Employment/Civil Rights

"You're Fired!"

Common-law causes of action for wrongful termination in Virginia

by Zachary A. Kitts and John M. Bredehoft

Virginia, as are most states, is a strong adherent to the doctrine of employment at will. While the concept of at-will employment is straightforward, the body of common law constituting legal exceptions to the doctrine is convoluted. Some of the reported decisions seem, frankly, irreconcilable. Judicial pronouncements in seemingly-unrelated fields—for example, Constitutional constraints on the criminalization of conduct—may have dispositive effect. Arbitrary rules developed for other types of contracts, and unlikely hypotheticals about the length of performance, may determine whether an employment agreement is enforceable at all.

As importantly, the doctrine of employment at will often operates in a manner antithetical to the understanding and expectations of one of the essential parties to the employment relationship: the employee. Many at-will employees believe, without justification, that their employer must have a "good reason" or a "just cause" before the employment relationship may be terminated. Yet the essence of the at-will doctrine is that an employee without an express written agreement to the contrary may be terminated for *any* reason or for *no* reason at all.

If an employee can generate enough evidence of an express written contract to satisfy the statute of frauds, however, that employee can successfully remove him or herself from the framework of the employment at-will presumption. Similarly, a common law action sounding in tort may be brought where the employee's termination violates public policy. Historically, the tort of wrongful discharge in violation of public policy arose from the confluence between tort and contract brought about by various historic shifts in legal thinking. This article focuses on the body of law that has arisen in Virginia as attorneys, litigants, and judges—as well as the General Assembly—struggle to define and clarify Virginia's unique interpretation of common law actions for wrongful termination.

I. What is the Employment At Will doctrine?

The employment at will doctrine is not a substantive rule of law. Rather, it is a common law presumption: in the absence of evidence that an employment arrangement is to run for a particular term, or be terminated only upon certain events (*e.g.*, "for just cause"), an employment contract may be terminated by either party at any time and for any reason.

The usual formulation of the doctrine provides that the termination must be upon reasonable notice to the other party. Although the Virginia Supreme Court has never interpreted this phrase, some Circuit Court level precedent exists on this aspect of the rule. In *Slade v. Central Fidelity Bank*, 12 Va. Cir. 291 (Lynchburg 1998) the Circuit Court for the City of Lynchburg held that Central Fidelity's failure to give notice to an employee with 24 years of service was not reasonable. In *Laudenslager v. Loral*, 39 Va. Cir. 228 (Chesapeake 1998) the Court interpreted the "reasonable notice" language as an implied obligation requiring each party to an employment relationship to give the other reasonable notice of termination. "Failure to give such notice," the Court opined, "is actionable as a breach of implied contract."

In Virginia, as in most states, the typical employment relationship is a "unilateral contract" in which the employer offers consideration in return for performance and the employee begins performing—by showing up at work and being paid in arrears. Employees outside the employment at-will presumption—those employees belonging to a union, enjoying tenured public employment, or entering into a written employment contract for a fixed

term or until "cause" for termination exists—are few in number.[1] The Virginia courts' oft-repeated injunction that employment at will is strongly-rooted, and exceptions to the doctrine narrowly-construed—makes wrongful termination actions a steep hill to climb in the Commonwealth.

A. History of the employment at-will presumption.

The employment at-will doctrine is in fact a marked departure from the common law of England, where hiring of an employee was presumed to be for a period of one year. The concept of employment at-will as we know it today was first expounded upon at length in the 1877 treatise "Master and Servant" by an American academic named Horace Wood. Wood's strident proclamation that "[W]ith us, the rule is inflexible, that a general or indefinite hiring is *prima facie* at will" should have been somewhat suspect from the start. Wood cited only four American cases in support of his theory, and none of them really seemed to say what he read into them.[2] It is not an exaggeration to say that Professor Wood crafted the doctrine largely out of whole cloth. Nevertheless, the concept found rapid acceptance, and flourished in the climate of unfettered capitalism prevalent in the United States at the time.

B. The employment at-will presumption in Virginia.

The seminal and oft-cited case importing the "at-will" presumption to the common law of Virginia had nothing to do with employment. Rather, the case of *Stonega Coal v. L&N Railway*, 106 Va. 223, 55 S.E. 551 (1906), concerned the rights of one railroad company to terminate a coal supply contract with another company, at will and without just cause. Quite reasonably, the Court held that a supply contract without a definite term and without express conditions for termination could be terminated at the will of one of the parties—it was not, in effect, a perpetual contract. This factually-inapposite scenario has become the fount of Virginia employment law for the last century.

The three early important cases interpreting and reinforcing the preeminence of the at-will presumption in Virginia *employment* law all concerned express contracts. Ironically, the Virginia Supreme Court sided with the employee in all three cases.

In *Hercules Powder Company v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949), the employer promised to pay all employees who remained on the job a bonus. When the plant closed, the employer refused to pay the bonus, and an employee sued. In upholding the trial Court's award of the bonus, the Supreme Court noted that the employee had the right to leave the employment of Hercules at any time; therefore, his continued performance of the contract was sufficient consideration to bind the employer to pay the bonus.

In *Norfolk Southern Railway v. Harris*, 190 Va. 966, 59 S.E.2d 110 (1950), the employee had a "just cause" termination provision in his employment contract. Notwithstanding this provision and the absence of "cause" as defined, the employer terminated his employment. The employee successfully sued for breach of contract. The employer appealed, arguing that despite the just cause language of his contract, Harris' contract did not state a specific term of years. The Supreme Court upheld the trial court, stating that the promise to terminate Harris only for just cause was a part of the contract for which Harris had bargained and for which Norfolk Southern had received consideration.

A third early case confirming the importance of the employment at will presumption in Virginia law is *Twohy v. Harris*, 194 Va. 69, 72 S.E. 2d 329 (1952). In *Twohy,* the plaintiff, who worked for Harris under a number of different companies, threatened to quit his job due to the poor wages. Harris offered him 10 percent of the stock in each corporation Harris owned to prevent him from seeking other employment, and Twohy accepted. Twohy was later forced to bring suit to enforce the agreement, and the Court ruled that his continued employment for Harris constituted consideration for the bonus. Again, the critical issue was the employee's right to leave employment at any time, with or without reason—and the forbearance of the exercise of that right as a species of consideration sufficient to bind the employer to his promise of stock.

C. Circumventing the employment at-will presumption with evidence of express employment contracts.

The employment at will presumption most often is implicated where the employee has no express oral or written agreement with her employer.4 There are other cases, however, where the doctrine is applied to employees who do have, or claim to have, express agreements with their employer. Historically and conceptually, wrongful discharge actions sounding in tort and contract are conceptually interwoven such that an understanding of both is vital.

Employees working subject to express oral agreements—or unsigned written agreements—are subject to the Statute of Frauds, Va. Code §11-2. The Statute of Frauds prohibits enforcement of unwritten contracts that cannot be performed fully within one year. Application of the Statute will not be fatal to an employment agreement which *can* be fully performed within one year. (Remember, the Statute of Frauds does not render an agreement void, simply unenforceable.) An employee working under an express oral contract that is barred by the Statute of Frauds is, as a matter of law and in reality, an employee at will.

For example, in *Silverman v. Bernot*, 218 Va. 650, 239 S.E.2d 118 (1977), the Court considered an oral agreement that the plaintiff was to be employed by the defendant until she either reached 62 years of age or died. The Court held that the contract

could have been performed fully within one year, if the defendant had died promptly, and accordingly enforcement was not barred by the Statute of Frauds. In other words, if the defendant had died within that one year period, the plaintiff would have fully performed her obligations under the contract. Contrast this situation to the one at issue in *Falls v. Virginia State Bar*, 240 Va. 416, 397 S.E.2d 671 (1990). Falls argued that he had an oral contract to be employed for as long as his performance was satisfactory; he was fired "without cause" more than a year after he started work. Trying to take advantage of *Silverman*, Falls argued that his death, his resignation, or his discharge for cause each *could have* occurred before the running of the first year, taking the agreement out of the Statute of Frauds. The Court disagreed: the critical distinction was that in *Silverman*, the contract provided that death would have ended the agreement (presumably, not for non-performance but by express operation of the contract itself) while in *Falls*, the employee's death, resignation, or termination for cause would have constituted a *breach* of the contract. Since the oral contract could not be performed, but only breached, within a year, enforcement was barred by the Statute.

II. The tort of wrongful termination of employment in violation of public policy

A. History of the development of the tort.

The tort of wrongful termination evolved naturally as a confluence of two evolving trends in legal thinking. First, the demise of code pleading at the turn of the last century enabled the body of tort law to expand beyond its traditional limitations. Prior to this shift, the common law writ system of pleading had strictly limited tort causes of action to those recognized by the common law of England such as battery, false imprisonment and the like, allowing litigants and the courts little or no flexibility to address personal wrongs that were outside the traditional definitions.

The modern view that replaced writ pleading was one of expanded liability. The view that recovery in tort should be allowed for any act that had the requisite factors of intent, causation and damages was expressed very succinctly by one of its foremost proponents, Oliver Wendell Holmes, in *Aikens v. Wisconsin*, 195 U.S. 194, 25 S.Ct. 3 (1904):

> The character of every act depends upon the circumstances in which it is done … the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape.

The second trend in legal thinking contributing to the development of the tort came from contract. In the seminal 1959 case of *Petermann v. Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), the plaintiff alleged that he was terminated for his refusal to commit perjury for his employer. The Court allowed recovery, reasoning that the employer's termination of the employee under these circumstances violated the implied covenant of good faith and fair dealing inherent in all contracts.[4] Other state appellate courts extrapolated from this contractual logic and found a cause of action for violations of implied contractual covenants in cases such as *Monge v. Beebe Rubber Co*., 316 A.2d 549, 114 N.H. 130 (1974) and *Fortune v. National Cash Register Company*, 364 N.E. 2d 1251, 373 Mass. 96 (1977).

Decisions such as *Petermann* and *Monge*, which utilized contractual principles to find liability for an employer's bad acts, made the eventual application of tort principles to these same situations a foregone conclusion. The first case to apply tort principles and reach a similar outcome was *Nees v. Hocks*, 536 P.2d 512, 272 Or. 40 (1975). Several other states followed suit, and in 1979 the tort of wrongful termination was recognized in §870 of the *Restatement (Second) of Torts*.

B. The Virginia tort of wrongful termination in violation of public policy.

Virginia recognized the tort of wrongful termination twenty years ago. Common law wrongful discharge claims in Virginia are commonly called "Bowman Claims," a name derived from the case which introduced the tort into the common law of Virginia, *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985). In *Bowman*, the plaintiff alleged she had been fired for voting her stock in her employer in a manner contrary to the employer's direction. The Court took note of the Virginia statute providing that each share of stock had one vote; drew the inference that the vote should be free of intimidation, and held that the termination of the employee violated the public policy underlying the statute.

Few developments followed immediately. Two years after *Bowman*, the Supreme Court made clear that the policy underlying the claim must be public, rather than private. *Miller v. SEVAMP, Inc*., 234 Va. 462, 362 S.E.2d 915 (1987). But it was not until 1994 that the Virginia Supreme Court—applying the tort to claims of discriminatory discharge based on race and gender—initiated the modern era of the tort.

Accordingly, one note—albeit now largely of an historical nature—is important to an understanding of the tort as it has developed in Virginia. Under Virginia law, wrongful termination claims based on discrimination were specifically prohibited by statute in 1995. In 1994, the Virginia Supreme Court recognized for the first time that a termination based on race or gender was unlawful, and actionable, because it violated public policy. In so doing, the Court referred to the expressly-stated public policy underlying the Virginia Human Rights

Act. *Lockhart v. Commonwealth Education Systems Corp*., 247 Va. 98,439 S.E.2d 328 (1994). This was followed by a series of other cases extending the principle to disability, perceived disability, and age.[5] Unfortunately, the Virginia legislature hereafter amended the Human Rights Act to preclude reliance on it as a source of "public policy" for wrongful termination claims; this attempt has generally foreclosed the common law remedy, although there have been some anomalous results.[6]

In *Doss v. Jamco, Inc*., 234 Va. 462, 362 S.E.2d 915 (1997), the Virginia Supreme Court upheld the ability of the General Assembly to eliminate the Human Rights Act as a public policy basis for common-law wrongful termination claims. In an attempt to avoid this holding, the plaintiff in *Conner v. National Pest Control Association*, 257 Va. 286, 513 S.E.2d 398 (1999), pled that she had been terminated in violation of the policy underlying several statutes, including the Human Rights Act. The Court held she had no common-law remedy, and that the legislature had intended to eliminate common-law claims covered by the VHRA even if other statutes provided similar policies that may have been violated. In the view of many, the holding in *Conner* is irreconcilable with the later decision in *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000). The Court in *Mitchem* permitted a common law claim to go forward where the plaintiff, a victim of what would ordinarily be termed sexual harassment, alleged that she had been fired for not consenting to the crime of fornication—*i.e.,* terminated for a reason underlying the public policy inherent in the criminal law.[7]

C. Virginia's evolving "three type" test and the criminal code.

The decisions in *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 465 S.E.2d 806 (1996) and later in *Mitchem*, *supra*, sent creative plaintiffs' attorneys running to the Code of Virginia, to seek out laws—particularly criminal laws—that would provide a public policy underpinning for a tort claim.[8]

These attempts have not always been successful. In *Dray v. New Mkt. Poultry Prods, Inc*., 258 Va. 187, 518 S.E.2d 312 (1999), the plaintiff alleged she had been fired because her employer erroneously believed that she had reported the company to government chicken inspectors under the Virginia Meat and Poultry Products Inspection Act. The Court found that the plaintiff failed to state a claim, reasoning she was attempting to mount a generalized common law "whistleblower" retaliatory discharge claim, which had not been recognized as an exception to Virginia's employment-at-will doctrine. The *Dray* Court found it significant that Ms. Dray—a private employee, not a government inspector—was not within the "class" of persons the statute was designed to protect. To the same effect is *Harris v. City of Virginia Beach Police Department*, 259 Va. 233, 523 S.E.2d 246 (2000). In *Harris*, the Court held that the plaintiff, a police officer, could not use the public policy underlying the obstruction of justice statute to state a wrongful termination claim; the policy underlying that law was directed towards protection of the judicial process, and was not to be used as a shield by an individual officer to challenge employment or other departmental decisions.

The clearest recent articulation of the state of the law in Virginia is found in *Rowan v. Tractor Supply Co*., 263 Va. 209, 559 S.E.2d 709 (2002). The Court reiterated its oft-repeated formulation that the public policy exception to the doctrine of employment at will is "narrow," and held that "[i]n only three circumstances have we concluded that the claims were sufficient to constitute a common law action for wrongful discharge. . . ." 263 Va. at 213. Those three circumstances are:

(1) Termination of an employee because the employee exercised a statutory right. The court placed *Bowman* itself into this class of cases.

(2) Termination of an employee in violation of an expressly-articulated public policy found in a statute, where the employee was "clearly a member of that class of persons directly entitled to the protection enunciated by the public policy." [9]

(3) Termination of an employee for refusal to commit a criminal act. The example selected by the Court for this class of cases was *Mitchem v. Counts*.

In *Rowan*, the plaintiff alleged she had been fired for a reason that violated the public policy underlying the obstruction of justice statute, Va. Code §18.2-460. Rowan claimed that she had been fired in retaliation for pressing a criminal claim against her employer's wishes. The Court held that Rowan had no claim—because she was not within the class of individuals who were the intended beneficiaries of the statute. "The goal of this policy is not to protect individuals from intimidation, but to protect the public from a flawed legal system due to impaired prosecution of criminals." 263 Va. at 215.

Recent decisions based on Constitutional considerations have inserted another disparate element into the law of wrongful termination. Of particular interest is *Martin v. Ziherl*, No. 040804 (Va. March 3, 2005), which struck down the Virginia fornication statute, Va. Code §18.2-344, as unconstitutional in light of the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). This was one of the two statutes the Court had referred to as a source of public policy *sufficient* to support the tort claim in *Mitchem v. Counts*, *supra*. Based on *Martin v. Ziherl*, it will be much more difficult to predicate a wrongful termination claim on the violation of any criminal statute involving consenting adults. Careful readers will note, however, that in *Mitchem* the issue was that the employee did not consent.

III. Additional considerations

As seen above, the body of case law defining and interpreting *Bowman* claims is not, to put it mildly, a model of clarity or consistency. Many of the decisions are simply irreconcilable, and the *Bowman* decision itself—citing, as it does, factual scenarios from other jurisdictions which the Virginia Supreme Court later expressly declared to not fit within the framework of the Virginia tort—is not of much assistance. There are, however, a few pointers that can be gleaned from the case law.

A. What other public policy statements are sufficient to support a *Bowman* claim?

The Virginia Constitution

With regards to those portions of the Virginia Constitution making discrimination on the basis of race or sex unlawful, the same policies are included in the VHRA and any common-law claim for wrongful termination is therefore precluded.[10]

While there is no case law addressing whether or not *other* provisions of the Virginia Constitution could provide a public policy statement sufficient to support a Bowman claim, the safe bet is that such arguments would not be successful. Like the U.S. Constitution, the Virginia Constitution places restraints only on governmental power, and has nothing to say about private actors. It is therefore difficult to see how an individual's actions could fall under the three scenarios described in *Rowan*.

Federal statutes

There is some lower court precedent to support the notion that federal statutes can serve to support a Bowman claim. The U.S. District Court for the Western District of Virginia recognized a *Bowman* claim based on the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964.[11] In 1995, the Circuit Court for Fairfax County recognized a *Bowman* claim based upon the anti-retaliation provisions of the Federal False Claims Act in *McBroom v. DynCorp, Inc*., Law No. 139027.

The greater weight of the authority probably rests with the opposite view, however. In the *Lockhart* decision, the Court asserted in a footnote that the tort is governed by Virginia law exclusively. *Lockhart*, 247 Va. at 99. In the *Lawrence Chrysler* decision, the Court strongly suggested, but did not rule, that the tort must be based upon a Virginia statute. *Lawrence Chrysler*, 251 Va. at 96.

B. Are adverse employment actions other than termination actionable?

Adverse employment actions may, of course, take many different forms, with termination no doubt being the most severe. In other contexts—such as statutory causes of action for discrimination and retaliation—adverse employment actions less serious than termination give rise to a cause of action. Would a *Bowman* claim be supported where the employee was, for example, suspended or demoted rather than terminated? The extension of the Bowman doctrine to adverse employment actions falling short of termination provides a tantalizing possibility for practitioners.

In *Commercial Business Systems v. Bellsouth Services, Inc*., 249 Va. 39, 453 S.E.2d 261 (1995) two Justices of the Virginia Supreme Court made reference to the *Bowman* doctrine in opining that failure to renew a non-employment contract could be actionable if the reasons for the refusal to renew violated public policy. Following the language of *Commercial Business Systems*, it would stand to reason that employees with an express contract for a definite term—in other words, employees outside of the employment at-will presumption altogether—might be construed to have a cause of action if the employer refused, in violation of public policy, to renew an employment contract. Such a development would certainly be consistent with the confluence of tort and contractual principles that gave rise to the tort in the first instance, and may well be the next conceptual step in this evolving body of law.

IV. Conclusion

Despite the stubborn vitality of the employment at-will doctrine, employees in Virginia who can generate enough evidence of an express written agreement with their employer to satisfy the Statute of Frauds will continue to be shielded from the harshness of the doctrine. Similarly, employees who can carve out a claim under the complex and at times contradictory body of tort law constituting the tort of wrongful termination in violation of public policy will continue to be afforded protection from termination where the employer's actions contravene the public good. Given the history of the development of common law causes of action for wrongful termination, future developments drawing from both streams of thought seem likely.

Endnotes

1. In addition to being at "at-will" jurisdiction, Virginia is also a "right to work" state. Despite the pleas of fired employees that they therefore have a "right to work," that provision of law relates to the absence of mandatory union membership and has nothing to do with the employment at will doctrine.
2. A well reasoned critique of Professor Wood can be found in *Toussaint v. Blue Cross*, 408 Mich. 579, 292 N.W. 2d 880 (1980).
3. It is common to speak of this ordinary situation as one in which the employee has "no employment contract." That is not, strictly speaking, accurate. The absence of an express written agreement does not mean an express oral agreement is not present. More commonly, the absence of any express oral or written agreement usually results in a contract implied in law: the employee works, and the employer is bound to pay wages (usually at an agreed rate) for the work done.
4. A word of caution: Virginia law does *not* imply a covenant of good faith and fair dealing into employment contracts.

5. *See generally Shaw v. Titan Corp.*, 255 Va. 532, 498 S.E.2d 696 (1998); *Bradick v. Grumman Data Systems, Inc.*, 254 Va. 156, 486 S.E.2d 545 (1997).
6. The General Assembly created a statutory cause of action permitting victims of discriminatory discharge to sue to recover six months' back pay – out of which an attorney's fee award would be carved. The statutory claim benefits only those employees working for businesses with between five and fourteen employees. This created the discouraging picture of Virginia changing the law to make it *legal* to discriminate by employers of fewer than five employees. It also created the absurd scheme of protection against age discrimination for employees of businesses with five to fourteen employees (under the VHRA) and for employees of businesses with twenty or more employees (under the federal Age Discrimination in Employment Act) – but no protection against age discrimination for employees of companies with fifteen, sixteen, seventeen, eighteen, or nineteen employees. One recalls Bismarck's adage about legislation and sausage.
7. These decisions arguably were foreshadowed by Judge Ellis' holding in *Haigh v. Matsushita Electric Corp. of America*, 676 F. Supp. 1332 (E.D. Va. 1987), holding that an employee who alleged he was fired for refusal to participate in an unlawful price-fixing scheme had stated a cause of action for wrongful termination in violation of public policy.
8. Dicta in *Lawrence Chrysler Plymouth* have been read to suggest that the statute articulating the public policy underlying the tort claim must be a Virginia, not federal, statute. This issue was neither briefed nor argued in *Lawrence Chrysler Plymouth*, but has apparently insinuated itself into the law of the Commonwealth.
9. In this class of cases, the Court placed the *Lockhart* case and *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997) (also based on the policies articulated in the Virginia Human Rights Act).
10. *Storey v. Patient First Corp.*, 207 F.Supp.2d 431 (E.D.Va. 2002); *Oakley v. May Dept. Stores*, 17 F.Supp.2d 533 (E.D.Va. 1998); *Joyner v. Fillion*, 17 F.Supp.2d 519 (E.D.Va. 1998).
11. *See, Fielder v. Southco, Inc.*, 699 F.Supp. 577 (W.D. Va. 1988).

    Theoretically, a claim of wrongful termination based on the public policy underlying the retaliation provisions of Title VII and other statutes would remain feasible even in the wake of the developments following *Lockhart*, as the VHRA has no anti-retaliation provisions.

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