spec. App. 1995); see also *Bagwell*, 665 A.2d at 312.

³⁹² See *Brandon*, 655 A.2d at 1306-07; see also *Magee v. DanSources Technical Servs., Inc.*, 769 A.2d 231, 253-54 (Md. Ct. Spec. App. 2001) (agreeing that the

burden of persuasion in an action for retaliatory discipline brought pursuant to the Maryland Whistleblower Statute. Noting the statute provided that “[t]his subtitle does not prohibit a personnel action that would have been taken regardless of a disclosure of information,” it held that “[a] whistleblower action by the employee intended to overturn a personnel action . . . will succeed only if the employee shows by a preponderance of the evidence that the protected disclosure was a ‘contributing factor’ in the decision to take the personnel action.”³⁹³

Maryland courts, in a recent decision by the Court of Appeals, confirmed that, whether “mixed” or “single” cases, the correct test for determining retaliatory discharge claims is whether the protected conduct was a “motivating factor” in the discharge.³⁹⁴ The court confirmed that the *Molesworth* decision does not include a holding that a “but for” instruction is required in a retaliatory discharge case. Furthermore, the court found that a theoretical distinction between “single motive” and “mixed-motive” cases is of no consequence whatsoever.³⁹⁵ Both courts concluded:

We believe Maryland law to be settled that a plaintiff’s burden is to prove that the exercise of his or her protected activity was a “motivating” factor in the discharge, thereby creating burden-shifting to the defendant. An instruction that imposes upon a plaintiff the burden of proving that the exercise of his or her protected activity was the “determining” factor in the discharge from employment is a misstatement of the law, and erroneous.³⁹⁶

Virginia courts are clearer regarding an employee’s burden in *Bowman* claims. In *Shaw*, 255 Va. at 542-43, the Virginia Supreme Court ruled that a plaintiff claiming wrongful termination must demonstrate that the reason for discharge violated Virginia’s public policy.³⁹⁷

A plaintiff is not required to prove that the employer’s improper motive was the *sole cause* of the wrongful termination.³⁹⁸ In reaching that conclusion, the court differentiated the common law claim of wrongful termination from the statutory cause of action under state workers’

Molesworth standard is a “motivating factor” and not “but for” causation); Dep’t of Natural Res. v. Heller, 892 A.2d 497, 499, (Md. Ct. App. 2006).

³⁹³ *Heller*, 892 A.2d at 510 (citing MD. CODE, STATE PERS. & PENS. § 5-302 (1997)).

³⁹⁴ See *Gasper v. Ruffin Hotel Corp. of Md, Inc.*, 960 A.2d 1228, 1234 (Md. Ct. Spec. App. 2008) *aff’d sub nom.* *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 17 A.3d 676 (Md. Ct. App. 2011).

³⁹⁵ *Gasper*, 17 A.3d. at 686.

³⁹⁶ *Gasper*, 960 A.2d at 1234; *Gasper*, 17 A.3d at 686.

³⁹⁷ *Shaw v. Titan Corp.*, 498 S.E.2d 696, 700 (1998).

³⁹⁸ *Id.*

compensation laws. While section 65.2-308 of the Virginia Annotated Code specifically forbids an employer from discharging an employee “solely because the employee intends to file or has filed” a workers’ compensation claim, there is no similar requirement for common law claims.

Virginia’s common law standard of proximate causation requires a plaintiff to prove that her employer discharged her because of any combination of unlawful factors. In such cases, the common law of Virginia does not require the court to give the jury an explicit instruction setting forth “but for” language.³⁹⁹ More recently, in *Schmidt, et al. v. Triple Canopy, Inc.*,⁴⁰⁰ the Virginia Supreme Court explained that in a common law wrongful discharge action the trial judge erred in instructing the jury that the plaintiff must prove that their former employer’s illegal motive for terminating them was the sole cause of the termination decision. Instead, plaintiffs can prevail by demonstrating by a preponderance of the evidence that the termination occurred because of factors that violate Virginia’s public policy.

In *Adams*, the Court of Appeals of D.C. held that “a discharged at-will employee may sue his or her former employer for wrongful discharge when the *sole* reason for the discharge is the employee’s refusal to violate the law, as expressed in a statute or municipal regulation.”⁴⁰¹ The *Wallace* court affirmed the dismissal of an employee’s wrongful termination claim because she could not demonstrate that her employer terminated her “solely, or even substantially for engaging in conduct protected by such an exception.”⁴⁰² Wallace’s allegations that other factors—such as professional envy of her extensive credentials by colleagues, refusal to cancel her daughter’s sixth birthday party, and reporting of five categories of alleged wrongdoing—contributed to her discharge prevented her from stating a viable claim for wrongful termination.⁴⁰³ In *Carl*, however, the court upheld a complaint alleging that the employer discharged the plaintiff for two discrete reasons—testifying before the D.C. Council against tort reform and serving as an expert witness for plaintiffs in medical malpractice cases.⁴⁰⁴ The court did so even though it deemed only the first of these reasons as sufficient to implicate a public policy exception.⁴⁰⁵ Though the *Wallace* court noted this change in judicial precedent, it refused

³⁹⁹ See *Shaw v. Titan Corp.*, 498 S.E.2d 696, 700-01 (Va. 1998).

⁴⁰⁰ No. 072556, Circuit Court No. CL-2006-0009565 (December 12, 2008).

⁴⁰¹ *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991); see also *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 883 (D.C. Ct. App. 1998) (emphasis added).

⁴⁰² *Wallace*, 715 A.2d at 886.

⁴⁰³ *Id.* at 885-86.

⁴⁰⁴ *Carl v. Children’s Hosp.*, 702 A.2d 159, 165 (D.C. 1997).

⁴⁰⁵ *Id.*

to apply it to the case at bar.⁴⁰⁶ Neither *Carl* nor any other subsequent decision has specifically overturned the determination in *Adams* that the employer's violation of public policy must be the sole reason from the employee's termination. In fact, the Superior Court confirmed the "sole reason" standard recently in *Byrd II*.⁴⁰⁷ However, the plaintiff in *Byrd II* did not attempt to argue a different standard, so that point was conceded. Nevertheless, the decision in *Carl* inarguably interpreted *Adams* broadly and permitted additional public policy exceptions.⁴⁰⁸ There is no reason why plaintiff's cannot argue that the *Carl* expansion of the common law claim also broadens the strict "sole reason" standard of causation to include the opportunity to please multiple, equally valid theories regarding the employer's motivations.

XI. DEFENSES

The primary defenses employers have to confront wrongful termination claims are (1) available statutory remedies preempt the employee's common law cause of action, and (2) the employer had a separate, legitimate reason to discharge the employee.

A. Preemption by Other Statutory Remedies

As the sections on workers' compensation, discrimination, and occupational safety and health above mention, employees cannot assert a common law wrongful termination claim where there is a statutory civil remedy on point. The purpose of the public policy exception is to provide employees with a cause of action where an obvious wrong may stand unpunished. Courts in all three jurisdictions confirm preemption of a wrongful termination claim where a statutory action is available. The rule in Virginia, however, is more nuanced.

Maryland courts named this preemption doctrine as the *Makovi* rule, referring to *Makovi v. Sherwin-Williams Co.*⁴⁰⁹ *Makovi*, in reviewing a case of pregnancy discrimination, held that the common law tort is "inherently limited to remedying only those discharges in violation of a clear mandate of public policy which otherwise would not be vindicated by a civil

⁴⁰⁶ See *Wallace*, 715 A.2d at 890.

⁴⁰⁷ *Byrd v. VOCA Corp. of Washington, D.C.*, No. 2004-CA-004412-B, 2011 D.C. Super. Ct. LEXIS 8, 23 (Sept. 13, 2011).

⁴⁰⁸ See *Bowie v. Gonzales*, 433 F. Supp. 2d 24, 36 (D.D.C. 2006).

⁴⁰⁹ *Makovi v. Sherwin-Williams Co.*, 561 A.2d 179 (Md. Ct. App.1989).

remedy.”⁴¹⁰ Title VII and Maryland’s FEPA, not *Adler*, was the plaintiff’s proper cause of action. Where a statute expresses the public policy foundation for an abusive discharge claim, and that statute already contains a remedy for vindicating the public policy objectives, then judicial recognition of an abusive discharge claim is both “redundant and inappropriate.”⁴¹¹

Like any rule, the *Makovi* rule is not without its exceptions. In *Makovi*, the Court of Appeals of Maryland admitted, “Sometimes the facts underlying a discharge constitute both a violation of an anti-discrimination statute and of another, more narrowly focused, statute reflecting clear public policy but providing no civil remedy.”⁴¹² For example, the court noted an Arkansas case where the plaintiff alleged her refusal to sleep with her supervisor was a refusal to engage in prostitution, which carried criminal, not civil, consequences.⁴¹³ This was precisely the case in *Insignia*.⁴¹⁴ As outlined previously, Ashton argued that *Insignia* wrongfully terminated her employment because she refused to acquiesce to a form of *quid pro quo* sexual harassment that would have amounted to an act of prostitution under Md. Code Ann., Crim. Law § 11-301, *et seq.* The court explained that the *Makovi* rule does not apply when an employer violates a mandate of public policy independent from discrimination laws. Citing the decision of *Watson*, the *Insignia* court confirmed that there is no preclusion where an additional crime, such as assault and battery, arose out of workplace sexual harassment covered by statute.⁴¹⁵ Keeping with the theme, the Maryland Court of Special Appeals refer to this exception to the *Makovi* rule as the *Watson* and *Insignia* exception.⁴¹⁶

The Virginia General Assembly went so far as to codify the preclusive nature of statutory remedies when employees seek common law tort claims. As mentioned previously, the Virginia General Assembly amended the VHRA in 1995 to preclude “causes of action based upon the public policies reflected in [the VHRA].”⁴¹⁷ Virginia’s workers’ compensation statute includes a similar provision. Under section 65.2-307 of the Virginia Annotated Code, “The rights and remedies herein granted to an employee .

⁴¹⁰ *Id.* at 180.

⁴¹¹ *Miller v. Fairchild Indus., Inc.*, 629 A.2d 1293, 1300 (Md. Ct. Spec. App. 1993); *see also King v. Marriott Inter. Inc.*, 866 A.2d 895, 904 (Md. Ct. App. 2005) (citing *Wholey v. Sears Roebuck*, 803 A.2d 482, 489 (Md. Ct. App. 2002)).

⁴¹² *Makovi v. Sherwin-Williams Co.*, 561 A.2d 179, 187 (Md. Ct. App. 1989).

⁴¹³ *Id.* (citing *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir.1984)).

⁴¹⁴ *Insignia v. Residential Corp. v. Ashton*, 755 A.2d 1080 (Md. Ct. App. 2000).

⁴¹⁵ *Id.* at 1086 (citing *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 769 (Md. Ct. App. 1991)).

⁴¹⁶ *See Magee v. DanSources Technical Servs., Inc.*, 769 A.2d 231, 256 (Md. Ct. Spec. App. 2001).

⁴¹⁷ VA. CODE ANN. § 2.2-2639(D) (2005).

. . shall exclude all other rights and remedies of such employee.”⁴¹⁸

However, Virginia courts have not explicitly held that the existence of statutory remedies, as a general rule, precludes the availability of a *Bowman* claim. In fact, Virginia courts have implied that the common law public policy exception is separate and independent from statutory causes of action. For example:

‘In order for the goal of the statute to be realized and the public policy fulfilled,’ the Supreme Court recognized an exception to the at-will doctrine.⁴¹⁹ Later, in *Miller v. SEVAMP, Inc.*, the Supreme Court of Virginia noted that *Bowman* applied a narrow exception to the employment-at-will doctrine but fell far short of recognizing a generalized cause of action for the tort of ‘retaliatory discharge.’⁴²⁰ Indeed, *the General Assembly of Virginia has enacted statutes providing a cause of action for ‘retaliatory discharge’ under specific circumstances* (such as discrimination against persons with disabilities;⁴²¹ employees who file safety or health complaints,⁴²² and employees who make workers’ compensation claims.⁴²³)⁴²⁴

Statutes that derogate from the common law “must be strictly construed and not enlarged by construction beyond their express terms.”⁴²⁵ A statutory change in the common law “is limited to that which is expressly stated in the statute or necessarily implied by its language.”⁴²⁶ Thus, “[w]hen an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule.”⁴²⁷ A plaintiff can theoretically argue that the existence of other statutory remedies, without

⁴¹⁸ VA. CODE ANN § 65.2-307(A) (1999).

⁴¹⁹ *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985).

⁴²⁰ *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918-19 (Va. 1987).

⁴²¹ § 51.01-41; § 51.01-46.

⁴²² § 40.1-51.2:1; 40.1-51.2:2.

⁴²³ § 65.1-40.1.

⁴²⁴ *Shields v. P C-Expanders, Inc.*, NO. 119505, 1993 WL 946038 (Va. Cir. Ct. Apr. 15, 1993); *see also Kerns v. Shirley Well Drilling*, 11 Va. Cir. 15 (Va. Cir. Ct. 1986) (emphasis added).

⁴²⁵ *Chesapeake & O. Ry. Co. v. Kinzer*, 142 S.E.2d 514, 518 (Va. Sup. Ct. App. 1965); *see also Williams v. Matthews*, 448 S.E.2d 625, 627-28, (Va. 1994); *Wackwitz v. Roy*, 418 S.E.2d 861 (Va. 1992).

⁴²⁶ *Mitchem v. Counts*, 523 S.E.2d 246, 250-51 (Va. 2000) (citing *Boyd v. Commonwealth*, 374 S.E.2d 301, 302 (Va. 1988); *Strother v. Lynchburg Trust & Savings Bank*, 156 S.E. 426, 428-29 (Va. Sup. Ct. App. 1931)).

⁴²⁷ *Boyd*, 374 S.E.2d at 302; *see also Newport News v. Commonwealth*, 183 S.E. 514, 520 (Va. Sup. Ct. App. 1936).

explicit preclusion of common law claims, does not prevent her from bringing those common law causes of action. The same conduct or occurrence can support more than one theory of recovery.⁴²⁸ In sum, Virginia courts have not ruled, outside of the explicit common law derogations in the VHRA and workers' compensation law, whether the existence of a statutory remedy preempts a wrongful termination claim under *Bowman*.

Similar to the *Insignia* decision in Maryland, Virginia courts permit wrongful termination claims related to, but not specifically covered by, statutes like the VHRA. In *Mitchem*, the Virginia Supreme Court held that an employer's termination of an employee for refusing to engage in a sexual relationship violated the Commonwealth's public policies against fornication and lewd and lascivious behavior, embodied in Va. Code §§ 18.2-344 and 345.⁴²⁹

Under D.C. law, the *Carl* exception to the at-will employment doctrine does not apply when the very statute creating the public policy already contains a "specific and significant remedy" for the aggrieved party.⁴³⁰ In *Nolting*,⁴³¹ the Court of Appeals of D.C. held that an employee cannot forego established administrative remedies and obtain recovery against an employer on the tort theory of wrongful termination.⁴³² The court explained:

[W]e are dealing here with a statutory provision which not only creates the wrong but also contains a specific remedy to compensate the person suffering that wrong. No such statute was involved in *Adams*; there was no administrative or other remedy available to the plaintiff. *The injury to the plaintiff in Adams would have gone uncompensated if the court had refused to recognize a public policy tort.* In the case *sub judice*, appellant does not stand in that same position; she is *not facing a situation in which the only possibility for compensation for her claimed injury is the recognition by this court of a public policy tort* expansive enough to cover her situation.⁴³³

The court has held that other statutes with proprietary causes of action,

⁴²⁸ See *Balzer and Assoc. v. The Lakes on 360, Inc.*, 463 S.E.2d 453, 455-56 (Va. 1995); *Fox v. Deese*, 362 S.E.2d 699 (Va. 1987).

⁴²⁹ *Mitchem*, 523 S.E.2d at 249-50.

⁴³⁰ *Kakeh v. United Planning Organization, Inc.*, 537 F. Supp. 2d 65 (D.D.C. 2008) (applying District of Columbia law).

⁴³¹ *Nolting v. Nat'l Capital Grp., Inc.*, 621 A.2d 1387 (D.C. Ct. App. 1993).

⁴³² *Id.* at 1389.

⁴³³ *Id.* (emphasis added); see also *Freas v. Archer Serv., Inc.*, 716 A.2d 998, 1002-03 (D.C. Ct. App. 1998).

such as the D.C. Whistleblower Protection Act, D.C. Code § 1-615.51, *et al.*, also preclude the creation of new public policy bases for wrongful termination claims.⁴³⁴

B. Legitimate Business Reason

As with most employee protections, employers are able to defend against a wrongful termination suit by asserting they had a legitimate business reason when discharging an employee. Maryland federal court provides the most poignant discussion on this topic. Reviewing a claim of retaliatory discharge for filing a workers' compensation claim, the U.S. District Court in Maryland held that "an employer who has mixed motives for discharging an employee may avoid liability, provided one motive is legitimate."⁴³⁵

This defense is not without limitation. An employer may not rely on two, or more, unlawful motives to subvert the prohibition against discharging an employee in violation of public policy. The federal court in *Ford* explained that an employer may not avoid liability for terminating an employee for mixed, but unlawful motives.⁴³⁶ The court rejected the employer's challenge to overturn a verdict in favor of the employee because doing would absurdly "permit an employer to avoid liability in this unusual situation by terminating an employee solely for wrongful reasons."⁴³⁷ Therefore, an employer remains liable for wrongful discharge where the motives include unlawful reasons.

XII. DAMAGES

Maryland, Virginia, and D.C. courts agree that a prevailing plaintiff in a common law wrongful termination suit may recover economic, compensatory, and punitive damages.

While the measure of damages in an action for wrongful discharge under *Adler* is the employee's salary for the remainder of the period of employment, that is not the only remedy available.⁴³⁸ In *Johnson v*

⁴³⁴ See *Carter v. Dist. of Columbia*, 980 A.2d 1217, 1225-26 (D.C. 2009).

⁴³⁵ *Ford v. Rigidply Rafters, Inc.*, 999 F.Supp. 647, 650 (D. Md. 1998) (interpreting *Kern v. South Balt. Gen. Hosp.*, 504 A.2d 1154 (Md. 1986) and citing *Ayers v. ARA Health Care Serv., Inc.*, 918 F. Supp. 143, 149 (D. Md. 1995)).

⁴³⁶ *Ford*, 999 F. Supp. at 649-651.

⁴³⁷ *Id.*

⁴³⁸ See *Atholwood Dev. Co. v. Houston*, 19 A.2d 706, 708 (Md. Ct. App. 1941).

Oroweat Foods Co.,⁴³⁹ the Fourth Circuit held that the terminated employee was entitled to recover expenses reasonably incurred in seeking alternative employment.⁴⁴⁰ In *Adler*, the court refused to dismiss the employee's claim for punitive damages, thereby rejecting the employer's argument that it would be unfair to award such damages in the same case where the underlying tort was for the first time recognized. As long as a plaintiff can support a finding of malice on behalf of the defendant, a court will permit the recovery of punitive damages.⁴⁴¹ An employee must still undertake to mitigate the damages by at least attempting, in good faith, to secure subsequent employment.⁴⁴²

Under *Bowman*, a successful plaintiff is entitled to economic, compensatory, and punitive damages.⁴⁴³ The court in *Shaw* outlined:

As we stated in *Bowman*, the common law cause of action for wrongful termination of employment sounds in tort. Titan conceded in the district court that this cause of action is an intentional tort. *When a plaintiff pleads and proves an intentional tort under the common law of Virginia, the trier of fact may award punitive damages.* Thus, we conclude that, under Virginia law, Shaw was entitled to recover punitive damages in the present action, and we answer the second certified question in the affirmative.⁴⁴⁴

As in Maryland, punitive (or exemplary) damages are allowable only where there is malice on the part of the defendant.⁴⁴⁵ Where the aggrieved injury is "free from fraud, malice, oppression, or other special aggravation, compensatory damages only are allowed."⁴⁴⁶

Similarly, D.C. courts may award lost pay, compensatory damages, and punitive damages to a prevailing employee under a claim of wrongful discharge in violation of public policy.⁴⁴⁷ To receive punitive damages, a plaintiff must prove the defendant's malicious intent by clear and

⁴³⁹ *Johnson v Oroweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986).

⁴⁴⁰ *Id.* at 509.

⁴⁴¹ See *Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144, 1151 (Md. Ct. Spec. App. 1990).

⁴⁴² See *Atholwood*, 179 Md. at 708.

⁴⁴³ See *Wynne v. Birach, No. 1:09cv15*, 2009 WL 36, at *72119 (E.D. Va. 2009)) (citing *Shaw v. Titan Corp.*, 498 S.E.2d 696 (Va. 1998)).

⁴⁴⁴ *Shaw*, 498 S.E.2d at 701 (citations omitted) (emphasis added).

⁴⁴⁵ *Burruss v. Hines*, 26 S.E. 875 (Va. Sup. Ct. App. 1897) (citing *Norfolk & W.R. Co. v. Neely*, 22 S.E. 367 (Va. Sup. Ct. App. 1895)).

⁴⁴⁶ *Id.* at 877.

⁴⁴⁷ See *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991); see also *Byrd v. VOCA Corp. of Washington, D.C.*, No. 2004-CA-004412-B, 2011 D.C. Super. Ct. LEXIS 8, 38 (Sept. 13, 2011).

convincing evidence:

To sustain an award of punitive damages, a plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent.⁴⁴⁸

XIII. PRACTICAL ADVICE AND CONCLUSION

A. Review Civil and Criminal Statutes

Many state and local legislatures have passed civil statutes protecting employees from unlawful discrimination, retaliation, and termination. Given the general rule that civil statutes with their own causes of action preempt common law wrongful termination claims, it is essential to review state and federal statutes before bringing a tort claim. One of the best ways to avoid a preclusion issue is to find a criminal statute on point, such as criminal prohibitions on prostitution and lewd behavior.⁴⁴⁹ Rarely do criminal statutes include civil causes of action, and rarely will a court find that a criminal statute does not espouse a public policy of the state.

B. Framing the Cause of Action

Frame the cause of action as “refusal to participate in unlawful activity” instead of “reporting unlawful activity.” Many cases in Maryland, Virginia, and D.C. clarify the public policy exception to the at-will doctrine is not a general protections for “whistleblowers.”⁴⁵⁰

C. Forum Selection

Employees generally obtain higher verdicts in state court and are more likely to survive summary judgment in state court. In addition, federal

⁴⁴⁸ *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003).

⁴⁴⁹ *See, e.g., Insignia Residential Corp. v. Ashton*, 755 A.2d 1080 (Md. Ct. App. 2000); *Mitchem v. Counts*, 523 S.E.2d 246 (Va. 2000).

⁴⁵⁰ *See e.g., Thigpen v. Greenpeace, Inc.*, No. 93-7587, 1993 WL 762109 (D.C. Super. Sept. 14, 1993) *aff'd*, 657 A.2d 770 (D.C. 1995); *Wholey v. Sears Roebuck*, 803 A.2d 482 (Md. Ct. App. 2002).

courts, including the Fourth Circuit, often construe wrongful termination claims more narrowly than state courts. Accordingly, state court is the preferred forum for litigating an *Adler*, *Bowman*, or *Carl* claim.

D. Discovery

In discovery, plaintiff should focus on developing evidence on the following issues:

1. Direct evidence of retaliatory motive, such as an admission that the decision-maker was angry at the employee for engaging in protected conduct.

2. Close temporal proximity between the employee's protected conduct and the decision to terminate the employee.

3. Deviation from company policy or practice, such as singling out the employee for extraordinary disciplinary action. For example, if the employer disciplined the employee for sending an innocuous email to his spouse letting her know that he is working late, and the company has not disciplined other employees for sending inappropriate emails, the disciplinary action taken against the employee will provide evidence of disparate treatment.

4. Comparator evidence demonstrating disparate treatment.

5. Animus for the employee's protected conduct. For example, the high cost to the employer of complying with the law or regulation implicated by the employee suggests employer animus. Conversely, develop evidence on the revenue that the employer generated or expected to generate by engaging in a fraudulent scheme about which the employee complained.

6. Falsity of the employer's alleged business justification for the discharge, showing pretext.

7. Evidence of unusual efforts by a senior manager or officer to retaliate against the employee. For example, if a senior officer who is not responsible for evaluating the employee's performance and who typically does not evaluate the performance of such employees, it would be very suspicious if the senior officer spends time papering the personnel file of the employee to create a justification for terminating the employee. It is also the type of conduct that may demonstrate malice.

E. Maximizing Damages

The employer's animus toward the employee's protected activity is a strong indication of malice. Similarly, evidence that the employer deviated from policies or protocols in terminating the employee can help prove

malice.

To obtain substantial punitive damages, it is critical to focus on what it would cost to deter the employer from violating the public policy. For example, requiring an employer to merely pay a discharged employee lost wages will not deter an employer who terminates an employee for reporting the discharge of toxic waste into public waterways. Instead, requiring the employer to pay the cost of cleaning up the pollution it caused is a greater deterrent.

The plaintiff's evidence of damages should be as detailed as the evidence of the employer's liability. For example, a plaintiff should proffer detailed evidence of the basis for calculating lost wages and benefits, and should offer detailed testimony from friends and family of the plaintiff describing how the wrongful discharge affected the plaintiff.

F. Employee Attributes that Strengthen a Wrongful Discharge Claim

Before choosing to represent the terminated employee, know the attributes that defense counsel fear most:

1. A long-term employee (more than nine years) with a satisfactory or better performance record and at least some prior expertise in the public policy basis of her complaint.
2. An employee who discloses wrongdoing in a timely manner using the employer's established complaint protocol in a non-contumacious manner.
3. An employee who is not complicit in her employer's wrongdoing.
4. An employee who objects about a matter of public concern (e.g., a matter relating to public health or safety).
5. An employee who cooperates fully in her employer's investigation of her disclosure.
7. An employee who the employer terminates within six (6) months of her protected disclosure, exercise of a statutory right, or refusal to engage in an illegal act.

G. Selecting a Theme

Before trying the case, be prepared to answer the core question in the minds of jurors: why does the plaintiff deserve relief? Keep the focus on the employer's conduct and make the jury understand why your client found it necessary to object to the employer's behavior. Emphasize the public interest aspect of the case. For example, if your client refused to follow orders to sell contaminated food, focus on the employer's callous

disregard for public safety. The employer's motive for terminating plaintiff is not just a core legal element; it is also a core focus of the plaintiff's trial presentation.

In selecting and developing your theme, the following guidelines set forth in Charles L. Belcon's *Alta's Litigating Tort Cases* § 12:10 (2008) are useful:

1. Does the theme summarize the "story"?
2. Does it have factual as well as emotional appeal?
3. Does it paint a visual image for the jury?
4. Does it blend with the life experiences, values, and perceptions of jurors?
5. Does it apply classical rhetorical principles of ethos, pathos, and logos?
6. Does it guide the jurors' decision-making process?
7. Is it consistent with the applicable legal instructions?
8. Does it point out the injustice in the case and allow the jurors to view a victory for the client as somehow advancing community interests?
9. Does the theme have universal application?⁴⁵¹

XIV. CONCLUSION

Adler, Bowman, and Carl claims provide a fertile ground for discharged employees to hold employers accountable for terminations that violate a clear mandate of public policy, including the opportunity to recover substantial punitive damages. This amorphous, yet potent, tort provides a powerful tool to employees that should enable plaintiffs to continue to obtain high verdicts against employers who violate a clear mandate of public policy in terminating employees.

⁴⁵¹ See Charles L. Belcon, *Alta's Litigating Tort Cases* § 12:10 (2008).