

## VIRGINIA

**W. David Paxton**

**Paul G. Klockenbrink**

**Kelsey M. Martin**

**GENTRY LOCKE, LLP**

10 Franklin Road, S.E. Suite 900

Roanoke, Virginia 24012

Phone: (540) 983-9300

Fax: (540) 983-9400

Web: [www.gentrylocke.com](http://www.gentrylocke.com)

Email: [Paxton@gentrylocke.com](mailto:Paxton@gentrylocke.com)

[Klockenbrink@gentrylocke.com](mailto:Klockenbrink@gentrylocke.com)

[Martin@gentrylocke.com](mailto:Martin@gentrylocke.com)

### I. AT-WILL EMPLOYMENT

#### A. Statute

Virginia has no applicable statute.

#### B. Case Law

Virginia strongly adheres to the common law employment at-will doctrine. *Doss v. Jamco, Inc.*, 492 S.E.2d 441, 442, 254 Va. 362, 366 (1997):

Ever since this Court decided *Stonega Coal & Coke Co. v. Louisville & Nashville R.R.*, 106 Va. 223, 55 S.E. 551(1906), Virginia has adhered to the rule that when an employment contract provides for the rendition of services but its intended duration cannot be determined from its provisions, "either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so." *Id.* at 226, 555 S.E. at 552.

*Id.* at 442, 254 Va. at 366.

Earlier, the Supreme Court of Virginia noted in *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 808, 251 Va. 94, 96-97 (1996):

We have repeatedly stated: "Virginia adheres to the common-law rule that when the intended duration of a contract for the rendition of services cannot be determined by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will, upon giving the other party reasonable notice.

An employee is ordinarily at liberty to leave his employment for any reason or for no reason, without incurring liability to his employer. Notions of fundamental fairness underlie the concept of mutuality which extends a corresponding freedom

to the employer."

*Id.* at 808, 251 Va. at 96-97.

In *Progress Printing Co., Inc. v. Nichols*, 421 S.E.2d 428, 244 Va. 337, 341 (1992), the Supreme Court noted that an employee can rebut the "at will" presumption in two ways: (1) proving the employer has agreed to a fixed term of employment, or (2) establishing the employer has agreed unequivocally to fire the employee only for just cause. *Id.*; see also *Addison v. Amalgamated Clothing & Textile Workers Union*, 372 S.E.2d 403, 236 Va. 233, 235-36 (1988) (verbal promise of long-term employment too indefinite to rebut presumption).

In *Jordan v. Clay's Rest Home, Inc.*, 483 S.E.2d 203, 253 Va. 185 (1997), the Supreme Court rejected the plaintiff's invitation to adopt the *McDonnell-Douglas* burden shifting scheme of proof for at-will employment cases. The court stated that "Virginia law is settled that in the trial of civil actions generally, and in the trial of wrongful discharge actions specifically, a plaintiff may prove a prima facie case by circumstantial evidence as well as direct evidence." *Id.* at 207, 192. The court saw no need to adopt the Title VII scheme of proof for wrongful discharge cases. *Id.*

In *R.K. Chevrolet, Inc. v. Hayden*, 480 S.E.2d 477, 480, 253 Va. 50, 54 (1997), the Virginia Supreme Court held that a contract under which an at-will employee agrees to two additional years of employment is enforceable by the employer because the employee obtains protection from firing except for good cause as consideration for his agreement. The court reversed the lower court's rejection of damages sought by the employer based upon lost revenues after the employee breached his agreement by leaving employment within the two-year period. *Id.* at 482, 56-57.

In *Cave Hill Corp. v. Hiers*, 570 S.E.2d 790, 793, 264 Va. 640, 645-46 (2002), the Supreme Court held that the presumption of at-will employment was not rebutted where an employment contract was effective for a definite period but was terminable by either party upon 30 days' notice. According to the court, the notice of termination provision trumped the provision of the contract stating a fixed term of employment. *Id.* Moreover, there was no requirement in the contract that "just cause" was needed for termination by the employer. *Id.* See also *Cominelli v. Rector and Board of Visitors of the University of Virginia*, 362 Fed. Appx. 359, 364 (4th Cir. 2010) (presumption of at-will employment was not rebutted by allegation that the position was a 5-year "appointment," especially when the employee had held the position for more than five years).

The Virginia Supreme Court has only recently clarified what constitutes "reasonable notice" of termination. *Johnston v. William E. Wood & Assocs.*, 292 Va. 222 (2016). In *Johnston*, the Plaintiff was employed at a real estate services firm for 17 years and at all times was an employee at-will. *Id.* at 224. The employer terminated her without any advance notice. *Id.* The Supreme Court held that the "reasonable notice" required for termination of employee has no temporal element. See *id.* at 227. The Court noted that the phrase "reasonable notice" simply means effective notice that the employment relationship has ended. Without such notice, an employee who has not received notice that the employment has been terminated will likely continue to work, only to learn at some later time that she was no longer an employee and, therefore, will not be paid for her effort. Similarly, an employer who has not received effectual notice that the employee has quit might well continue paying the employee who no longer works

there. To avoid this problem of uncompensated effort or undeserved compensation, a requirement of reasonable, i.e., effectual, notice makes sense.” *Id.*

## II. EXCEPTIONS TO AT-WILL EMPLOYMENT

### A. Implied Contracts

#### 1. Employee Handbooks/Personnel Materials

The Virginia Supreme Court has ruled that an employee handbook which provides for a system of progressive discipline may rebut the at-will presumption, but only if the employer clearly states in the manual that discipline can only be imposed for cause. *County of Giles v. Wines*, 546 S.E.2d 721, 262 Va. 68 (2001), citing *Norfolk S. Ry. Co. v. Harris*, 59 S.E.2d 110, 111, 114, 190 Va. 966, 969, 976 (1950). The county's policies at issue in *Wines* stated that employees "may be discharged for inefficiency, insubordination, misconduct or other just cause." Because the policy did not say "shall only be discharged" or "will not be discharged without just cause," the language was insufficient to rebut the strong presumption in favor of the at-will employment relationship in Virginia. *Id.* at 723, 73.

In *Moore v. Historic Jackson Ward Ass'n*, 61 Va. Cir. 149, 150 (Richmond, 2003), the court relied on the Supreme Court of Virginia's ruling in *County of Giles v. Wines* to sustain a demurrer to an employee's breach of contract claim. Following the *Giles* rationale, the court held that an employer's personnel policy, which did not say "shall only be discharged" or "will not be discharged without just cause," was insufficient to avoid the at-will presumption. *Id.*, citing *County of Giles v. Wines*, 546 S.E.2d 721, 262 Va. 63, 73 (2001). See also *Greene v. National Head Start Association*, 2010 U.S. Dist. LEXIS 42738 (E.D. Va. 2010) (permissive language not sufficient to rebut the presumption of at-will employment; contract language must unconditionally establish that discharge will only occur for just cause).

Virginia strictly enforces the statute of frauds. See *infra*, Part V.C. Va. Code § 11-2(8) prohibits the enforcement of contracts of more than a year unless they are in writing and signed by the employer. *Falls v. Va. State Bar*, 397 S.E.2d 671, 240 Va. 416 (1990). This rule bars the enforcement of oral "just cause" agreements of indefinite duration, and the Supreme Court in *Falls* found that an unsigned policy manual of the employer which gave employees the right to progressive discipline did not satisfy the statute of frauds, and thus was not an enforceable agreement. *Id.* at 472-73, 419-20.

Virginia federal district courts, interpreting Virginia law prior to *Falls* and *Progress Printing*, held that statements contained in employee handbooks may be used by the employee to rebut the presumption of at-will employment. See *Seabolt v. Westmoreland Coal Co.*, 703 F. Supp. 1235, 1238-40 (W.D. Va.), *aff'd*, 898 F.2d 144 (4th Cir. 1989); *Thompson v. Am. Motor Inns, Inc.*, 623 F. Supp. 409, 416 (W.D. Va. 1985) (employee could demonstrate that employee handbook constituted an offer of benefits in exchange for continued labor and that assent is evidenced by the employee's reading and understanding the handbook, and working in accordance with its terms); See also *Barger v. Gen. Elec. Co.*, 599 F. Supp. 1154, 1164 (W.D. Va. 1984).

Correspondence between an employer and employee establishing an "annual salary" creates a jury question as to whether the contract of employment is at-will, or is for a fixed term.

*Hoffman v. Pelouze*, 164 S.E. 397, 158 Va. 586 (1932). The evidence in *Hoffman* was sufficient to support a jury verdict in favor of the employee who had been terminated before the end of the second full year of employment under an "annual" salary arrangement. *Id.* at 595-96. When an employee enters into a contract of employment for a definite period (one year or less) and continues after the agreed term expires without a new contract, "a rebuttable presumption arises that the contract has been renewed for a like term." *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 234 Va. 462, 466 (1987), citing *Buchanan & Son v. Ewell*, 139 S.E. 483, 486, 148 Va. 762, 772 (1927) and *Conrad v. Ellison-Harvey Co.*, 91 S.E. 763, 766, 120 Va. 458, 466 (1917).

Virginia does not allow disciplinary memoranda fixing a time period for probationary performance to convert an at-will contract into one providing for termination for cause. *Graham v. Cent. Fid. Bank*, 428 S.E.2d 916, 245 Va. 395 (1993). The court stated "[i]n the absence of proof of clear intent to do so, disciplinary letters should not be construed to convert at-will employment contracts into contracts for fixed periods." *Id.* at 918, 400. The court explained that otherwise, employers would not give unsatisfactory employees an opportunity to improve. *Id.*

Distribution of an anti-harassment or anti-retaliation policy cannot support formation of a contract between an employer and employee. "[A]s any promises in the policy are general statements of adherence to the anti-discrimination laws, standing alone they do not create a separate and independent contractual obligation." *Jarrett v. Goldman*, 67 Va. Cir. 361, 386 (Portsmouth, 2005), quoting *Peralta v. Cendant Corp.*, 123 F. Supp. 2d 65, 83-84 (D. Conn. 2000).

A different rule applies to state government employees. Non-probationary employees who work for the state government are not employees "at-will." These employees are covered by a "grievance procedure" mandated by statute that gives independent hearing officers the authority to order reinstatement after discharge, Va. Code §§ 2.2-3001, 2.2-3005.1(A), and this protection takes such employees outside of the "at-will doctrine." See, e.g., *Old Dominion Univ. v. Birkmeyer*, 73 Va. Cir. 341, 343 (Norfolk, 2007).

## 2. Provisions Regarding Fair Treatment

In the wake of *County of Giles v. Wines*, it is unlikely that provisions merely promising "fair treatment" will be deemed sufficient to rebut the at-will presumption. See *infra* Part B.1.a; see also *Spiller v. James River Corp.*, 32 Va. Cir. 300, 306-07 (Richmond, 1993) (ethical standards discussing job fairness do not possess the definiteness and specificity required to constitute a promise that employees will be terminated only for cause).

## 3. Disclaimers

A handbook or policy which appears to require "good cause" for termination can be negated by a clearly worded disclaimer in an application and/or handbook/policy acknowledgement. In *Progress Printing v. Nichols*, 421 S.E.2d 428, 244 Va. 337 (1992), the Supreme Court held that an acknowledgment form stating the employee handbook did not constitute a contract barred a wrongful discharge claim based on an implied contract theory. The court upheld the use of the disclaimer even though it was executed 13 days after an employee began work. Based on *Progress Printing*, an employer can preserve the at-will relationship by using a clearly worded written disclaimer which the employee signs. *Id.* at 431, 343. See also

*Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446, 454 (4th Cir. 2004) (clear disclaimer in employment handbook “negates any other provisions or attempts to rebut the at-will presumption”); *Jarrett*, 67 Va. Cir. at 385 (“where a specific disclaimer is included in an employment application and policy manual acknowledgment . . . a handbook . . . fails to override the disclaimer”).

#### 4. Implied Covenants of Good Faith and Fair Dealing

Virginia courts have refused to apply an implied covenant of good faith and fair dealing in employment contracts as a means to overcome the “at will” presumption. *See Spencer v. Tultex Corp.*, 37 Va. Cir. 15, 16 (Henry County, 1995); *Spiller v. James River Corp.*, 32 Va. Cir. 300, 307 (Richmond, 1993). In *Burton v. Cent. Fid. Bank*, 14 Va. Cir. 159, 161 (Lynchburg, 1988), the court held that covenants of good faith and fair dealing are “not consistent with the termination at will presumption and contradicts the mutuality concept,” *but cf. Katti v. Moore*, 2006 U.S. Dist. LEXIS 85486, at \*10-11 (E.D. Va. Nov. 22, 2006) (dismissing employee breach of implied covenant of good faith and fair dealing claim against employer not because claim not recognized, but because a valid and binding contract existed).

#### B. Public Policy Exceptions

##### 1. General

Virginia currently recognizes only a very limited and narrowly proscribed set of common law wrongful discharge claims based on “public policy.” Unlike many other states, Virginia courts will only look for “public policies” specifically reflected in a state statute.

##### a. History of Claim

In *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 229 Va. 534 (1985), the Supreme Court of Virginia recognized a “public policy” exception to the at-will rule based upon an employer’s retaliation against employees who exercised their rights guaranteed by state law. Employees of a state bank were told by the bank that if they did not vote their stock in favor of a controversial merger, they would be fired. *Id.* at 799, 537. The plaintiffs obeyed the bank's order out of fear of losing their jobs, but later wrote a joint letter to the bank president explaining that their votes were invalid and coerced, and soon thereafter they were terminated. *Id.* at 799, 537-38.

The Supreme Court of Virginia held that the plaintiffs had stated a valid cause of action for wrongful discharge in retaliation for exercising their statutorily protected right to vote their shares free from intimidation. *Id.* at 801, 540.

The courts of at least 20 states have granted exceptions to the strict application of the doctrine in favor of at-will employees who claim to have been discharged in violation of an established public policy.

In order for the goal of the statute to be realized and the public policy fulfilled, the shareholder must be able to exercise this right without fear of reprisal from corporate management which happens also to be the employer. Because the right conferred by statute is in furtherance of established public policy, the employer may

not lawfully use the threat of discharge of an at-will employee as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation.

*Id.* at 800-01, 229 Va. at 540 (citation omitted).

In *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 234 Va. 462 (1987), Miller was fired two weeks after appearing before a grievance review panel as a witness for a fellow employee. In contrast to *Bowman*, the Supreme Court held that Miller failed to state a claim for retaliatory discharge because the employer's alleged act impinged only upon private rights established by the employer's internal regulations:

*Bowman* applied a "narrow exception to the employment-at-will rule," but it fell far short of recognizing a generalized cause of action for the tort of retaliatory discharge . . . . [The exception] is limited to discharges which violate public policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general . . . . [it does not] make actionable those discharges of at will employees which violate only private rights or interests.

*Id.* at 918, 234 Va. at 467-68 (citations omitted).

b. Expansion of Claim

In 1994, the Virginia Supreme Court, in two cases combined on appeal, held that public policy of the state ensures that individuals can pursue employment free from discrimination based on race or gender. *Lockhart v. Commonwealth Educ. Sys.*, 439 S.E.2d 328, 331-32, 247 Va. 98, 105 (1994). As a result, an exception to the at-will rule, and thus a tort claim, could now be stated where (1) an employee alleges she was terminated for refusing to accede to the sexual advances of a sole proprietor, and (2) an employee who claims she opposed policies and practices that discriminated against minorities and was demoted and later discharged. *Id.* at 332, 106. The court also held that the availability of adequate statutory remedy under federal law was irrelevant to whether the employee had a state law claim of wrongful discharge in these cases. *Id.* at 332, 105-06.

c. 1995 Amendment to Virginia Human Rights Act

In response to *Lockhart*, the General Assembly amended the VHRA effective July 1, 1995. *See* Act of May 5, 1995, ch. 838 (enacted as amended at Va. Code § 2.2-3903). For claims arising after that date, the exclusive remedy for wrongful discharge claims premised on the policies prohibiting discrimination in employment are found either under federal law or the express statutory provisions added to Virginia Code section 2.2-3903, which allows employees who work for employers with 5 to 14 employees to file a statutory claim for wrongful discharge and recover up to one year's back wages, interest plus an award of attorney fees up to 25 percent of the recovery. No award may be made for compensatory or punitive damages, nor can the court order reinstatement.

d. Post-1995 Decisions

Several questions remained after 1995, which have resulted in several additional court decisions.

In *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806, 251 Va. 94 (1996), the Supreme Court of Virginia emphasized that in order to state a wrongful discharge claim based on violation of public policy, the former employee must be able to identify a specific statutory provision that establishes the policy in question. *Id.* at 809, 98-99. The court in *Brooks* rejected the claim of a body shop repairman who sued the automobile dealership, which fired him after he refused to make repairs on a car because he believed the repair method was unsafe. *Id.* Reviewing the statutes referred to by the repairman, the Virginia Consumer Protection Act and the Automobile Salvage Laws, the Court found nothing that supported his position, and expressly rejected his request to expand the public policy exception to include general duties imposed by common law. *Id.* at 809, 98.

In *Bradick v. Grumman Data Sys. Corp.*, 486 S.E.2d 545, 254 Va. 156 (1997), the Virginia Supreme Court accepted for certification the following question from the Fourth Circuit: Does the common law of Virginia provide a wrongful discharge remedy to an employee of an employer covered by the Rehabilitation Act where the employee is discharged on account of his disability or the employer's perception of his disability?

The court had "never before considered whether the narrow exception recognized in *Bowman* permitted a cause of action for unlawful discharge from at-will employment based upon a disability." *Bradick*, 486 S.E.2d at 546, 254 Va. at 159. The court stated, however, that "it is not disputed that both the [Virginia Human Rights Act] (VHRA) and the Virginians with Disabilities Act (VDA) contain clear expressions of Virginia's public policy opposing discrimination against disabled persons." *Id.* Because the employer is subject to the federal Rehabilitation Act, it is exempt from the employment discrimination provisions of the VDA. *Id.* at 546-47, 160. The court ruled that the exclusivity provision of the VDA does not abrogate any action an employee may have under Virginia common law for wrongful discharge from at-will employment based on disability. *Id.* Therefore, "based on the public policy expressed in the VDA and the VHRA at the time of [the employer's] alleged action of discrimination," the court held that the "common law of Virginia provides a wrongful discharge remedy to an employee . . . of an employer covered by the federal Rehabilitation Act." *Id.* at 547, 160-61 (the cause of action in this case arose prior to the amendments to the VHRA which became effective on July 1, 1995).

In *Doss v. Jamco, Inc.*, 492 S.E.2d 441, 254 Va. 362 (1997), the Virginia Supreme Court accepted for certification a question of law from the United States District Court for the Western District of Virginia: Did Virginia law prohibit a common law cause of action based upon the public policies reflected in the Virginia Human Rights Act, Va. Code §§ 2.2-3900, *et seq.*?

The VHRA provides that: "[c]auses of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances." Va. Code § 2.2-2639(D). The Supreme Court answered the certified question in the affirmative. The court held that by adding subsection (D) to Virginia Code section 2.2-2639 in 1995:

. . . the General Assembly plainly manifested its intention to alter the common law

rule with respect to "causes of action based upon the public policies reflected in [the Act]." And, just as plainly, the General Assembly altered the common law rule by providing that such causes of action "shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances."

*Doss*, 492 S.E.2d at 447, 254 Va. at 371. The court further stated that "the General Assembly plainly manifested an intent to abrogate the common law rule with respect to causes of action for unlawful termination of employment based upon the public policies reflected in the Act." *Id.* at 448, 254 Va. at 372.

The battleground after *Bradick* and *Doss* was whether the Supreme Court's ruling on the effect of the 1995 amendments to the VHRA effectively barred all claims of public policy violation: (1) if they are premised on some form of unlawful employment discrimination and, (2) if the public policy is contained in the Virginia Constitution, other federal or state statutes, or local ordinances as well. In addition, plaintiffs' counsel have argued that the 1995 amendments only address claims involving "discharge" of an employee, and not cases which involve adverse employment actions, such as harassment, that fall short of discharge.

In *Conner v. Nat'l Pest Control Ass'n, Inc.*, 513 S.E.2d 398, 257 Va. 286 (1999), the Supreme Court of Virginia settled the questions left open by *Bradick* and *Doss*. *Conner* challenged her termination as a violation of public policy against retaliation for complaints of discrimination in employment as articulated in portions of the Virginia Constitution and the Fairfax County Code, various sections of the Virginia Code, and Title VII of the Civil Rights Act of 1964. The Supreme Court of Virginia definitively held that the 1995 amendments to the VHRA eliminated the common law cause of action for wrongful termination based on any public policy reflected in the VHRA, even if that policy was also articulated in other statutes. *Id.* at 399-400, 257 Va. at 289-90.

## 2. Virginia Currently Recognizes Public Policy In Three Narrow Areas

In *Rowan v. Tractor Supply Co.*, 559 S.E.2d 709, 263 Va. 209 (2002), the Virginia Supreme Court summarized the current state of the public policy exception to the at-will rule in response to a certified question from the United States District Court for the Western District of Virginia: "Does a complaint state a *Bowman* claim under Virginia Code § 18.2-460 when the plaintiff, an at-will employee, alleges that her employer terminated her employment because she refused to yield to the employer's demand that she discontinue pursuing criminal charges of assault and battery against a fellow employee?" *Rowan*, 559 S.E.2d at 709, 263 Va. at 211.

According to the court, a common law action for wrongful discharge under the public policy exception is only viable in three circumstances: (1) where, as in *Bowman*, "an employer violated a policy enabling the exercise of an employee's statutorily created right;" (2) where, as in *Lockhart*, "the public policy violated by the employer was explicitly

expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy;" and (3) where, as in *Mitchem v. Counts*, "the discharge was based on the employee's refusal to engage in a criminal act." *Rowan*, 559 S.E.2d at 711, 263 Va. at 214.

Rowan asserted that Virginia Code Section 18.2-460, which criminalizes obstruction of justice, provided her with a right to protection for participating in the prosecution and trial of suspected wrongdoers. *Id.* at 711, 214. Thus, she argued, she fit under the first circumstance identified above because her employer had violated her right to protection, which was a violation of public policy. *Id.*

The court disagreed. The court ruled that Va. Code § 18.2-460 does not create a statutory right. *Id.* at 711, 215. For this reason, there is no corresponding public policy that would support an exception to the employment at-will doctrine. *Id.* Further, the court stated that the policy behind the statute was to protect the public from a flawed legal system, not to protect individuals from intimidation. *Rowan*, 559 S.E.2d at 712, 263 Va. at 215. The federal district court later dismissed Rowan's claims based on the Virginia Supreme Court's response to its certified question.

a. Exercising Legal Right

At least one federal court has declined to expand wrongful discharge claims in Virginia absent guidance from the Virginia Supreme Court. In *Sewell v. Macado's, Inc.*, 2004 U.S. Dist. LEXIS 19950 (W.D. Va. Oct. 4, 2004) (unpublished), the plaintiff asserted she was terminated because she attended a child custody and visitation hearing in California pursuant to a court order. *Id.* at \*3-4. She alleged her employer's actions violated the public policy behind Va. Code § 18.2-465.1, which makes it a punishable offense for an employer to terminate an employee for missing work for a court appearance. *Id.* at \*13. Because the Virginia Supreme Court had not specifically recognized a wrongful discharge claim based on Va. Code § 18.2-465.1, the district court dismissed the plaintiff's claim. *Id.* \*14-15.

Recently, the Virginia Supreme Court found in *Francis v. Nat'l Comm'n of Career Arts & Scis., Inc.*, 796 S.E.2d 188, 189 (Va. 2017) that an employee who sought a protective order against threats of violence against a co-worker under Va. Code §§ 19.2-152.7:1 through 19.2-152.10 (Protective Order Statutes) could not state a claim for wrongful discharge against her employer for allegedly retaliating against her because she sought a protective order. The Court held that there was no public policy in the Protective Order Statutes, Va. Code Ann. §§19.2-152.7:1 through 19.2-152.10, protecting the exercise of the right to seek a protective order. Even if the employee was a member of a protected class of persons entitled to the protections enunciated by that public policy, there was no viable Bowman claim because there was no allegation that the termination of employment violated the public policy to protect the employee's health and safety.

In *McFarland v. Virginia Retirement Services of Chesterfield, L.L.C.*, 477 F. Supp. 2d 727 (E.D. Va. 2007), the United States District Court for the Eastern District of Virginia held that a plaintiff had stated a "Bowman"-style wrongful discharge claim. The plaintiff, an employee of a retirement community, alleged that she was terminated for reporting suspected abuse of aged

adults. *Id.* at 731. Va. Code § 63.2-1606 mandated that she report any such abuse. *Id.* at 733-34. The court held that, if plaintiff's allegations were true, she was exercising a statutorily created right to report such abuse, which was based on a policy to protect the aged. *Id.* at 734. Thus, her wrongful discharge claim survived a motion to dismiss.

Likewise, a Virginia circuit court held that terminating an employee for performing statutory obligations can give rise to a *Bowman* claim. *McClosky v. Warren Co. Dept. of Social Services, et al.*, 81 Va. Cir. 35 (Warren County, 2010) (plaintiff, an investigator, alleged that her supervisor prevented her from investigating and testifying about patient abuse before Grand Jury; she alleged that she had a duty as an investigator under Va. Code §§ 19.2-201, 208 to testify when called).

b. Refusing to Violate the Law

In *Mitchem v. Counts*, 523 S.E.2d 246, 259 Va. 179 (2000), the plaintiff claimed she had been wrongfully discharged when she refused to engage in sexual relations with her former employer. She claimed that, on multiple occasions, the defendant "massaged her shoulders, patted her buttocks, touched her leg, rubbed her knee, and hugged her against her will." The Supreme Court, agreeing with the plaintiff, held that the 1995 amendments to the VHRA did not bar this wrongful discharge claim because it was based on a violation of the public policy expressed in two criminal statutes: Va. Code § 18.2-344, prohibiting fornication, and Va. Code § 18.2-345, prohibiting lewd and lascivious cohabitation. The court reasoned that the criminal statutes prohibiting fornication and cohabitation contained public policies "not reflected in the VHRA" and the claims based upon these public policies are beyond the scope of the prohibition found in Va. Code § 2.1-725(D) of the VHRA. However, the Supreme Court agreed that the plaintiff could not rely on the general assault and battery statute, Va. Code § 18.1-59, to support a public policy claim because it involves an issue of consent. Consequently, the plaintiff's allegation that the defendant discharged her for refusing to engage in these criminal acts was not barred by the VHRA and that the plaintiff had stated a viable *Bowman* public policy claim.

In *Martin v. Zihlerl*, 607 S.E.2d 367, 371, 269 Va. 35, 42 (2005), relying on the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 564 (2003), the Supreme Court held that the Virginia "fornication" statute was unconstitutional because it infringes on the rights of adults to "engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Martin*, 607 S.E.2d at 371, 269 Va. at 42. Following the rationale of *Martin* and *Lawrence*, the Virginia Supreme Court held that the "fornication" statute, Va. Code § 18.2-344, does not support a public policy *Bowman* claim for wrongful termination as applied to private consensual sexual activity between adults. *Robinson v. Salvation Army*, 292 Va. 666, 673 (2016). Arguably, Va. Code § 18.2-345, which prohibits "lewd and lascivious cohabitation," is unconstitutional for similar reasons, and can no longer serve as a basis for a wrongful discharge claim. *But see Ingelson v. Burlington Medical Supplies*, 2015 WL 6443098 (E.D. Va. Oct. 22, 2015) (declining to grant motion to dismiss where employee alleged that she was terminated for refusing to aid and abet adultery with her married

supervisor, noting that adultery is a misdemeanor crime in Virginia, (Va. Code § 18.2-365), and that it is also unlawful to aid and abet a crime by sharing the criminal intent of another person).

In a decision reached the same day as *Mitchem*, the Virginia Supreme Court declined to broaden the claim beyond the narrow confines of what is found explicit in a statute. *City of Virginia Beach v. Harris*, 523 S.E.2d 239, 259 Va. 220 (2000). Harris, a police officer, was ordered by his supervisor not to obtain warrants against two criminal suspects. *Id.* at 241, 225. Harris disobeyed the order and obtained the warrants, of which one was served and then "nolle prossed." *Id.* Harris then was instructed not to take further action concerning the case. *Id.* Thereafter, while on duty, Harris appeared before a magistrate and obtained warrants against the supervisor. *Id.* at 241, 226. The warrants charged the supervisor with two counts of obstruction of justice and one count of delay in executing lawful process. *Id.*

Harris was fired, and claimed his discharge violated public policy reflected in two Virginia Code sections. The city said Harris was fired for disobeying the supervisor's order and for abuse of his position as a police officer. *Id.* at 241, 226. The Virginia Supreme Court, reversing a trial court ruling for the employee, held that Va. Code § 18.2-460, concerning the crime of obstruction of justice, and former Va. Code § 15.1-138, concerning the powers and duties of a police force, do not embody the type of public policy that may support a cause of action for wrongful discharge under the public policy exception to the employment-at-will doctrine. *Id.* at 245-46, 232. It noted that the public policy exception has been recognized in two categories of cases: (1) those statutes that contain explicit statements of public policy and, (2) those statutes not explicitly stating public policy but which are designed to protect the rights of the people in general. *Id.* at 245, 232. Referencing its decision in *Dray v. New Mkt. Poultry Products, Inc.*, 518 S.E.2d 312, 313, 258 Va. 187, 191 (1999), the Court emphasized that the plaintiff was required to be within the class of persons intended to be protected by the specific public policy. *Id.*

Reviewing the two statutes cited, the court said this claim merely vindicated his personal rights and did not implicate the public policy of protecting public safety. *Id.* at 246, 233-34. In short, the court held that the plaintiff police officer could not use a criminal statute to protect himself when the public policy underlying the statute was the protection of the public. *Harris*, 523 S.E.2d at 246, 259 Va. at 233.

It is not sufficient for a plaintiff to show that the defendant engaged in illegal conduct; rather, the plaintiff must show that he engaged in protected activity, such as refusing to engage in criminal actions, for which he was fired. In *Lucker v. Cole Vision Corp.*, 2005 U.S. Dist. LEXIS 25118, at \*3 (W.D. Va. Oct. 26, 2005), the plaintiff alleged that he was fired for refusing to go along with "illegal, fraudulent and deceptive" advertising practices engaged in by his employer, an optical retail store. Plaintiff Lucker claimed that the retail store had falsely advertised a 50 percent discount on a pair of eyeglasses with no intent to sell at such a discount. *Id.* Plaintiff claimed he was terminated in violation of the public policies underlying Va. Code §§ 59.1-200(A)(8) and (14), which prohibit sellers from "[a]dvertising goods or services with intent not to

sell at the price or upon the terms advertised," and prohibiting the use of "any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction," and Va. Code § 54.1-111(A)(8), which provides that the state board can discipline those who violate "any statute or regulation governing the practice" of optometry. *Id.* Lucker was advised by legal counsel that he could be prosecuted and he could have his optician's license suspended or revoked for participating in the scheme. *Id.* at \*4.

The court held that neither statute provided the plaintiff with a *Bowman* claim. *Id.* at \*17. According to the court, Va. Code §§ 59.1-200(A)(8) and (14) were designed to generally protect the interests of consumers, not employees. *Id.* at \*24. Moreover, Va. Code § 54.1-111(A)(8) had nothing to do with false advertising. *Id.* at \*25. Thus, Lucker did not show that he refused an unlawful order. *Id.* at \*27.

Two federal courts have found the basis for a *Bowman* claim when the employee was fired for refusing to submit forged or false financial reports required by law. In *Anderson v. ITT Indus. Corp.*, 92 F. Supp. 2d 516, 518 (E.D. Va. 2000), the plaintiff contended that the defendant terminated him because he would not forge certain documents, which would have violated Va. Code §§ 18.2-172, *et seq.* The district court held that the plaintiff fell within the class of individuals the relied-upon statutes were designed to protect, because the statutes imposed a legal duty upon the plaintiff not to engage in the forgery prohibited. *Id.* at 523. Likewise, in *Wynee v. Birach*, 2009 U.S. Dist. LEXIS 102276, (E.D. Va. Nov. 3, 2009), the federal court found that a plaintiff who alleged that she quit her job because she was directed to submit financial documents to lenders which she believed were fraudulent had alleged a public policy violation sufficient for a *Bowman* claim because making false statements to obtain credit is a crime under Va. Code 18.2-116.

In *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214 (4th Cir. Va. 2015), the Fourth Circuit held that a physician who alleged that he was fired in retaliation for reporting illegal pharmacy practices had stated a claim for wrongful discharge. The physician alleged that his termination violated the public policy provisions stated in Va. Code §§ 54.1-3310 and 54.1-3435. Those statutes make it unlawful for anyone to practice pharmacy or to engage in wholesale distribution of prescription drugs without a license, and although these statutes cited were not in Virginia's criminal code, violating the statutes constituted a misdemeanor and led to criminal penalties. Therefore, the Court held, refusal to practice pharmacy without a license should be treated as refusal to engage in a criminal act and thus the physician had sufficiently alleged a *Bowman* claim.

### c. Exposing Illegal Activity – No General Whistleblower Protection

In *Dray v. New Mkt. Poultry Products, Inc.*, 518 S.E.2d 312, 258 Va. 187 (1999), a poultry inspector, frustrated by management's failure to respond to complaints regarding quality control on the production line, informed governmental inspectors of alleged quality control deficiencies. Although the plaintiff made no further complaints regarding quality control problems, she alleged that she was threatened with termination if she ever made such a complaint again. During the week preceding her termination, government inspectors who were onsite labeled an increasing amount of poultry as substandard and required reprocessing of a large quantity of poultry products. Dray alleged that management believed she had informed the government inspectors of these latest

deficiencies, and this belief caused her termination. She argued that the public policy articulated in several sections of the Virginia Meat and Poultry Products Inspection Act, Va. Code §§ 3.1-884.17, et seq., protected her from retaliatory discharge. *Id.*

The trial court's dismissal of the claim was upheld on appeal. The Virginia Supreme Court rejected the former employee's effort to establish a general "whistleblower" exception to the at-will doctrine. *Id.* at 313-14, 258 Va. at 191. Finding the statute did not bestow any rights or duties on this plaintiff, or any others similarly situated, the court refused to impose a generalized right to be free from retaliation from a statute designed to protect the public as a whole. *Id.*

### 3. Individual Liability Permitted

In *VanBuren v. Grubb*, 733 S.E2d 919, 284 Va. 584 (2012), a nurse at a medical center alleged that she was subjected to sexual harassment by her supervisor and was subsequently fired because she refused to leave her husband. The U.S. District Court for the Western District of Virginia dismissed the case. On appeal, the Fourth Circuit requested the Virginia Supreme Court rule whether Virginia recognizes a common law wrongful discharge claim in violation of established public policy against an individual supervisor who was not the "employer" but directly participated in the wrongful conduct. *Id.*

The Supreme Court held that Virginia law did recognize such a claim. *Id.* 284 Va. 593, 733 S.E.2d at 924. The court reasoned that the tortious act in a wrongful discharge claim is not the discharge itself, but the wrongful reasons behind it. Thus, where the reasons for the discharge are the unlawful actions of the actor who affects the discharge, then the supervisor as the wrongdoer can be held liable. The individual defendant (who was both her supervisor and the owner of the company) left the practice in response to the suit. *Id.* If liability was not recognized in these cases, there might be nothing to prevent other business owners from doing the same thing to avoid liability. *Id.*

#### C. Additional Consideration

In *Sea-Land Serv., Inc. v. O'Neal*, 297 S.E.2d 647, 224 Va. 343 (1982), a long-time employee who worked her way to a management level position brought a wrongful discharge claim. In January 1978, O'Neal learned that her old position of teletype operator/messenger was vacant, and she requested that she be transferred to this position to enable her to attend night school. She was told that the transfer would be fine, but that she had to resign from her current position before the transfer could be made official. *Id.* at 649, 224 Va. at 347. O'Neal resigned on Friday, but when she reported to work the following Monday, she was informed that she was over qualified and could not have her old job back. *Id.*

O'Neal successfully sued Sea-Land and recovered \$125,000.00 in compensatory damages. On appeal by Sea-Land, the Supreme Court of Virginia held that O'Neal's act of resignation constituted sufficient consideration to bind Sea-Land to its promise of employment in the new position. *Id.* at 651, 350.

The court noted that although Sea-Land may have had the right to terminate O'Neal's employment "at will" either while she was still in the management position or in the event she became a teletype operator/messenger, the company did not dismiss her this way. *Id.* at 650, 348. Instead, it promised her that, if she resigned from the one position, she would be employed in the other. *Id.* This was an undertaking separate and apart from any contract covering the particular position involved and was not subject to any presumption of terminability at will that might have applied to such a contract. *Id.* Once O'Neal performed her part of the bargain by resigning from the first position, Sea-Land became obligated to perform on its part and breached that obligation to her damage when it refused to employ her in the teletype operator/messenger position. *Id.* at 650, 349.

Similarly, Virginia courts have held that, in certain instances, bonus promises that serve as incentives to employees may rebut the at-will presumption. *See Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 917, 234 Va. 462, 466 (1987) (holding that employment contracts can be supported by additional consideration sufficient to take the contract out of the category of employment at-will), citing *Twohy v. Harris*, 72 S.E.2d 329, 332, 194 Va. 69, 72 (1952); *see also Hercules Powder Co. v. Brookfield*, 53 S.E.2d 804, 189 Va. 531 (1949).

In *Clark v. BayDocs, Inc.*, No. 3:12cv896, 2013 U.S. Dist. LEXIS 46408 (E.D. Va. Mar. 29, 2013), the plaintiff filed a motion for leave to add a wrongful termination claim. Clark alleged that the defendant terminated him expressly due to his refusal to accept a salary reduction. The court denied the motion but granted Clark leave to file a different Amended Complaint. The court determined Clark's Amended Complaint likely failed to state a *Bowman* claim for relief because the defendant's correspondence to Clark indicated that Clark's reduction in salary was a condition of continued employment and did not imply that a failure to sign would mean Clark quit or resigned. However, the court held that the factual allegations in Clark's complaint could plausibly allege a claim based on the "*contractually promised but unpaid compensation theory*," noting that other courts in the Eastern District had upheld claims based on contractual promises of future bonuses or compensation, later unpaid.

### **III. CONSTRUCTIVE DISCHARGE**

To date, the Supreme Court of Virginia has not recognized a state law cause of action for constructive discharge. Virginia state courts and federal courts that have addressed the issue are split as to whether a claim based on a constructive discharge will survive a motion to dismiss or a demurrer.

There are several circuit court cases ruling that a wrongful discharge claim can be based on "constructive discharge." These courts apply the law developed under federal law concepts. *See Barron v. NetVersant-Northern Va., Inc.*, 68 Va. Cir. 247 (Fairfax County, 2005); *Padilla v. Silver Diner*, 63 Va. Cir. 50 (Virginia Beach, 2003); *Gochenour v. Beasley*, 47 Va. Cir. 218 (Rockingham, 1998); *Lundy v. Cole Vision Corp.*, 39 Va. Cir. 254 (Richmond, 1996); *Dowdy v. Bower*, 37 Va. Cir. 432 (Roanoke, 1995);

In *Padilla*, for example, the circuit court permitted some of the plaintiffs to pursue

a constructive discharge cause of action, over defendants' demurrer, where the employees quit because of repeated sexual advances and propositions. *Padilla*, 63 Va. Cir. at 57. According to the court, to establish a constructive discharge claim, a plaintiff must show that the employer created intolerable working conditions by actions that violate a clear and unequivocal public policy of the Commonwealth. *Id.* The plaintiffs satisfied these elements at the demurrer stage by alleging that their continued employment was contingent upon their involvement in acts that violate public policies set forth in Va. Code § 18.2-344, which prohibits fornication, and Va. Code § 18.2-345, which prohibits lewd and lascivious cohabitation. *Id.*

The court in *Padilla* noted that at least one Virginia circuit court had rejected the theory of constructive discharge as a cause of action. See *Jones v. Professional Hospitality Resources, Inc.*, 35 Va. Cir. 458 (Virginia Beach, 1995). Several federal courts applying Virginia law have held that Virginia does not recognize a constructive discharge cause of action. See *Fereol de Gastyne v. Entrust, Inc.*, 2010 U.S. Dist. LEXIS 87957 (E.D. Va. Aug. 24, 2010) (allegations of constructive discharge do not meet the *Bowman* exception to the general rule that an at-will employee can be discharged at any time after reasonable notice without cause by the employer); *Hairston v. Multi-Channel TV Cable Co.*, 1996 U.S. App. LEXIS 4854 (4th Cir. Mar. 19, 1996); *Dixon v. Denny's Inc.*, 957 F. Supp. 792, 798-99 (E.D. Va. 1996); *Michael v. Sentara Health Sys.*, 939 F. Supp. 1220, 1232 (E.D. Va. 1996).

More recently, federal courts have been allowing claims to go through under limited circumstances. See *Wynne v. Birach*, 2009 U.S. Dist. LEXIS 102276 (E.D. Va. Nov. 3, 2009) (“an employee who can meet the high burden of proving constructive discharge does have standing to pursue a *Bowman* wrongful discharge claim”). Judges in the Western District of Virginia, however, have predicted that the Virginia Supreme Court would recognize a cause of action for constructive discharge, and has allowed such claims to go forward in a series of cases. In *Faulkner v. Dillon*, 2015 U.S. Dist. LEXIS 35512 (W.D. Va. Mar. 23, 2015), the plaintiff, a female, alleged that the defendant, a male owner of a dry cleaning business, repeatedly made sexual propositions, pinched her bottom, offered her money for sex, hugged her and tried to forcibly kiss her, despite her resistance. When she told him she would talk to a lawyer if he did not stop the advances, he told her no one would believe her because she was a drug addict and a felon. The plaintiff finally notified the owner, through her lawyer, that she would not be returning to work. She sued for assault and battery, wrongful discharge and intentional infliction of emotional distress. The court denied the defendant’s motion to dismiss, holding, “the decision is often determined upon whether constructive discharge is viewed as a permissible extension of the recognized public policy exceptions to Virginia’s employment-at-will doctrine.” The court noted the form of gender discrimination alleged by the plaintiff – sexual harassment – has been recognized by the Virginia Supreme Court as a public policy exception to the employment-at-will doctrine. See also *Johnson v. Paramount Mfg., LLC*, 2006 U.S. Dist. LEXIS 67735 (W.D. Va. Oct. 18, 2006); *Watson v. Paramount Mfg., LLC*, 2006 U.S. Dist. LEXIS 78100 (W.D. Va. Oct. 18, 2006); *Hill v. Paramount Mfg., LLC*, 2006 U.S. Dist. LEXIS 78488 (W.D. Va. Oct. 18, 2006) (anticipating that the Virginia Supreme Court would recognize a claim based on constructive discharge because it has recognized constructive behavior in other areas of law); *Hensler v. O’Sullivan Corp.*, 1995 U.S. Dist. LEXIS 18110 (W.D. Va. Oct. 31, 1995) (stating that discharge is discharge, whether the employer simply

comes out and says so or conducts itself in such a manner to force the employee out of his job).

#### IV. WRITTEN AGREEMENTS

##### A. Standard "For Cause" Termination

"What constitutes a good and sufficient "cause" for the discharge of the servant is a question of law, and where the facts are undisputed it is for the court to say whether the discharge was justified. But where the facts are disputed, it is for the jury to say upon all the evidence whether there were sufficient grounds to warrant the discharge." *Spotswood Arms Corp. v. Este*, 133 S.E. 570, 573 147 Va. 1047,1055 (1926); *Tremlett v. Bassett Mirror Co.*, No. 91-2002, 1992 U.S. App. LEXIS 2738, \*23 (4th Cir. Feb. 26, 1992); *see also JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 709 (E.D. Va. 2007) (granting employer's motion for summary judgment where undisputed facts clearly demonstrated employer had cause to fire employee).

The Supreme Court of Virginia has ruled that disobedience in response to an employer's reasonable rules, orders or instructions justifies dismissal for cause. The question of whether in a given instance disobedience is unjustified is determined by the terms of the contract and nature of employment as well as the circumstances surrounding the incident(s) relied upon as misconduct. *Spotswood Arms Corp. v. Este*, 133 S.E. 570, 575, 147 Va. 1047, 1063 (1926); *see also Sch. Bd. of the City of Norfolk v. Wescott*, 492 S.E.2d 146, 149-50, 254 Va. 218, 224 (1997) (dismissal upheld for repeated attendance problems after warnings). However, if an employer has cause to discharge an employee and nevertheless continues to employ that employee, with knowledge of those facts, in order to receive the benefits of the employee's services, then the employer cannot afterwards rely on that breach as grounds for discharge. *Robin v. Sydman Bros.*, 163 S.E. 103, 105-06, 158 Va. 289, 298 (1932).

In 1999, the Supreme Court of Virginia revisited this issue in *Parrish v. Worldwide Travel Serv., Inc.*, 512 S.E.2d 818, 257 Va. 465 (1999). Parrish refused to follow his employer's directions and was fired. The evidence showed that the plaintiff and his employer had a disagreement over how best to perform his duties under a three-year employment contract. The lower court ruled in favor of the employer. Although the Supreme Court noted that the plaintiff had the best of intentions, it was undisputed that he did not specifically comply with the instructions given to him by his employer. Affirming the dismissal of the case, the Supreme Court ruled that Parrish's refusal to solicit new business for the company, as listed in the goals of his employment, constituted insubordination and was a material breach of his employment contract, providing the employer with good cause to terminate his employment. *Id.* at 820, 257 Va. at 467-69.

In defense of a breach of contract claim, an employer may rely on any good reason to justify a discharge, even if it was not the motivating cause or was not even known at the time of discharge. *Spotswood Arms v. Este*, 133 S.E. 570, 576, 147 Va. 1047, 1065-66 (1926); *Crescent Horse-Shoe & Iron Co. v. Eyrone*, 27 S.E. 935, 936, 95 Va. 151, 158 (1897). In 1989, the Supreme Court of Virginia reaffirmed this rule, but held that after-acquired evidence justifying termination could not be used where an employee with a contract for a fixed term can show that the employer first breached the contract. *Elliott v. Shore Stop, Inc.*, 384 S.E.2d 752, 755-56, 238 Va. 237, 243-44 (1989).

In *Mills v. Va. Polytechnic Inst. & State Univ.*, 64 Va. Cir. 251 (Montgomery County, 2004), the plaintiff brought a breach of contract claim against Virginia Tech based on its faculty handbook. *Id.* at 252. The plaintiff asserted he was transferred from Roanoke to Blacksburg in violation of a handbook provision requiring written notice before a transfer of over 35 miles. *Id.* at 253. The plaintiff failed to report to his new position in Blacksburg for over a month, and the university fired him. *Id.* at 252. The court ultimately held that even if the university violated a term of the faculty handbook, such a violation did not amount to a material breach of an employment agreement. *Id.* at 255. The plaintiff, on the other hand, materially breached the agreement by failing to appear for work for over a month. *Id.* at 255-56.

*Barron v. NetVersant-Northern Va., Inc.*, 68 Va. Cir. 247 (Fairfax County, 2005), involved an employment agreement where the plaintiff was entitled to one year's salary and a lump sum payment equal to the cost of 12 months of health insurance premiums as severance if his employer terminated him without cause. *Id.* Three years after the parties entered into the agreement, the employer tried to negotiate the plaintiff's salary down from \$135,000.00 to \$90,000.00, change the plaintiff's status to that of an at-will employee, reduce his job responsibilities and title, and deny him participation in the company's commission plan. *Id.* The employee quit and demanded severance benefits. *Id.* When the employer refused to pay, the plaintiff sued for breach of contract. *Id.* at 249-50. The court held that the plaintiff was "constructively terminated" without cause when the company made fundamental, material and unilateral changes to the employment agreement, and awarded the plaintiff his severance benefits. *Id.* at 253-54.

In *JDS Uniphase Corp. v. Jennings*, 473 F. Supp. 2d 705, 708-09 (E.D. Va. 2007), a management level employee was terminated for intentionally hiring a temporary employee without consulting with the employer's human resources department — a direct violation of company policy. The employee was employed at-will and thus could be terminated with or without cause. *Id.* at 708. However, if the employee was terminated without cause, he would be entitled to six month's severance pay pursuant to a letter agreement. *Id.* The employer did not pay the severance, taking the position that the termination was for cause, as it was due to failure to comply with company policy. *Id.* at 709. The employee, however, argued that the reasons given for termination were pretextual, and that the true reason was retaliation for making management aware of company tax problems. *Id.* at 708. Thus, he argued, he was terminated because he was a "whistleblower," not for "cause," and the company breached the agreement by not paying him severance. *Id.* The federal court disagreed, holding that "no reasonable fact finder" could conclude that the termination was without cause. *Id.* at 709. The fact that the employee had admitted to willfully disregarding company policy was dispositive. *Id.*

#### B. Status of Arbitration Clauses

The Uniform Arbitration Act, Va. Code § 8.01-581.01 *et seq.*, validates a written contract to submit to arbitration any controversy arising between the parties. The Act includes agreements between employees and employers. A Federal Court in Virginia recently compelled arbitration of a class action FLSA case by store managers where the plaintiffs failed to opt out of an online program that required all claims to be arbitrated. *Fielding v. Dolgen, LLC*, 2018 U.S. Dist. LEXIS 102792, 2018 WL 3037425 (E.D. Va. June 19, 2018).

In *McMullin v. Union Land & Mgmt.*, 410 S.E.2d 636, 242 Va. 337 (1991), the Supreme

Court applied the Uniform Arbitration Act to a partner's claim against the partnership for services rendered to the partnership. In requiring arbitration, the court observed that the arbitration clause, which required arbitration of "any claim or controversy arising out of or relating to" the parties' agreement, included "contract-generated or contract-related disputes between the parties however labeled," *Id.* at 639, 341. Thus, the court concluded that the clause was broader than a clause covering claims merely 'arising out of' a contract, allowing for the controversy at issue to be submitted for arbitration pursuant to the agreement between the parties. *Id.* at 639, 342.; *see also Weitz v. Hudson*, 546 S.E.2d 732, 735, 262 Va. 224, 228-29 (2001) (relying on *McMullin*, reversing the circuit court and compelling arbitration of partnership dispute regarding proceeds of sale of assets where parties agreed to arbitrate "any dispute or controversy" that arose "under, out of, in connection with" or "in relation to" the partnership agreement).

Parties can confer broad powers upon an arbitration panel under the Uniform Arbitration Act. *See SIGNAL Corp. v. Keane Fed. Sys., Inc.*, 574 S.E.2d 253, 257, 265 Va. 38, 45 (2003) (involving agreement to arbitrate conferring authority to resolve any dispute related to or arising out of a contract). Moreover, a court may only vacate an arbitration panel decision if the panel exceeds those powers conferred by the arbitration agreement. *Id.* Further, "an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision." *Id.* at 46 (quoting *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 475 N.W.2d 704, 710, 438 Mich. 488 (Mich. 1991)). The Act does not provide for court review of an arbitrator's decision if the arbitrator demonstrated a "manifest disregard of the law." *Id.* at 257, 46.

One Virginia court has interpreted an agreement mandating arbitration of disputes "arising out of the employment or termination of employment" broadly enough to include events that occurred post-termination. *Martino v. Banc Am. Servs.*, 66 Va. Cir. 268, 272-73 (Charlottesville, 2004). The plaintiff had filed defamation and conspiracy to injure business claims for the post-termination actions of his former employer. *Id.* at 269. The court found that the disputes would not have arisen but for the plaintiff's employment and, thus, the arbitration agreement mandated arbitration. *Id.* at 272-73.

Another Virginia court has held that arbitration clauses are severable from an otherwise invalid contract. *Khosla v. Global Mortg., Inc.*, 72 Va. Cir. 229 (Fairfax County, 2006). In *Khosla*, an employee alleged that a mortgage company fraudulently induced him to sign an employment agreement by falsely representing that the company had the necessary licenses to operate in Virginia. *Id.* at 229-230. The agreement included an arbitration clause, and the company sought to compel the employee to arbitrate the dispute. *Id.* 230. The employee argued that the entire contract was invalid because of the company's fraud. *Id.* at 230. The court, however, noted that the employee did not specifically challenge the arbitration provision, and held that it was plainly severable from the remainder of the agreement. *Id.* at 231. The court's opinion did not indicate whether the agreement had a "severability clause." Incidentally, the court found that venue and choice of law provisions in the same agreement did not stand alone like the arbitration provision and, thus, were unenforceable. *Id.* at 233.

One federal court has ruled that arbitration provisions of an agreement are not precluded because the release which was part of the same agreement did comply with the Older Workers Benefit Protection Act (OWBPA). *Bennet v. Dillard's, Inc.*, 849 F. Supp. 2d 616 (E.D. Va. 2011).

Although the notice provisions of the release did not contain the OWBPA mandated terms, the court ruled that waiver of trial in favor of arbitration was not a waiver of a substantive right and therefore did not violate the OWBPA. *Id.* at 619.

In *Boatright v. Aegis Defense Services, LLC*, 938 F. Supp. 2d 602, 604 (E.D. Va. April 3, 2013), the three employees alleged that the defendant, a government security services contractor, had not paid them for their hours worked and had also failed to pay them at the proper pay rates. The plaintiffs' employment agreements contained identical dispute resolution provisions which required the waiver of a jury trial and arbitration of all or part of any claims at the defendant's choice. *Id.* at 605. The court upheld the use of arbitration under the employment agreements. *Id.* at 610. First, the court held that the arbitration clauses in the agreements did not have to be supported by independent consideration and the contract as a whole was supported by adequate consideration. *Id.* at 608-09. Second, the structure of the arbitration agreement was "not so one-sided as to be oppressive and therefore [did] not meet the showing for unconscionability. *Id.* at 609.

In *Bank of Commonwealth v. Hudspeth*, 714 S.E.2d 566, 282 Va. 216 (2011), the plaintiff was a former employee of the defendant who sued to recover compensation he alleged he was owed by the defendant following his termination. *Id.* at 568, 218. The defendant filed a motion to compel arbitration, maintaining that under Financial Industry Regulatory Authority (FINRA) regulations, it was entitled to arbitration of the plaintiff's claim. *Id.* at 568, 218-19. The court concluded that arbitration was required despite no employment agreement to arbitrate under the regulations because the plaintiff was an "associated person of a member" of FINRA and the defendant was a "customer" under FINRA regulations." *Id.* at 570, 572, 223, 225-26. The court conceded that while the term "customer" was ambiguous under the regulations, it was required to construe the ambiguity in favor of arbitration. *Id.* at 572, 226.

In *Schuling v. Harris*, 747 S.E.2d 833, 286 Va. 187 (2013), the owner of an automotive business required his full-time, live-in housekeeper to sign an arbitration agreement for claims arising out of her employment. The owner filed a complaint against the housekeeper alleging multiple torts, statutory violations and breach of contract. In his motion to compel arbitration, the employer said the designated arbitrator, the National Arbitration Forum ("NAF"), was no longer available to administer the arbitration and requested the circuit court appoint a substitute arbitrator. *Id.* at 191. The circuit court refused holding that the parties' agreement was conditioned on NAF conducting the arbitration. *Id.* The Supreme Court reversed holding that the agreement was not conditional upon this arbitrator conducting the arbitration, finding instead the parties intended the designation to be severed if unenforceable, since the agreement's severability provision caused to be severed any part of any provision found unenforceable in whole or in part for any reason. *Id.* at 195.

## V. ORAL AGREEMENTS

### A. Promissory Estoppel

The Virginia Supreme Court has expressly declined to adopt the doctrine of promissory estoppel as giving rise to a cause of action in Virginia. *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 493 S.E.2d 512, 516, 254 Va. 514, 521 (1997); *Virginia School of the*

*Arts v. Eichelbaum*, 493 S.E.2d 510, 254 Va. 373 (1997); *Ward's Equipment v. New Holland North America*, 493 S.E.2d 516, 254 Va. 379 (1997).

B. Fraud

The Supreme Court of Virginia has recognized that discharged employees can, in certain cases, plead and prove claims of fraud-in-the-inducement and recover compensatory and punitive damages. *Elliott v. Shore Stop, Inc.*, 384 S.E.2d 752, 755- 56, 238 Va. 237, 243-44 (1989); *Sea-Land Serv., Inc. v. O'Neal*, 297 S.E.2d 647, 651-52, 224 Va. 343, 351-52 (1982).

Claims of actual and constructive fraud must be proven by clear and convincing evidence. *Evaluation Research Corp. v. Allequin*, 439 S.E.2d 387, 390-91, 247 Va. 143, 148-49 (1994). In *Allequin*, the employee established that he was induced to resign from a prior business and relocate to accept a position. *Id.* at 388-89, 145. The employee was assured that the new job "was not on a contract basis," and that the new employer would seek to find him another position if the contract at the Air Force base expired. *Id.* at 389, 145-46. Even though the employee established the above evidence, the Supreme Court held that the employee had failed to prove by the requisite level of proof that the statements made were a false representation at the time they were made. *Id.* at 391, 149. For a similar result, see *Sneed v. Am. Bank Stationary Co.*, 764 F. Supp. 65, 67-68 (W.D. Va. 1991).

Proof of actual fraud by nondisclosure "requires evidence of a knowing and deliberate decision not to disclose a material fact." *Cohn v. Knowledge Connections, Inc.*, 585 S.E.2d 578, 581, 266 Va. 362, 368 (2003). In *Cohn*, an employee left her job to work for the defendant employer expecting to be assigned to the employer's Pentagon office. *Id.* at 579-80, 364. When the position was awarded to someone else, she sued the employer for actual and constructive fraud. *Id.* at 580, 365-66. In her actual fraud claim, she alleged that she did not get the Pentagon opening because the officer she would have worked with did not like to work with women. *Id.* at 581, 367. Her claim was based on her employer's statement that the officer "did not get along with the prior female office manager." She further alleged that the employer intentionally withheld this information from her before she accepted the employer's offer of employment. *Id.* at 581, 367. In her constructive fraud claim, she asserted that the employer had innocently misrepresented the qualifications of the individual who received the Pentagon opening. *Id.* A jury awarded the employee \$125,000.00 in compensatory damages, but the trial court set aside the verdict.

The Supreme Court affirmed the trial court's decision to set aside the verdict. According to the Court, the employer's statement regarding the Pentagon officer was an opinion, not a statement of fact, and an opinion cannot support a fraud claim. The constructive fraud claim failed because the employee's own evidence demonstrated that she was denied the Pentagon opening because of the officer's attitude towards women, not because of any misrepresentation of the qualifications of the employee who was awarded the position.

C. Statute of Frauds

Virginia strictly enforces the Statute of Frauds. Va. Code § 11-2(8) prohibits the enforcement of contracts of more than a year unless they are in writing and signed by the employer. *Falls v. Va. State Bar*, 397 S.E.2d 671, 240 Va. 416 (1990). This rule bars the enforcement of oral "just cause" agreements of indefinite duration.

In *Progress Printing Co. v. Nichols*, 421 S.E.2d 428, 244 Va. 337 (1992), the Supreme Court stated:

We have held that an employment condition which allows termination "for cause" sets a definite term for the duration of the employment. *Norfolk S. Ry. Co. v. Harris*, 59 S.E.2d 110, 114-15, 190 Va. 966, 976 (1950). However, the employment term created by a termination for cause condition, while definite, is not capable of being performed within one year. *Falls v. Va. State Bar*, 397 S.E.2d 671, 672, 240 Va. 416, 418-19 (1990). Therefore, a termination "for cause" provision used to overcome the presumption of employment at will must be in an employee manual or other document which complies with the statute of frauds.

421 S.E. 2d at 432, 244 Va. at 341.

In *Silverman v. Bernot*, 239 S.E.2d 118, 218 Va. 650 (1977), the court held that:

When it appears by the whole tenor of an agreement not in writing that it is to be performed after the first year, then the contract is within the statute and must be in writing. But when by its terms, or by reasonable construction, such a contract can be fully performed on one side within a year, although it can be done by the occurrence of some improbable event, as the death of the person referred to, the contract is not within the statute and need not be in writing.

239 S.E. 2d at 121, 218 Va. at 654.

The Supreme Court later clarified that the possibility that an employee may be discharged within the first year of performance did not remove the employment contract from the Statute of Frauds, and thus, oral assurances could not be considered in deciding whether the employment contract was one that could be terminated only for cause. *Graham v. Cent. Fid. Bank*, 428 S.E.2d 916, 918, 245 Va. 395, 399 (1993), *citing Falls v. Va. State Bar*, 397 S.E.2d 671, 672-73, 240 Va. 416, 418-19 (1990); *see Nguyen v. CNR Corp.*, 44 F.3d 234, 239 (4th Cir. 1995).

In one case, however, a court found that the Statute of Frauds did not apply where an employee quits a job to accept a position and begins working right away on a promise of a salary of \$84,000.00 and benefits for one year. *Shiple v. Jackson*, 56 Va. Cir. 235 (Richmond, 2001). Finding that the promises made by the employer could have been performed in one year, the court rejected the employer's motion to dismiss the claim as unenforceable. *Id.* at 236.

## VI. DEFAMATION

### A. General Rule

Virginia makes no distinction between actions for libel and actions for slander. *Fleming v. Moore*, 275 S.E.2d 632, 635, 221 Va. 884, 889 (1981). Generally, a plaintiff must prove four elements to prevail in a defamation suit: (1) the exact words of a false statement; (2) the tendency of the statement to prejudice a person's morals, profession or trade; (3) the publication of the statement to a third-party; and (4) depending on the defendant, malice or reckless disregard for the truth or negligence. *Food Lion, Inc. v. Melton*, 458 S.E.2d 580, 584, 250 Va. 144, 150 (1995); *Great Coastal Express Inc. v. Ellington*, 334 S.E.2d 846, 852, 230 Va. 142, 151 (1985). The defamatory words must be set out *in haec verba* in the complaint; thus, the pleading must purport to give the exact words. *Fuste v. Riverside Healthcare Ass'n*, 575 S.E.2d 858, 862, 265 Va. 127, 134 (2003). *But see Gov't Micro Res., Inc. v. Jackson*, 624 S.E.2d 63, 67, 271 Va. 29, 38, (2006) ("A motion for judgment that does not recite all the specifics of the alleged defamatory statement, although not good pleading, may nevertheless state a 'substantial cause of action imperfectly' . . . [and] the particulars of the allegedly defamatory statement may be supplied in a bill of particulars.").

Communications within an organization, from one co-worker or supervisor to another, are not immune from suit. The Virginia Supreme Court has ruled that the "intra corporate immunity doctrine" does not apply to defamation actions, and an interoffice statement about an employee will constitute a "publication." *Larimore v. Blaylock*, 528 S.E.2d 119, 122, 259 Va. 568, 573 (2000); *Thalhimer Bros. v. Shaw*, 159 S.E. 87, 90, 156 Va. 863, 871 (1931).

Even where an employer has acted wrongfully, an employee who misstates the extent of the employer's wrongful conduct may be subject to a defamation claim. *Williams v. Garraghty*, 455 S.E.2d 209, 249 Va. 224 (1995) (permitting a supervisor to bring a defamation claim against a worker who made false factual allegations against the supervisor as part of a sexual harassment accusation).

### B. Job References and Blacklisting Statutes

Virginia law prohibits a business from willfully and maliciously preventing or attempting to prevent a former employee from obtaining employment with another. Va. Code. § 40.1-27. This "anti-blacklisting" statute does not prohibit responding to inquiries and providing a truthful statement of the reason for a discharge, or of the character, industry and ability of a person who voluntarily quits.

The Virginia legislature passed a statute in 2000 to clarify the existence of a privilege for job references. Va. Code § 8.01-46.1 (2000), grants limited immunity to employers when communicating job-related information about an employee to a prospective or current employer. Immunity applies only to situations where the information

is requested, not unsolicited references. The statute requires the employer to act in good faith, and applies to references given after July 1, 2000. *See Sarno v. Clanton*, 59 Va. Cir. 384, 386-87 (Norfolk, 2002) (an employer was protected by the qualified privilege when it discussed the character of its employee with its employee's potential employers because the conversation was made in good faith, and the plaintiff failed to show malice on the part of employer). Additionally, an employee's subjective belief that he or she would have obtained a job but for statements that current or past employers have made to prospective employers is not enough to sustain a cause of action for interference with business expectancy. *Id.* at 385.

Even prior to 2000, Virginia courts had recognized the existence of a qualified privilege which applies in the context of job references. *See Southeastern Tidewater Opportunity Project, Inc. v. Bade*, 435 S.E.2d 131, 246 Va. 273 (1993) (employee failed to prove by clear and convincing evidence that defamatory letter regarding his termination which was sent to members of Board of Directors was activated by common law malice); *Chesapeake Ferry Co. v. Hudgins*, 156 S.E. 429, 155 Va. 874 (1931).

### C. Privileges

Virginia recognizes two forms of privilege – absolute and qualified.

#### 1. Absolute Privilege

Statements made during a judicial or quasi-judicial proceeding are absolutely privileged if relevant to the subject matter of the proceeding. *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 524 S.E.2d 420, 424, 259 Va. 92, 101 (2000). Virginia Employment Commission proceedings are considered quasi-judicial, and statements made in a VEC hearing are immune from suit. *Shabazz v. PYA Monarch, LLC*, 271 F. Supp. 2d 797, 804 (E.D. Va. 2003); *Fennell v. Town of Pocahontas*, No. 1:05cv00045, 2005 U.S. Dist. LEXIS 19007 (W.D. Va. Sept. 2, 2005).

The Virginia Supreme Court has held that draft complaints sent as part of an effort to solicit a pre-litigation settlement are part of a judicial proceeding and are absolutely privileged. *Mansfield v. Bernabei*, 727 S.E.2d 69, 75, 284 Va. 116, 126 (2012). In *Mansfield*, a building manager of a residential condominium filed a complaint with the EEOC against his three corporate employers, including the plaintiff, after he was terminated. The manager sent a demand letter and a draft complaint to these three individuals. The plaintiff then filed a defamation suit against the manager's counsel, alleging the allegations in the draft complaint defamed him. The defendant filed demurrers, contending the allegation made in the complaint were privileged even though they had been made before the suit was filed. *Id.* at 71-72, 119. The trial court sustained the demurrers. *Id.*

The Supreme Court affirmed, first stating the general rule that the absolute privilege attaches to communications that are relevant, material, or pertinent to the issues of the judicial proceeding. *Id.* at 73, 122. The court also noted that the rule “included within its scope all proceedings of a judicial nature” and “clearly extends outside the courtroom.” *Id.* The court thus inquired whether: (1) the statement was made preliminary to a proposed proceeding; (2) the

statement was related to a proceeding contemplated in good faith and serious consideration; and (3) the communication was disclosed by interested persons. *Id.* at 75, 125. The court concluded that because the demand letter threatened legal action and the manager actually filed a complaint in federal court, the trial court did not err in concluding the privilege attached to the draft complaint. *Id.* at 75, 126. *See also Cummings v. Addison*, 84 Va. Cir. 334, 339 (Norfolk, 2012) (granting summary judgment on a counterclaim for defamation partially based on five alleged defamatory statements contained in a draft complaint sent to the counterclaimant's attorney).

A federal court applying Virginia law held that the Virginia Board of Bar Examiners performs judicial functions on behalf of the Supreme Court of Virginia, and statements made to the Board of Bar Examiners related to applicants for the Bar are absolutely privileged. *Shestul v. Moeser*, 344 F. Supp. 2d 946, 951 (E.D. Va. 2004).

Possible Exception. The absolute privilege that applies to the judicial proceedings may be lost if representations about judicial findings "substantially depart" from, or misrepresent, the established public record. *Vaile v. Willick*, 2008 U.S. Dist. LEXIS 53619, at \*21 (W.D. Va. July 14, 2008). In *Vaile*, the plaintiff was a law student embroiled in a series of lawsuits with his ex-wife after he removed their children from his ex-wife's custody without her consent. *Id.* at \*3. A Nevada judge had awarded \$960,755.56 in damages and attorneys' fees to plaintiff's ex-wife. *Id.* The wife's lawyers sent letters to plaintiff's law school and to the American Bar Association stating that they were "baffled . . . that a law school would admit a student found to have committed multiple violation [sic] of State and Federal law, including kidnapping, passport fraud, felony non-support of children and violation of RICO." *Id.* at \*4. The court held that the absolute privilege for publishing public records applied to the letters, because they contained statements that purported to represent the finding of a federal court and attached the entire opinion for further reference. *Id.* at \*21. However, a question remained whether the representations in the letters "substantially departed from [the court's] decision such that the privilege was lost." *Id.* The court left this determination for the jury, "because reasonable people could disagree whether the letters are an impartial and accurate account of [the court's] decision." *Id.*

## 2. Qualified Privilege

In *Great Coastal Express, Inc. v. Ellington*, 334 S.E.2d 846, 230 Va. 142 (1985), the employee brought action against employer based on allegedly defamatory statements made by officers of employer. The court noted that Virginia recognizes the common-law defense of qualified privilege in defamation actions.

A communication, made in good faith, on a subject matter in which the person communicating has an interest, or owes a duty, legal, moral, or social, is qualifiedly privileged if made to a person having a corresponding interest or duty." [citation omitted]. However, a party may lose its qualified privilege if the alleged words were spoken:

- (1) With actual malice; or

- (2) And [sic] even though believing the alleged words to be true, he used language which was intemperate or disproportionate in strength and violence to the occasion and which was unnecessarily defamatory of the plaintiff; or
- (3) Not in good faith, and without an honest belief in their truth; or
- (4) Deliberately adopted a method of speaking the alleged words which gave unnecessary publicity to such words; or
- (5) And [sic] purposely arranged to speak the alleged words in the presence of a person or persons who were wholly uninterested in the matter and who had no right to be present and who in the natural course of things would not have been present; or
- (6) For the purpose of gratifying some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff; or
- (7) With such gross indifference or recklessness as to amount to a wanton and willful disregard of the rights of the plaintiff.

*Id.* at 853-54, 230 Va. at 153-54.

To defeat the qualified privilege, the plaintiff must show by clear and convincing evidence that the defamatory words were spoken with common law malice. *Smalls v. Wright*, 399 S.E.2d 805, 808, 241 Va. 52, 55 (1991). Common law malice is "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made." *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 727, 229 Va. 1, 18 (1985). The question whether a defendant was motivated by malice, and thus exceeded the privilege, is a question of fact for a jury rather than one for the Court to determine on a motion to dismiss. *Fuste v. Riverside Healthcare Ass'n*, 575 S.E.2d 858, 863, 265 Va. 127, 135 (2003).

In *Cashion v. Smith*, 286 Va. 327 (2013), the Supreme Court reiterated the rule of *Great Coastal Express*, noting that personal spite or ill will is just *one* of the elements that will establish common law malice. However, it noted, there are other elements that will establish common-law malice: (1) the statements were made with knowledge that they were false or with reckless disregard for their truth, *Raytheon Technical Servs. Co. v. Hyland*, 273 Va. 292, 301 (2007); (2) the "statements [we]re communicated to third parties who have no duty or interest in the subject matter," *Larimore v. Blaylock*, 528 S.E.2d 119, 121, 259 Va. 568, 572 (2000); (3) the statements were motivated by personal spite or ill will, *Preston v. Land*, 220 Va. at 118, 120-21 (1979); (4) the statements included "strong or violent language disproportionate to the occasion," *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 591 (1961); or (5) the statements were not made in good faith, *Chalkley v. Atlantic Coast Line R.R. Co.*, 150 Va. 301, 325 (1928). *Cashion*, 286 Va. at 338-39.

In one case, the Virginia Supreme Court ruled that a police officer exceeded his qualified

privilege by suggesting to the suspect's employer that the employee-suspect had committed a criminal offense when no criminal charges were subsequently brought. *Schnupp v. Smith*, 457 S.E.2d 42, 249 Va. 353 (1995) (affirming \$300,000.00 verdict for plaintiff in suit against police officer who told plaintiff's employer that plaintiff's work van had been spotted on street corner known as site for drug transactions).

A qualified privilege exists in cases involving defamatory statements made between co-employees and employers in the course of employee disciplinary or discharge matters. *Larimore v. Blaylock*, 528 S.E.2d 119, 121, 259 Va. 568, 572 (2000). This privilege may also be defeated if the plaintiff proves that the defamatory statements were made maliciously, which is a question for a jury. *Id.* This qualified privilege extends to statements made by Human Resources personnel and other administrative staff (*Nigro v. Virginia Commonwealth Univ. Med. Coll. of Virginia, et al.*, 2010 U.S. Dist. LEXIS 123939, at \*49 (W.D. Va. 2010)), but not to statements made to clients or patients about former employees. See *Suarez v. Loomis Armored US, LLC*, 2010 U.S. Dist. LEXIS 129335, at \*9 (E.D. Va. Dec. 7, 2010) (statements made to client representative that armored truck driver was fired for theft not privileged because client representative had no duty to ask about plaintiff's termination) and *Baylor v. Comprehensive Pain Mgmt. Ctrs.*, 2011 U.S. Dist. LEXIS 37699, at \*37 (W.D. Va. April 6, 2011) (defamatory statements made to patients about reasons for doctor's termination not privileged because there is no duty to inform them).

#### D. Other Defenses

##### 1. Truth

Truth is an absolute defense to any defamation cause of action. *Alexandria Gazette Corp. v. West*, 93 S.E.2d 274, 279, 198 Va. 154, 159 (1956); see also *Kuhar v. Devicor Prods.*, 2016 U.S. Dist. LEXIS 147257, (E.D. Va. Oct. 24, 2016) (holding a statement made by employer about a terminated plaintiff to a former customer that the plaintiff had "up and left" was essentially true because the employee had left earlier than she previously said she would); *Union of Needletrades, Indus. & Textile Emps. v. Jones*, 603 S.E.2d 920, 268 Va. 512 (2004) (reversing judgment of trial court and entering judgment for employer because plaintiff employee failed to prove falsity of alleged defamatory statement).

##### 2. No Publication

As stated above, a plaintiff must prove publication to a third party to prevail in a defamation suit. *Food Lion, Inc. v. Melton*, 458 S.E.2d 580, 584, 250 Va. 144, 150 (1995). As such, a false statement made by a supervisor to the affected employee is not actionable because there is no publication to a third party, and thus there can be no defamation. See *Hines v. Gravins*, 112 S.E. 869, 870, 136 Va. 313, 319 (1922).

Virginia's insulting words statute (Va. Code. §8.01-45) is co-extensive with its defamation statute, however, it does not require publication to be actionable. The words do not have to be spoken face-to-face, but may be written in a letter to the employee. *Trail v. General Dynamics*

*Armament and Technical Products, Inc.*, 697 F. Supp. 2d 654, 657 (W.D. Va. 2010) (writing a letter of termination to employee wrongfully accusing him of criminal conduct constituted insulting words under Virginia's insulting words statute).

### 3. Self-Publication

The Virginia Supreme Court has not addressed the issue of whether self-publication will give rise to a defamation claim. At least one circuit court and one federal court have rejected the theory. *Cybermotion, Inc. v. Vedcorp.*, 41 Va. Cir. 348 (Salem, 1997); *Ortiz v. Panera Bread Co.*, 2011 U.S. Dist. LEXIS 85463, at \* 14-15 (E.D. Va. Aug. 2, 2011).

### 4. Invited Libel

There are currently no relevant statutes or reported cases in Virginia recognizing the defense of invited libel. The defense was raised in *Kay v. Collins*, 39 Va. Cir. 150, 154 (Richmond, 1996), but found inapplicable.

### 5. Opinion

Statements of opinion, as opposed to false statements of fact, cannot give rise to a defamation claim. "[P]ure expressions of opinion, not amounting to 'fighting words,'" are protected by the First Amendment of the Constitution of the United States and Article 1, § 12 of the Constitution of Virginia. *Chaves v. Johnson*, 335 S.E.2d 97, 101-02, 230 Va. 112, 119 (1985). "Statements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion." *Raytheon Tech. Servs. Co. v. Hyland*, 641 S.E.2d 84, 90, 273 Va. 292, 303 (2007); *Gov't Micro Res., Inc. v. Jackson*, 624 S.E.2d 63, 67, 271 Va. 29, 38 (2006); *Fuste v. Riverside Healthcare Ass'n, Inc.*, 575 S.E.2d 858, 861, 265 Va. 127, 132-33 (2003); *Chaves*, 335 S.E.2d at 101, 230 Va. at 119. Whether an alleged defamatory statement is one of fact or opinion is a question of law and is, therefore, properly decided by a court instead of a jury. *Chaves*, 335 S.E.2d at 102, 230 Va. at 119. *See e.g. Cummings v. Addison*, 84 Va. Cir. 334, 339 (Norfolk, 2012) (holding that the statement from a country club member to the club president regarding a club employee that "his family did not join the club for an employee to become a predator, stalk, and harass them" was not defamatory but simply an opinion "best interpreted as an expression of exasperation or frustration").

At the same time, simply couching statements in terms of "opinion" does not preclude a defamation cause of action. *Raytheon*, 641 S.E.2d at 84, 273 Va. at 292, *citing Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990); *see Cretella v. Kuzminski*, U.S. Dist. LEXIS 42152, at \*15-16 (E.D. Va. May 29, 2008) (treating as a statement of fact an allegation that the plaintiff, an attorney who sent a cease-and-desist letter to an online critic of his client, was "involved in what I would characterize as extortion"). Moreover, opinions may be actionable where they "imply an assertion" of objective fact. *Raytheon*, 641 S.E.2d 84, 273 Va. 292, *quoting Milkovich*, 497 U.S. at 21. Whether an alleged defamatory statement is a statement of fact or opinion is a question of law to be resolved by the trial court, and when making a determination as to whether a statement is fact or opinion, the courts "do not isolate one portion of the statement. Rather the alleged defamatory statement must be considered a whole to determine whether it states a fact or non-actionable

opinion.” *Gov’t Micro Res.*, 271 Va. at 40.

E. Non-Disparagement Clauses

Courts in Virginia have recognized that non-disparagement clauses can be enforceable. *See Kappa Sigma Fraternity v. Richard G. Miller Mem’l Foundation*, 2008 U.S. Dist. LEXIS 12379 (W. D. Va. Feb. 20, 2008). When drafting non-disparagement clauses, care must be used to avoid sweeping too broadly because if the clause, when enforced, would prevent the disclosure of evidence of fraud on the government or other criminal conduct, then it will be void as against public policy. *Compare U.S. ex rel. Head v. Kane Co.*, 668 F. Supp 2d 146 (D.D.C. 2009) *with X Corp. v. Joe Doe*, 805 F. Supp 1298 (E.D. Va. 1992).

**VII. EMOTIONAL DISTRESS CLAIMS**

A. Intentional Infliction of Emotional Distress

Claims of emotional distress are disfavored in Virginia. In order to recover for intentional infliction of emotional distress under Virginia law, a plaintiff must:

. . . prove by clear and convincing evidence, that: the wrongdoer's conduct was intentional or reckless; the conduct is outrageous and intolerable; the alleged wrongful conduct and emotional distress are causally connected; and that the distress is severe.

*Russo v. White*, 400 S.E.2d 160, 162, 241 Va. 23, 26 (1991); *see also Supervalu, Inc. v. Johnson*, 2008 Va. LEXIS 103, at \*370 (Sept. 12, 2008). Because claims for intentional infliction of emotional distress are disfavored in Virginia, a plaintiff must allege all facts necessary to establish a cause of action in the complaint to withstand challenge on demurrer. *Almy v. Grisham*, 639 S.E.2d 182, 187, 273 Va. 68, 77 (2007). Proof that the defendant acted with an intent which is tortious or even criminal is insufficient to demonstrate the conduct is outrageous and intolerable. *Russo*, 400 S.E.2d at 162, 241 Va. at 27 (1991). Likewise, proof that "a defendant 'has intended to inflict emotional distress,' or his conduct can be 'characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort'" does not equate to outrageous and intolerable conduct. *Id.*

Liability for intentional infliction of emotional distress "has been found only where the conduct has been 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." *Russo*, 241 Va. at 27; *Howard v. Williams*, 2008 Va. Cir. LEXIS 16, at \*4-10 (Fairfax County, Feb. 27, 2008) (dismissing complaint of hospital clerk who claimed his supervisors acted outrageously, maliciously, and intolerably in waiting nine days to transfer him out of an operating room after he complained that his post-traumatic stress disorder made him unable to tolerate exposure to blood, bodily fluids, and the smell of burning flesh because the clerk had not plead that the defendant’s conduct was “outrageous” or “intolerable” with specificity); *see also Hatten v. Campbell*, 71 Va. Cir. 95, 99 (Chesterfield County, 2006) (sustaining demurrer to employee’s intentional infliction of emotional distress claim).

It is the trial judge's responsibility to initially determine if the facts plead will support a

finding of "outrageousness" and "severe emotional distress." See *Howard*, 2008 Va. Cir. at \*8, citing *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974). Applying these standards, some courts have found claims of sexual harassment and retaliation for complaining about sexual harassment to be insufficient to state a claim. See *Paroline v. Unisys Corp.*, 879 F.2d 100, 113 (4th Cir. 1989); *Beardsley v. Isom*, 828 F. Supp. 397, 400-01 (E.D. Va. 1993).

One Virginia court has held that "another basis on which extreme outrage can be found is the defendant's knowledge that the plaintiff is especially sensitive, susceptible, and vulnerable to injury through mental distress at the particular conduct." *Zeng v. Elec. Data Sys. Corp.*, 2007 U.S. Dist. LEXIS 44412, at \*12-13 (E.D. Va. June 18, 2007), quoting Prosser and Keeton on the Law of Torts, § 2, p. 62 (5th ed. 1984). In *Zeng*, a software engineer's intentional infliction of emotional distress claim was based in part on allegations that her bosses "threaten[ed] to fire plaintiff, with knowledge that she was pregnant and physically sensitive, and stating that such termination will occur 'even if you are pregnant.'" *Id.* at \*12. The court held that the plaintiff's allegations, if true, would establish an emotional distress claim because pregnancy "is clearly a period when a person is mentally sensitive, susceptible, and vulnerable to physical injury." *Id.* at \*13.

#### B. Negligent Infliction of Emotional Distress

Virginia has not recognized the existence of a tort claim against an employer because of negligent infliction of emotional distress allegedly inflicted on an employee by a supervisor. *Chesapeake & Potomac Tel. Co. of Virginia v. Dowdy*, 365 S.E.2d 751, 754, 235 Va. 55, 61 (1988). The *Dowdy* court held there can be no actionable negligence unless there is a legal duty, a violation of the duty, and a consequent injury. *Id.* "In Virginia, there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances." *Id.* As a result, the dismissal of a claim of negligent infliction of emotional distress was upheld. *Id.*; see *Gray v. INOVA Health Care Servs.*, 514 S.E.2d 355, 257 Va. 597 (1999) (no claim for negligent infliction of emotional distress), *but see Stottlemeyer v. Ghramm*, 597 S.E.2d 191, 194, 268 Va. 7, 13-14 (2004) (stating that the Court need not consider whether plaintiff has a cause of action for negligent supervision because since the jury found no negligence by the defendant the issue was moot).

### VIII. PRIVACY RIGHTS

#### A. Generally

There is no general right of privacy in Virginia under the Virginia Constitution or statute that applies in the employment context. Virginia courts, however, have held that there is no common law claim for invasion of privacy. See *Cohen v. Sheehy Ford, Inc.*, 27 Va. Cir. 161, 163 (Fairfax, 1992); *Cerick v. Cent. Fid. Bank*, 19 Va. Cir. 1, 4 (Fairfax County, 1989); *Smith v. Dameron*, 12 Va. Cir. 105 (Va. Cir. Ct. 1987); *But see Barker v. Richmond Newspapers, Inc.*, 14 Va. Cir. 421 (Richmond, 1973) (assuming, but not deciding that in Virginia there is a common law right of action for invasion of privacy, but

still holding that the plaintiff could not recover). Federal courts have also found no such cause of action under Virginia law. *See Brown v. Am. Broad. Co.*, 704 F.2d 1296, 1302-03 (4th Cir. 1983); *Falwell v. Penthouse Intl. Ltd.*, 521 F. Supp. 1204, 1210 (W.D. Va. 1981).

In contrast, Virginia does prohibit the use of a person's name, portrait or picture without consent for a commercial purpose. Va. Code § 801.40(A). As a result, employers must have an employee's consent to use their employee's name or photo on marketing materials or a website. *See Town & Country v. Riggins*, 457 S.E.2d 356, 249 Va. 387 (1995) (awarding compensation and punitive damages to NFL star whose name was used by realty company to promote and sell his former wife's house).

## B. New Hire Processing

### 1. Eligibility Verification and Reporting Procedures

Any employer with more than an average of 50 employees for the previous 12 months that enters into a contract in excess of \$50,000 with any state agency to perform work or provide services pursuant to such contract is required to register and participate in the Federal E-Verify program to verify work authorization of its newly hired employees performing work pursuant to such public contract. Va. Code § 2.2-4308.2(B). Any employer who fails to do so may be debarred from contracting with any state agencies for up to one year.

For purposes of these reporting procedures, a "newly-hired employee" is defined as an individual in employment (as defined in Va. Code Section 60.2-212), who (i) has not previously been in the employment of the employer or (ii) was previously in the employment of the employer but has been separated from such prior employment for at least 60 consecutive days. Va. Code § 63.2-1946(H).

It is a Class 1 misdemeanor to hire an individual not authorized to work in the United States. Va. Code. § 40.1-11.1. All applications used in Virginia "shall ask prospective employees if they are legally eligible for employment in the United States." *Id.*

### 2. Background Checks

Since 2007, Va. Code § 19.2-389 has made it easier for employers and prospective employers to obtain the criminal record history of employees or potential employees. Previously, employers could only directly obtain criminal histories for employees whose job duties required that they enter the homes of others. Individuals, however, could request copies of their own criminal records, and employers often circumvented the restrictions by requiring their employees to provide such information. Va. Code § 19.2-389(H) now permits employers and prospective employers to directly request records of criminal convictions, at the employer's cost, for employees or prospective employees, provided that the employee or prospective employee has consented to the request in writing and has

presented a photo-identification to the employer or prospective employer.

Employees are not required to provide information concerning arrests that have been expunged (i.e., did not result in a criminal conviction and the person has had the criminal records sealed). See Va. Code §§ 19.2-392.3 and 19.2-392.4. It is a Class 1 misdemeanor for an employer to require an applicant to disclose any information concerning an arrest or criminal charge against him or her that has been expunged. Va. Code § 19.2-392.4.

Under Va. Code § 46.2-208(B)(11), an employer may condition a job offer on the receipt of the applicant's driving record only if the position requires the operation of a motor vehicle. In those situations, the applicant must give the prospective employer a written consent authorizing the release of the records.

Virginia limits the use of a computer to access an individual's salary, credit, or other financial information without the other person's written consent. Va. Code § 18.2-152.5 makes it a crime to use a computer or a computer-network to intentionally examine any employment, financial, credit or personal information without the other person's consent. The authorization of a credit history check should cover this point.

### C. Other Specific Issues

#### 1. Workplace Searches

In *Buonocore v. Chesapeake & Potomac Telephone Co.*, 492 S.E.2d 439, 254 Va 469, (1997), an assistant manager of security for the plaintiff's employer accompanied a federal law enforcement agent on a search of the plaintiff's home. *Id.* at 440, 471. C & P did not have permission to search the plaintiff's home. *Id.* The plaintiff contended that the search was unlawfully conducted in violation of Va. Code § 19.2-59, which provides a damages remedy for that searches that were conducted without a proper warrant (by law enforcement officials or other persons). *Id.* at 440-41, 471-72. The Virginia Supreme Court affirmed the trial court's ruling that Code § 19.2-59 did not create a cause of action against a private entity or individual, because "considered as a whole, the statutory language demonstrates a legislative intent to deter the conduct of only those individuals who, by virtue of their governmental employment, can be found guilty of malfeasance in office." *Id.* at 441, 473.

#### a. Polygraphs

Virginia law restricts the use of polygraphs. Employers may not ask applicants or employees about sexual activities when administering a polygraph, unless the activity resulted in a criminal conviction. Va. Code § 40.1-51.4:3. This statute also requires all written records of a polygraph to be destroyed or maintained on a confidential basis and can only be revealed with the consent of the individual tested. There is a separate statutory provision, Va. Code § 40.1-51.4:4, that regulates the use of polygraphs by law enforcement agencies with their employees.

#### 2. Electronic Monitoring

Under Virginia law, an employer may lawfully intercept an employee telephone communication so long as it has the consent of one of the parties to the conversation. Va. Code § 19.2-62. It is unlawful to monitor the phone calls between employees and customers unless the employer first gives the employee notice that monitoring may occur at any time during the course of employment. Va. Code § 18.2-167.1.

### 3. Social Media

All government and private employers, regardless of company size or revenue, in Virginia, are prohibited from requesting usernames and passwords for personal social media accounts from current employees or applicants. Specifically, Va. Code § 40.1-28.7:5 prohibits employers from:

- a. Requiring a current or prospective employee to disclose the username and password to his social media account;
- b. Requiring a current or prospective employee to add an employee, supervisor, or administrator to his list of contacts;
- c. Using any login information inadvertently obtained to access an employee's social media account;
- d. Disciplining an employee for exercising his rights under this section;
- e. Refusing to hire an applicant for exercising his rights under this section.

This law gives a very broad definition of "social media account" which includes the employee or applicant's personal (non-work) email account. The law does not restrict an employers' ability to view social media account information that is owned by or established at the direction of the employer, or information that is publicly available. Further, the law does not restrict the employer's access to such information with the purpose to conduct investigations or comply with state or federal law.

### 4. Taping of Employees

Virginia has a wiretapping statute which features the "one-party consent" rule. Virginia Code § 19.2-62. As a result, any person participating in a phone call in Virginia (i.e. all parties are in Virginia during the phone call) may record a conversation or phone call so long as they are an actual party to the conversation, or if they get permission from one party to the conversation in advance.

### 5. Release of Personal Information on Employees

An employer is not permitted to release, communicate, or distribute any current or former employee's personal identifying information to a third party unless required by federal law, state law, court order, warrant issued by a judicial officer, subpoena, or discovery. Va. Code § 40.1-28.7:4.

When an employer, upon request, discloses information about a former or current employee to a prospective employer of the former or current employee, it will be immune from civil liability for such disclosure or its consequences, unless it is shown that the information disclosed by the former or current employer was knowingly false or was offered with the intent to deliberately mislead. Va. Code § 8.01-46.1.

## 6. Medical Information

Employers may require prospective employees to submit to a medical examination or furnish medical records, provided the employer bears all of the cost. Va. Code § 40.1-28. Further, an employer under has the right to obtain all applicable medical records of an employee who is treated for an injury arising out of employment. Va. Code § 65.2-604.

## IX. WORKPLACE SAFETY

Virginia courts have drawn a clear distinction between the torts of negligent hiring, negligent supervision, and negligent retention. Unlike other jurisdictions, Virginia has been slow to expand the grounds for employer liability based on claims of negligence. As a result, it is critical to determine which type of claim is being asserted.

### A. Negligent Hiring

Virginia law has long recognized the tort of negligent hiring. *Infant C. v. Boy Scouts of Am.*, 391 S.E.2d 322, 325, 239 Va. 572, 578 (1990); *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 393 236 Va. 206, 208 (1988); *Davis v. Merrill*, 112 S.E. 628, 133 Va. 69 (1922); *Weston's Adm'x v. St. Vincent, Etc.*, 107 S.E. 785, 793, 131 Va. 587, 611 (1921). Nonetheless, in *Majorana v. Crown Cent. Petroleum*, 539 S.E.2d 426, 431 260 Va. 521, 531 (2000), the Virginia Supreme Court rejected the assertion that reasonable background investigations of all prospective employees are mandatory and that failure to conduct them gives rise to liability *per se*; rather, the plaintiff must demonstrate that an employee's propensity to cause injury to others was either known or should have been discovered by reasonable investigation.

To prove the tort of negligent hiring, the plaintiff must show that the employer negligently placed an "unfit person" in an employment situation resulting in an unreasonable risk of harm to others. *J. v. Victory Tabernacle*, 372 S.E.2d at 394, 236 Va. at 211 (involving negligent hiring of janitor on probation for sexual assault who repeatedly sexually assaulted a 10-year-old girl on church premises). The plaintiff must allege that facts existed in the employee's past that would have deterred a reasonable employer from hiring this employee had the employer inquired of the facts. *Davis*, 112 S.E. at 631, 133 Va. at 79-80 (involving negligent hiring of railroad crossing gate keeper with known propensity for violence who later shot and killed passerby in her car).

Absent a statutory requirement to conduct a background search, merely alleging a failure to investigate is not enough; the plaintiff must also show actual facts in the plaintiff's history that were available to the employer. *See Apartments Mgmt. v. Jackman*, 513 S.E.2d 395, 397-98, 257 Va. 256, 261 (1999); *Dawkins v. Richmond Comm. Hosp.*, 30 Va. Cir. 377, 379 (Richmond, 1993); *see also Phillip Morris v. Emerson*, 368 S.E.2d 268, 278 235 Va. 380 400 (1988) (holding Phillip Morris liable for negligently selecting an independent contractor to dispose of highly toxic

chemicals); *Simmons v. Baltimore Orioles*, 712 F. Supp. 79 (W.D. Va. 1989) (fan assaulted in a parking lot by two minor league baseball players unsuccessfully brought a claim because there was no past history of violent behavior on the part of the ball players, and the court ruled the employer was not required to instruct them on how to "peacefully deal with hecklers").

The basis for liability on a negligent hiring claim is the employer's own negligence in the hiring process. In this regard, a plaintiff must prove that it was the employer's hiring or placement of the employee that proximately caused the plaintiff's injury. *Interim Pers. of Cent. Va., Inc. v. Messer*, 559 S.E.2d 704, 707, 709, 263 Va. 435, 441-42 (2002) (holding that it was not reasonably foreseeable that employee would steal a truck from his employer and cause accident under the influence of alcohol).

There is no requirement, however, that the employee injure another through negligence. *J. v. Victory Tabernacle*, 372 S.E.2d at 393, 236 Va. at 210. The court in *Victory Tabernacle* stated, "to say that a negligently hired employee who acts willfully or criminally thus relieves his employer of liability for negligent hiring when willful or criminal conduct is precisely what the employer should have foreseen would rob the tort of vitality by improperly subjecting it to factors that bear upon the separate concept of employer liability based on respondeat superior." *Id.* For this reason, the doctrine of respondeat superior is unavailable to an employer to defend against this type of claim, even if the negligently-hired employee commits a criminal act. *Id.*; *See infra*, Part X.A.

In *Blair v. Defender Servs., Inc.*, 386 F.3d 623, 630 (4th Cir. 2004), the Fourth Circuit permitted a university student's negligent hiring claim to go forward against her school's janitorial contractor. The student had been assaulted in a university bathroom by a janitor who worked for a third party contractor. *Id.* at 625-26. The contractor was contractually obligated to perform a criminal background check on the janitor but had failed to do so. *Id.* at 627. The student presented evidence that the contractor would have discovered a protective order against the janitor in his county of residence for assault had it performed a criminal background check. *Id.* The Fourth Circuit held that there was an issue of fact as to whether the protective order would have been discovered during a reasonable background investigation. *Id.* at 629-30.

Similarly, in *Jones v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 51632 (W.D. Va. July 7, 2008), a federal court declined to reverse a judgment against an employer that contracted with a tractor-trailer company. The plaintiff was seriously injured in an accident caused by a driver of the independent contractor, and the plaintiff alleged that the defendant should have known that the independent contractor "had a propensity to hire incompetent, unsafe drivers and not to properly check the credentials and backgrounds of its drivers." *Id.* at \*7-8. The court agreed, concluding that the defendant "could have become aware of the [trucking company's] propensity through a variety of public sources of information available at the time defendant hired the trucking company and its inexperienced driver to haul the subject load." *Id.* at \*8. The court pointed to publicly available information such as the driver's "grossly deficient" safety ratings, as assessed by the Federal Motor Carrier Safety Administration, and recent agency "compliance reviews" of the company, "which included citations for failure to maintain employment applications, driving records, and employment records in the driver's files." *Id.*

Claims of negligent hiring can be brought by a co-worker. *Paroline v. Unisys Corp.*, 879

F.2d 100, 103-104 (4th Cir. 1989) (employee attacked by supervisor who gave her a ride home during a snow storm); *Richmond Newspapers, Inc. v. Hazelwood*, 457 S.E.2d 56, 249 Va. 369, 370-72 (1995) (employee alleged negligent hiring claim after being "goosed" on several occasions by his supervisor).

#### B. Negligent Supervision/Retention

As noted above, the Virginia Supreme Court declined to recognize the tort of negligent supervision. *Chesapeake & Potomac Tel. Co. v. Dowdy*, 365 S.E.2d 751, 235 Va. 55 (1988). In *Dowdy*, the employee alleged that his supervisor constantly harassed him, causing stress and aggravation to a pre-existing illness. *Id.* at 753, 58-59. The Supreme Court of Virginia declared "there is no duty of reasonable care imposed upon the employer in the supervision of its employees under these circumstances, and we will not create one." *Id.* at 754, 61. See *Spencer v. Gen. Elec. Co.*, 894 F.2d 651, 657 (4th Cir. 1990), *overruled on other grounds*, 506 U.S. 103 (1992) (Virginia does not recognize a claim of negligent supervision where an employee alleges injury by sexual harassment); *Muse v. Schleiden*, 349 F. Supp. 2d 990, 1001 (E.D. Va. 2004) (claim that sheriff's office was negligent in supervision of deputy who ran through red light while responding to call failed because Virginia does not recognize cause of action); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1130 (W.D. Va. 1996) (dismissing negligent supervision claim); *Lawrence v. Sentara Hosps.-Norfolk*, 2014 Va. Cir. LEXIS 108, \*4 ("most circuit court decisions have interpreted *Dowdy* to bar actions for negligent supervision"); *Wood v. Lowe's Home Ctrs., Inc.*, 63 Va. Cir. 461, 462 (Roanoke, 2003) (Virginia does not recognize negligent supervision claim); *William v. Dowell*, 34 Va. Cir. 240, 243 (Richmond, 1994) (Pizza Hut not liable for negligent supervision of waitress who racially harassed customers), *but see Stottlemeyer v. Ghramm*, 597 S.E.2d 191, 194, 268 Va. 7, 13-14 (2004) (declining to consider whether the claim existed because the jury found no negligence).

In *Burns v. Gagnon*, 727 S.E.2d 634, 283 Va. 657 (2012), the Supreme Court again indicated that under Virginia law, a person generally does not have a duty to protect another from the conduct of third persons except where a special relationship exists (1) between the defendant and a third person which imposes a duty upon the defendant to control the third person's conduct; or (2) between the defendant and the plaintiff which gives a right to protection for the plaintiff. In *Burns*, a student was involved in a fight with another student at a high school, suffering injuries. Several hours before the fight, another student had approached the defendant, a vice principal at the school, and informed him that a fight was going to happen between the plaintiff another student. *Id.* The defendant principal did not act on this information. *Id.* The plaintiff sued the principal for gross and simple negligence, arguing that he breached various duties of care that he owed the plaintiff.

The Supreme Court held that the principal did not have a common law duty to supervise and care for the student, thus no special relationship existed between the principal and the student because the facts of the case did not suggest that the defendant knew or should have known that the plaintiff was in great danger of serious bodily injury or death. Accordingly, the defendant could only be liable if he failed to discharge his duties as a reasonably prudent person would under the circumstances. *Id.* at 643, 671.

On the other hand, an employer can be held liable for its negligence in retaining (i.e., failing to discharge) an employee who engages in tortious conduct when the employer had knowledge of the employee's history of similar bad acts on the job. In *Southeast Apartments Mgmt. v. Jackman*, 513 S.E.2d 395, 397 257 Va. 256, 260 (1999), the Supreme Court held that Virginia, like most other jurisdictions, recognizes this tort claim.

While recognizing the existence of the tort of negligent retention, the Court in *Jackman* declined to find it applicable to the facts in which a maintenance worker at an apartment complex had assaulted a tenant. The court held that "suspicions" that the maintenance worker may have had a drug or alcohol problem, and may have had an attraction for single women, did not render the employee dangerous and likely to commit sexual assaults. *Id.* See also *Baker v. Booz Allen Hamilton*, 358 Fed. Appx. 476, 483 (4th Cir. (Md.) 2009) (sexual assault of co-worker's not a foreseeable injury from employee with history of non-sexual violent workplace behavior); compare *Blair v. Defender Servs., Inc.*, 386 F.3d 623, 630 (4th Cir. 2004) (allowing student to proceed with negligent retention claim against janitorial contractor whose employee assaulted her in university bathroom).

### C. Interplay with Workers' Compensation

The Virginia Workers' Compensation Act provides the exclusive remedy for "injuries by accident" "arising out of and in the course of" an individual's employment. *Butler v. Southern States Coop, Inc.*, 620 S.E.2d 768, 772, 270 Va. 459, 465 (2005). The "in the course of" component is generally satisfied if the injury occurred while the employee was performing a service for the employer. *Id.* To satisfy the "arising out of" component, there must be a "causal connection between the employee's injury and the conditions under which the employer requires the work to be done." *Id.* When an injury is personal to the employee and not directed against the employee because of employment, the injury does not "arise out of" employment. *Id.*

In *Butler*, for example, plaintiff claimed she was sexually assaulted by a coworker while making a delivery for her employer. *Id.* at 772, 270 Va. at 466. The Supreme Court held that the assault was personal to the employee, was not directed against her because of her employment, and was in no way in furtherance of the employer's business. *Id.* Thus, the assault did not "arise out of" her employment. *Id.* at 773, 270 Va. at 466.

Similarly, overruling an earlier decision (*Haddon v. Metro. Life Ins.*, 389 S.E.2d 712, 239 Va. 397 (1990)), the Supreme Court ruled in *Middlekauff v. Allstate Ins. Co.*, 439 S.E.2d 394, 397, 247 Va. 150, 154-55 (1994) that the Workers' Compensation Act did not bar a claim of intentional infliction of emotional distress based upon persistent long-term harassment regarding the employee's weight because the employee's allegation of a pattern of abusive behavior was not an "injury by accident" under the exclusivity provision of the Act.

Not surprisingly, Virginia courts and those applying Virginia law have held that claims of negligent hiring are not barred by the Workers' Compensation Act. *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989); *Richmond Newspapers v. Hazelwood*, 457 S.E.2d 56, 249 Va. 369 (1995). In *Padilla v. Silver Diner*, 63 Va. Cir. 50 (Virginia Beach, 2003), the court relied on *Richmond Newspapers v. Hazelwood*, 457 S.E.2d 56, 249 Va. 369 (1995), to hold that the plaintiff's negligent retention claim and various other tort claims were not barred by the Workers' Compensation Act. *Id.* at 53-54. In that case, female employees alleged they were sexually assaulted by male employees. *Id.* at 51. The court held that the plaintiff's injuries were not the result of an accident arising out of and in the course of employment because the alleged assaults were "personal" in nature, and the defendant employer had sufficient notice of the behavior of harassing employees. *Id.* at 53-54.

In *Hartman v. Retailers & Mfrs. Distrib. Mktg. Serv., Inc.*, 929 F. Supp. 2d 581 (W.D. Va. 2013), the plaintiff was sexually assaulted by a co-worker in the parking lot outside her workplace after leaving work one night. *Id.* at \*1. The plaintiff alleged multiple claims for relief: (1) assault and battery through respondeat superior; (2) negligent hiring; (3) negligent retention; and (4) general negligence claims. *Id.* at \* 2. The Defendants moved to dismiss the plaintiff's claims, arguing that the Workers' Compensation Act offered the exclusive remedy for her claims. *Id.* The parties stipulated that the incident in the case constituted an "accident" that occurred "in the course of employment." *Id.* The sole question the court addressed was whether the incident fell under the "arising out of" prong of the statute. *Id.*

The court denied the defendants' motion to dismiss plaintiff's first three counts because it was "apparent that this was not a random assault that resulted because of conditions under which the employer requires the work to be done, but was instead personal in nature between two individuals who happened to be co-workers." *Id.* at \*7. The court found that attack was not personal and in no way in furtherance of [the employer's] business, and thus could not be fairly traced to her employment as a contributing proximate cause. *Id.* Compare *Wood v. Lowe's Home Ctrs., Inc.*, 63 Va. Cir. 461 (Roanoke, 2003), where an employee filed assault and battery, intentional infliction of emotional distress, negligent hiring, negligent supervision, and negligent retention claims against his employer arising out of an altercation with a coworker. *Id.* at 461-62. The court found that the plaintiff's claims were barred by the exclusivity provision of the Workers' Compensation Act because his injuries arose out of his employment; the dispute arose when the employee refused to assist his supervisor with a task and was not personal to the employee. *Id.* at 464-65. See also *Scott v. CG Belkor*, 2017 U.S. Dist. LEXIS 44944 (E.D. Va. Mar. 27, 2017), where the plaintiff, a husband of a woman who was murdered could not file a lawsuit for negligence because the murder was found to have arisen during her employment. The murderer was a stranger who had no personal acquaintance or prior interactions with the deceased, and there was no evidence that the murderer had come to the apartment complex where the deceased worked with the intention of killing her specifically. *Id.* at \*13. Thus,

the court found that the injury was not personal to the deceased and was directed against her as employee, reasoning that it was a risk that she faced as an employee of the apartment complex. *Id.* at \*14. The court also noted that the multiple stab wounds the deceased had suffered were not “as purely personal in nature” as a sexual assault. *Id.* at \*15.

#### D. Firearms in the Workplace

In Virginia, a private property owner may prohibit firearms on his or her respective property. Va. Code 182.-308.01(C). The statute thus indicates that employers and business owners may prohibit firearms on their private property. The Virginia General Assembly has not yet enacted a “bring-your-gun-to-work” law that limits the right of an employer or private property owner to prohibit firearms on its premises.

#### E. Use of Mobile Devices

Under Va. Code § 46.2-1078.1, it is unlawful to operate a motor vehicle while using any handheld personal communications device to send or read texts or emails. It is not unlawful for operators to read or send texts or emails when lawfully parked or stopped. The fine for a first offense is \$125 and \$250 for a second or subsequent offense. Additionally, there is a mandatory minimum \$250 fine for those convicted of reckless driving under Virginia Code Section § 46.2-868 while operating a mobile device in violation of Va. Code § 46.2-1078.1.

### X. TORT LIABILITY

#### A. Respondeat Superior Liability

In 1999, the Virginia Supreme Court announced the test to be used in determining respondeat superior liability. *Giant of Maryland Inc. v. Enger*, 515 S.E.2d 111, 257 Va. 513 (1999); *see also Stith v. Thorne*, 2007 U.S. Dist. LEXIS 42672, at \*46-47 (E.D. Va. May 29, 2007). In *Giant of Maryland*, the Supreme Court agreed that the jury instruction given by the trial court erroneously made the employer automatically liable for any tort committed while "at work". This is not the law in Virginia. The court endorsed the following instruction, citing *Davis v. Merrill*, 112 S.E. 628, 631 133 Va. 69, 77-78 (1922):

The test of the liability of the master for the tortious act of the servant, is not whether the tortious act itself is a transaction within the ordinary course of the business of the master, or within the scope of the servant's authority, but whether the service itself, in which the tortious act was done, was within the ordinary course of such business or within the scope of such authority.

*Enger*, 515 S.E.2d at 112, 257 Va. at 516.

The question – was the employee acting within the scope of his or her employment? - is a fact question for the jury, not one the court can decide as a matter of law. In *Gina Chin & Associates v. First Union Bank*, 537 S.E.2d 573, 260 Va. 533 (2000), the court reversed a grant of

summary judgment for a bank after a customer had sued under a theory of respondeat superior for losses the customer suffered when a bank teller participated in a fraudulent scheme to transfer money from one account to another. The court ruled it was a fact question for the jury. In a companion case, *Majorana v. Crown Cent. Petroleum Corp.*, 539 S.E.2d 426, 428-29, 260 Va. 521, 526-27 (2000), the court also ruled that a female customer who was assaulted by a gas station attendant should be allowed to sue the gas station company for assault and battery and intentional infliction of emotional distress under a respondeat superior theory of liability.

In both cases, the plaintiff merely alleged that the defendant employee was acting within the scope of his or her employment at the time of the wrongdoing. The Supreme Court said these allegations were sufficient to take the case to a jury. These recent decisions rejected the analysis used in the earlier cases of *Kensington Assoc. v. West*, 362 S.E.2d 900, 234 Va. 430 (1987), and *Cary v. Hotel Rueger, Inc.*, 81 S.E.2d 421, 195 Va. 980 (1954), which found no liability could be imposed on an employer as a matter of law when the employee acted out of "personal motive." The existence of a personal motive by the bad-acting employee is no longer dispositive.

In limited circumstances, an individual may have a cause of action against a company based on a respondeat superior theory for the actions of an employee even if the individual has no cause of action against the employee. In *Hughes v. Doe*, 639 S.E.2d 302, 273 Va. 45 (2007), the plaintiff sued a hospital and one of its employees for negligence in performing a medical procedure. *Id.* at 303, 47. The plaintiff's claims against the employee were dismissed as untimely. *Id.* The hospital then promptly moved for summary judgment, arguing that dismissal of the claim against the employee precluded a claim against the hospital because plaintiff's cause of action against the hospital was entirely based on a respondeat superior theory. *Id.* The Supreme Court of Virginia disagreed, finding that the plaintiff's claim against the hospital (as the employer) could still proceed because the plaintiff's claim against the employee was not dismissed on the merits. *Id.* at 304, 48-49.

A business is not liable for acts performed by an independent contractor because no master servant relationship exists between the contractor and the employer. *McDonald v. Hampton Training Sch. for Nurses*, 486 S.E.2d 299, 300-01, 254 Va. 79, 81 (1997) (case remanded for determination of whether physician is an employee or independent contractor of hospital). In determining whether an entity is an employee or independent contractor, a court must examine: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power of control. *Jones v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 45325, at \*15 (W.D. Va. June 10, 2008), quoting *Hadeed v. Medic-24, Ltd.*, 377 S.E.2d 589, 594-95, 237 Va. 280, 288 (1989). The fourth factor, power of control, is determinative. *Id.* However, the employer need not actually exercise this control; the test is whether the employer has the power to exercise such control. *Jones* at \*16, quoting *McDonald*, 486 S.E.2d at 301, 254 Va. at 81.

The Supreme Court again considered respondeat superior liability in the independent contractor context. In *Southern Floors & Acoustics v. Max-Yeboah*, 594 S.E.2d 908, 267 Va. 682 (2004), a Food Lion customer tripped in a grocery store aisle on a stack of tiles left by a subcontractor in the process of retiling the floors. The court ultimately found that Food Lion was neither vicariously liable, nor directly liable, for the customer's injuries. The court held, "Food Lion had no duty to supervise the means and method of the work of Southern Floors and cannot be found independently negligent for failing to do so."

Courts have generally taken a broader view of whether an employee's wrongful acts can be characterized as having been committed while he or she was engaged in workplace duties or functions. For example, in *Gulf Underwriters Ins. Co. v. KSI Services, Inc.*, 416 F. Supp. 2d 417 (E.D. Va. 2006), the court held that a bookkeeper had acted within the scope of employment when she embezzled money. *Id.* at 423-24. The court reasoned that the bookkeeper could not have committed the acts in question without the "facilities and attributes of her office as bookkeeper" and that she had thus "used the access and authority inherent in her office to accomplish her embezzlement scheme." *Id.*

In *Magallon v. Wireless Unlimited Inc.*, 85 Va. Cir. 460 (Fairfax County, 2013), the plaintiff, a sales representative at Wireless Unlimited, alleged that an account manager for an affiliated company (and a personal friend of the Wireless Unlimited franchise owner) threatened her with sexual assault, cursed at her, and actually sexually assaulted her on multiple occasions. *Id.* at 462-63. The plaintiff brought claims of assault and battery, defamation, defamation per se, and intentional infliction of emotional distress against Wireless Unlimited through respondeat superior liability. *Id.* at 461. The court concluded that Wireless Unlimited had allowed the account manager to exercise managerial duties on its behalf, even though the defendant was not an official employee of Wireless Unlimited. *Id.* at 464. Thus, a principal-agent relationship existed between Wireless Unlimited and the account manager. *Id.*

#### B. Tortious Interference with Business/Contractual Relations

The elements of tortious interference include: (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Duggin v. Adams*, 360 S.E.2d 832, 835-36, 234 Va. 221, 226 (1987).

Virginia courts have held that a claim for tortious interference with contract requires a third party outside of the contract. *See Handley v. BSA*, 32 Va. Cir. 524, 534 (Newport News, 1992) ("in reviewing the various Virginia cases dealing with this tort, every case has involved the conspiracy of an independent third party"); *see also CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 (1993) (noting that the elements of a cause of action for tortious interference are the existence of a valid contractual relationship or business expectancy, knowledge of the relationship on the part of the tortfeasor, intentional interference causing a breach in the relationship, and damages). In Virginia, a party to the contract may be held liable as a co-conspirator to induce breach of the same, however in this scenario there must be a person not a party to the contract among the conspirators in order to satisfy the elements of the underlying tort. *Stauffer v. Fredericksburg Ramada, Inc.*, 411 F. Supp. 1136, 1139 (E.D. Va. 1976). Where an at-will relationship exists, the plaintiff must not only establish that an intentional interference caused the termination of the at-will contract, but also that the defendant employed "improper methods." *Duggin*, 360 S.E.2d at 836, 234 Va. at 226-27; *Lewis-Gale Medical Center, LLC v. Alldredge*, 710 S.E.2d 716, 721, 282, Va. 141, 151-152 (2011); *see also Johnson v. Paramount*, 2006 U.S.

Dist. LEXIS 67735, at \*19 (W.D. Va. Sept. 21, 2006) (plaintiff stated tortious interference claim against coworkers).

In *Lewis-Gale Medical Center, LLC v. Alldredge*, 710 S.E.2d 716, 721, 282, Va. 141, 151-152 (2011), the plaintiff was a doctor employed by a professional corporation of physicians. The defendant was a hospital who had a contract with the professional corporation to staff its emergency rooms. Although a private contractor, the plaintiff was implicated in internal staffing matters at the hospital to the extent that at one point she was dubbed an “organizational terrorist.” The plaintiff had an employment agreement that provided she could be terminated without cause on 90 days written notice. The plaintiff alleged that her employer terminated her employment after the hospital wrongfully pressured it to do so. The plaintiff sued, alleging the hospital tortuously interfered with her employment agreement. The jury awarded \$950,000 in damages.

On appeal, the Supreme Court reversed and held that the plaintiff had failed to prove that the hospital’s action constituted “improper methods.” The court stated, “the law provides a remedy in tort only where the plaintiff can prove that the third party’s actions were illegal or fell so far outside the accepted practice of [the] ‘rough and tumble world’” of the competitive marketplace. The plaintiff failed to prove any illegal conduct by the hospital.

If the method of interference is the exercise of a lawful right, it "is not actionable and will not support recovery for tortious interference," even if the contract is not "at-will." *R & D 2001, L.L.C. v. Collins*, 2006 Va. Cir. LEXIS 131, at \*5- 6 (Fairfax County, July 12, 2006); *Charles E. Brauer Co., Inc. v. NationsBank of Va., N.A.*, 466 S.E.2d 382, 387, 251 Va. 28, 36 (1996).

Since a party cannot interfere with his own contract, it has been held that an employee cannot pursue a tortious interference contract against his or her employer for termination of employment. *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 448 (E.D. Va. 2002); *Zeng v. Elec. Data Sys. Corp.*, 2007 U.S. Dist. LEXIS 44412, at \*9 (E.D. Va. June 18, 2007); *Malik v. Phillip Morris, USA Inc.*, 2006 U.S. Dist. LEXIS 41046, \*6 (E.D. Va. June 20, 2006). On the other hand, the Supreme Court has indicated that it may recognize a cause of action for tortious interference against a coworker if it is alleged that the coworker was acting outside the scope of his/her employment. *See Fox v. Deese*, 362 S.E.2d 699, 708 234 Va. 412, 427 (1987); *see also Hatten v. Campbell*, 71 Va. Cir. 95, 100 (Chesterfield, 2006) and *Williams v. Autozone Stores, Inc.*, 2009 US Dist. LEXIS 106327, at \*8-9 (E.D. Va., Nov. 12, 2009) (holding that a manager’s actions outside the scope of their employment may constitute tortious interference with at-will employment).

### C. Abuse of Process

The Supreme Court of Virginia considered an employee's abuse of process claim against her employer in *Montgomery v. McDaniel*, 628 S.E.2d 529, 271 Va. 465 (2006). The employer

had suspended and sued the employee, as well as others, for breach of fiduciary duty, constructive fraud, conspiracy, breach of contract, and "breach of employment duties and responsibilities," but later nonsuited his case. *Id.* at 531, 468. The employee claimed that the employer had sued her merely to gain leverage in a lawsuit by the employee's daughter. *Id.* at 533, 472. The Supreme Court found that the employee had sufficiently plead the first element of an abuse of process claim - that the employer had an ulterior motive for suing her, but failed to establish the second element of such a claim - that the employer engaged in an act not proper in the regular prosecution of the proceedings. *Id.* at 532, 469-70.

## **XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS**

### **A. General Rule**

Virginia courts have demonstrated a willingness to enforce non-compete and anti-solicitation agreements that contain reasonable provisions but are quick to invalidate them if they are overbroad or ambiguous. *See Advanced Marine Enters. v. PRC, Inc.*, 501 S.E.2d 148, 155-56, 256 Va. 106, 119-20 (1998); *New River Media Group v. Knighton*, 429 S.E.2d 25, 26, 245 Va. 367, 370 (1993). The Supreme Court of Virginia has said that it will strictly construe non-competition covenants and resolve ambiguities in scope in favor of the employee. *See Garcia v. Clinch Valley Physicians*, 414 S.E.2d 599, 601, 243 Va. 286, 289-90 (1992) (holding expiration of annual term or non-renewal of employment was not the same as a "termination," and thus the restrictive covenant that was applicable upon termination of the employee's employment agreement did not apply to the employee when the employer decided not to renew his contract).

Virginia uses a three-pronged test to determine whether to enforce a covenant not to compete:

- (1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate business interest?
- (2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?
- (3) Is the restraint reasonable from a standpoint of sound public policy?

*Richardson v. Paxton Co.*, 127 S.E.2d 113, 117, 203 Va. 790, 794 (1962); *Meissel v. Finley*, 95 S.E.2d 186, 188, 198 Va. 577, 580 (1956).

In *Peace v. Conway*, 435 S.E.2d 133, 135-36, 246 Va. 278, 281-82 (1993), the Supreme Court refused to restrain employees absent a clearly drafted non-competition agreement. Unlike some states that require specific consideration, the Virginia courts have recognized that continued employment of an at-will employee proves ample and valid consideration to justify enforcement of a restrictive covenant. *Paramount Termite Control Co. v. Rector*, 380 S.E.2d 922, 926, 238 Va. 171, 176 (1989). Similarly, Virginia courts will enforce an agreement between businesses not to hire the other's employees for a period of time once their relationship ends. *Therapy Servs., Inc. v. Crystal City Nursing Ctr., Inc.*, 389 S.E.2d 710, 712, 239 Va. 385, 389 (1990).

In *Omniplex World Services Corp. v. U.S. Investigations Services, Inc.*, 618 S.E.2d 340, 270 Va. 246 (2005), the Virginia Supreme Court sent a stunning reminder to all employers not to overreach when they draft restrictive covenants. The non-compete provision prohibited the employee from performing “any services” for “any” Omniplex customer for whom the employee had performed services during his employment with Omniplex. *Id.* at 341, 248. The Supreme Court ruled that this provision was overbroad and unenforceable because it prohibited any type of services provided to Omniplex customers, not just services in direct competition with Omniplex. *Id.* at 342-43, 250. The court was uncharacteristically divided in the decision (4-3 vote), but the majority sent a clear signal that non-compete agreements will be subject to intense scrutiny if they purport to prohibit anything more than direct competition by a former employee. *See also Lanmark Tech., Inc. v. Canales*, 454 F. Supp. 2d 524, 530 (E.D. Va. 2006) (non-compete overbroad where it effectively prevented employee from working in any capacity for competitor); *Cantol, Inc., v. McDaniel*, 2006 U.S. Dist. LEXIS 24648 at \*14 (E.D. Va. Apr. 28, 2006) (non-competes only enforceable “to the extent that the proscribed functions are the same functions as were performed for the former employer”); *see also Motion Controls Sys., Inc. v. East*, 546 S.E.2d 424, 426, 262 Va. 33, 37-38 (2001) and *Simmons v. Miller*, 544 S.E.2d 666, 678-89 261 Va. 561, 581-82 (2001) (court found restrictions overbroad and unenforceable that attempted to prohibit an employee from engaging in business activities that the employer was not actually engaged in, but were merely “similar”).

The Virginia Supreme Court found that a non-compete agreement was unenforceable in *Parikh v. Family Care Ctr., Inc.*, 641 S.E.2d 98, 273 Va. 284 (2007), because it did not protect the employer's legitimate business interests. The non-compete at issue purported to prohibit a physician from practicing medicine in competition with the plaintiff's practice. *Id.* at 99, 287. The Supreme Court, however, found that the practice, which was a nonprofessional corporation, was not authorized to practice medicine in the Commonwealth of Virginia. Because the practice could not lawfully practice medicine, it had no legitimate interest in enforcing the covenant. *Id.* at 101, 291.

In *Totten v. Employee Benefits Mgmt., Inc.*, 60 Va. Cir. 342, 344 (Roanoke, 2002) (hereinafter *Totten I*), the circuit court ruled that the non-competition agreement prohibited more activities than was necessary to protect the legitimate business interests of the defendant. According to the court, the agreement's “duration is either too vague or non-existent and it is improperly global in scope.” Because the “Plaintiff's future hopes to earn a living [were] unreasonably limited by the onerous and overly restrictive provisions,” the court found the non-competition clauses unenforceable.

In *Home Paramount Pest Control Cos. v. Shaffer*, 718 S.E.2d 762, 282 Va. 412 (2012), the defendant breached an employment contract he had signed with the plaintiff that contained a non-competition provision which prohibited the defendant from engaging in pest control services in any section of the state in which the defendant worked and/or was assigned for two years following the termination of employment. In affirming the trial court's dismissal of the case, the Supreme Court held that the non-competition clause was overly broad and unenforceable because the agreement, on its face, prohibited the defendant from “engaging even indirectly, or concerning himself in any manner whatsoever, in the pest control business, even as a passive investor.” *Id.* at 765, 418. The court acknowledged that the language of the clause was the exact language found in a non-compete clause it previously upheld in *Paramount Termite Control Co. v. Rector*, 238

Va. 171, 380 S.E.2d 922 (1989), but nonetheless overruled that case insofar as it conflicted with its present holding. *Id.* at 766, 419-20. The court reasoned that while stare decisis principles remained strong, it had since “gradually refined” and clarified the law in the area since *Paramount* had been decided. *Id.*

In *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 732 S.E.2d 676, 284 Va. 382 (2012), a government contractor and one of its subcontractors had entered into an agreement that contained a covenant not to compete which prohibited the subcontractor from *directly or indirectly* entering into a subcontract geared toward a specific purpose for twelve months after the termination of the parties’ agreement. The subcontractor terminated its agreement with the contractor pursuant to the contract but then entered into an agreement for the exact proscribed purpose. When the contractor sued for breach of the agreement, the trial court determined that the subcontractor “plainly breached the subcontract.”

On appeal, the defendant argued that the covenant was overbroad because it failed to limit its scope to *direct* competitors on the plaintiff, citing *Home Paramount Pest Control Companies v. Shaffer*, 718 S.E.2d 762, 282 Va. 412 (2012). The court rejected this contention, holding that *Home Paramount* did not stand for the proposition that the word “*indirect*” acts as a per se bar to enforcement.” *Id.* Because the wording of the clause did not prohibit indirect competition but rather prohibited the subcontractor from entering into a contract as a subcontractor with competing businesses that provided a similar service as the plaintiff, the clause was not overbroad, and was enforceable.

Recently, in *Hair Club for Men, LLC v. Ehson*, 2016 U.S. Dist. LEXIS 118069 (E.D. Va. Aug. 31, 2016), a federal court applying Virginia law found the hair replacement and therapy salon employer’s non-compete was enforceable against a former hair stylist. The non-compete clause at issue was broad, and it prevented the employee from "engag[ing] in the business of hair replacement, on [her] own account, or becom[ing] interested] in such business, directly or indirectly, as an individual, partner, stockholder, director, officer, clerk, principal, agent, employee, or in any other relation or capacity whatsoever . . . ." *Id.* at \*7-8. The Court held the clause to be valid because the employee had exposure to the employer’s proprietary information and clients. *Id.* at \*12. It further noted that the time and duration of the non-compete were limited – the employee could not compete within 20 miles of any of the employer’s 200 locations – and this restriction prevented the employee from “Setting up shop next to another Hair Club and siphoning their clients. . . ." *Id.* The Court also rejected the employee’s argument that a non-compete restricting a cosmetologist was a violation of public policy. *Id.* at \*13.

The application of the three-pronged test for determining whether restrictive covenants are overbroad is fact intensive, therefore some courts will be hesitant to decide the matter on a pre-trial motion for declaratory relief. In *Capital One Fin. Corp. v. Kirkpatrick*, 2007 U.S. Dist. LEXIS 56003, at \*6 (E.D. Va. Aug. 1, 2007), the court considered a broad non-compete agreement that purported to prevent employers from "engaging in a Competitive Business, in any capacity . . . that would concern that Competitive Business" for a maximum of two years after leaving the employer. *Id.* at \*5. The geographic scope was similarly broad, extending to the United States, the United Kingdom, and Canada. *Id.* The court acknowledged that the broad language of the agreement placed "significant constraints on the defendant's future employment," but it nonetheless declined to dismiss the claim, reasoning that it could not conclude "from a purely

facial analysis that such restrictions were unreasonable under any factual setting." *Id.* at \*7.

The Virginia Supreme Court has held that a factual record must exist for a trial court to decide the merits whether a restraint on competition is enforceable. In *Assurance Data, Inc. v. Malyevac*, 286 Va. 137 (2013), a government contractor attempted to enforce a non-compete agreement against a salesman who left to work for a competitor. The circuit court dismissed the contractor's suit on a demurrer filed by the former employee which asserted that the agreement was overbroad and thus unenforceable. The Supreme Court reversed, stating that it was inappropriate to dispose of the lawsuit on a demurrer because "the premise running through our precedent is that restraints on competition are neither enforceable nor unenforceable in a factual vacuum." *Id.* at 144. The Court held that it was the trial court's duty, based on the evidence presented, to ascertain whether the restraint was narrowly drawn to protect the employer's legitimate business interest. Thus the trial court should not have dismissed the complaint finding it "overbroad" without the benefit of a factual record. *Id.* This approach was recently embraced by the federal courts in Virginia. *O'Sullivan Films, Inc. v. Neaves*, 2017 U.S. Dist. LEXIS 176967, 2017 WL 4798997 (W.D. Va. Oct. 24, 2017).

In *Brainware, Inc. v. Mahan*, 808 F. Supp. 2d 820 (E.D. Va. 2011), the defendant, a senior account executive, signed an employment agreement with Brainware that contained non-compete, non-solicitation, and non-disclosure clauses. *Id.* at 823. The non-compete clause prohibited the employee from taking part in the development, design, production, marketing, selling, or rendering of any product or service competitive with those sold by Brainware while the employee was employed by the company for one year after termination of employment. *Id.* The employee resigned from Brainware and began working for one of its competitors and the company sued for breach of contract. *Id.* at 824. Brainware maintained that during the employee's tenure with the company, he was "involved in numerous activities that provided him with direct access to highly proprietary, non-public, and confidential public information," and that he had disclosed this information to his new employer. *Id.* The employee filed a motion to dismiss, contending that non-compete, non-solicitation, and non-disclosure provisions of the Brainware employment contract were overbroad and unenforceable. *Id.*

Applying Virginia law, the court denied the defendant's motion in regard to all three clauses, finding that "Brainware's small product line and [the employee's] extensive knowledge of Brainware's business strategy, customer accounts, and pricing, along with other confidential information, support the conclusion that the Agreement's non-compete provision does not extend further than necessary to protect Brainware's legitimate business interests." *Id.* at 827. The court noted that the business environment limited the restrictive effect of the covenant and weighed heavily in the plaintiff's favor: Brainware had a narrow and specialized product line while the employee's new competing employer offered a "broader array of products and services." *Id.* at 827. The court further held that in light of the other factors, the lack of a geographical limitation did not "in itself, render the non-compete provision unenforceable." *Id.* The court concluded that the three clauses struck "an appropriate balance between defendant's right to secure gainful employment and plaintiff's legitimate interest in protection against direct competition by a former employee with confidential information gained through his employment with plaintiff." *Id.* at 829.

Restrictive covenants are given more deference when they are contained in contracts encompassing the sale of a business as opposed to a routine employment contract. *See Musselman*

*v. Glass Works, LLC*, 533 S.E.2d 919, 260 Va. 342 (2000); *Roto-Die Co. v. Lesser*, 899 F. Supp. 1515, 1519 (W.D. Va. 1995); *Nat'l Homes Corp. v. Lester Indus., Inc.*, 293 F. Supp. 1025 (W.D. Va.), *aff'd* in part, *rev'd* in part, 404 F.2d 225 (4th Cir. 1968); *Centennial Broad., LLC v. Burns*, No. 6:06-cv-00006, 2006 U.S. Dist. LEXIS 70974, at \*28-29 (W.D. Va. Sept. 29, 2006). Similarly, deference is given to covenants contained in partnership agreements. *See Foti v. Cook*, 263 S.E.2d 430, 433-34, 220 Va. 800, 806 (1980); *Miran v. Merullo*, 75 Va. Cir. 111, 115 (Virginia Beach, 2008). However, such agreements must be signed. *Persinger & Co. v. Larrowe*, 477 S.E.2d 506, 509, 252 Va. 404, 408-09 (1996).

Once found to be enforceable, Virginia courts will impose injunctive relief prospectively from the date of decision. *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 389 S.E.2d 467, 470, 239 Va. 369, 374 (1990) (imposing a three-year prospective injunction from the date trial court on remand enters the order).

## B. Blue Penciling

The Virginia Supreme Court has neither adopted nor expressly rejected the "blue pencil rule," but it is commonly understood that the courts applying Virginia law have no power to "blue pencil" an agreement to narrow its scope to make it enforceable. *See Pais v. Automation Prods, Inc.*, 36 Va. Cir. 230, 239 (Newport News, 1995) ("this Court has not been granted the authority to 'blue pencil'"). Instead, the case law suggests that Virginia follows an "all-or-nothing rule" with respect to restrictive covenants in employment contracts. *See Grant v. Carotek, Inc.*, 737 F.2d 410, 412 (4th Cir. 1984) (refusing plaintiff's request that court interpret the plain language of the covenant in a more restricted manner); *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 284-85 (4th Cir. 1974) (refusing to read into the agreement limitations that were not there); *Hawkins v. Fishbeck*, 301 F. Supp. 3d 650 (W.D. Va. 2017) (courts cannot reform unenforceable contracts; there is no blue penciling in Virginia); *Lanmark Tech., Inc. v. Canales*, 454 F. Supp. 2d 524, 529 (E.D. Va. 2006) (there is no authority for courts to "blue pencil" or otherwise rewrite the contract to eliminate any illegal overbreadth); *Roto-Die Co., Inc. v. Lesser*, 899 F. Supp. 1515, 1523 (W.D. Va. 1995) (Judge Kiser holding that "blue pencil" rule does not exist in Virginia); *Power Distrib., Inc. v. Emergency Power Eng'g, Inc.*, 569 F. Supp. 54, 58 (E.D. Va. 1983) (holding that the covenant was over broad and therefore unenforceable); *Better Living Components, Inc. v. Coleman*, 67 Va. Cir. 221, 227 (Albemarle County, 2005) (circuit courts in Virginia have expressly addressed the topic [of blue penciling] and have uniformly denied the existence of such a power"); *Prof'l Heating & Cooling, Inc. v. Smith*, 64 Va. Cir. 313, 315 (Norfolk, 2004) (refusing to interpret a "No Piracy" agreement so as to "rewrite the parties' contract").

In another case, arising from the same facts as *Totten I*, discussed *supra*, a circuit court considered a severability clause in an agreement that was actually an "unenforceable 'blue pencil' provision rather than a true severability clause." *Totten v. Emp. Benefits Mgmt., Inc.*, 61 Va. Cir. 77, 78 (Roanoke, 2003) (hereinafter *Totten II*). The employee argued that his entire agreement with his former employer was invalid because the non-competition and severability clauses were unenforceable. The court nonetheless severed the contract, finding that "it was the intent of the parties to preserve the balance of the agreement in the event that some portions were found to be void." *Id.*, citing *Roto-Die Co., Inc. v. Lesser*, 899 F. Supp. 1515, 1523 (W.D. Va. 1995). At least one circuit court on two occasions has ruled that the mere existence of a blue pencil provision in an employment agreement renders the entire agreement invalid. *BB&T Insurance Servs, Inc. v*

*Thomas Rutherford, Inc.*, 80 Va. Cir. 174, 181 (Richmond, 2010); *Pace v. Ret. Plan Admin. Serv., Ltd.*, 74 Va. Cir. 201, 205 (Richmond 2007). This position was recently rejected by a federal district court. *Update, Inc. v. Samilow*, 311 F. Supp. 3d 784 (E.D. Va. 2018).

### C. Confidentiality Agreements

Where an employee signs a non-disclosure or confidentiality agreement, an employer may pursue remedies for breach of contract for violations of that agreement. *See Int'l Paper Co. v. Gilliam*, 63 Va. Cir. 485 (Roanoke, 2003). There is authority that confidentiality provisions must be narrowly tailored to survive judicial scrutiny as the same rules apply to them as apply to other restrictive covenants. *Devnew v. Flagship Group, Ltd.*, 75 Va. Cir. 436, 450 (Norfolk, 2006) (stating that courts evaluate the validity of confidentiality provisions of an employment agreement using the same standards as for a non-solicitation provision); *Totten v. Employee Benefits Mgmt., Inc.*, 61 Va. Cir. 77, 78 (Roanoke, 2003) (confidentiality provision reasonable where no greater than necessary to protect the employer's legitimate business interests), *but see BB&T Insurance Servs.*, 80 Va. Cir. at 180 (confidentiality provision that limits any disclosure in perpetuity is unenforceable). The Virginia Supreme Court has not decided this issue, so there is an open question as to whether a confidentiality provision with no time limit as part of restriction is enforceable.

In *Car Pool, LLC v. Hoke*, 2012 U.S. Dist. LEXIS 146798, at \*2 (E.D. Va. October 11, 2012), the plaintiff entered into a settlement agreement with the defendant following her sexual harassment claim against the company under Title VII. The agreement contained a confidentiality clause which required the defendant to affirm that she had not disclosed any facts relating to the matter with anyone. The company alleged that she signed the agreement despite the fact she had disclosed the settlement to a third party. The court denied the defendant's motion to dismiss the company's breach of contract and rescission claims, holding that the company had alleged sufficient facts to support both claims. *Id.* at \*10, 12.

In *Brainware, supra*, the defendant, a senior account executive, signed an employment agreement with Brainware that contained non-compete, non-solicitation, and non-disclosure clauses. *Id.* at 823. The non-disclosure provision prohibited the employee from disclosing any of the employer's proprietary information. *Id.* at 823-24. The employee resigned his employment and then went to work for a competitor. *Id.* at 824. The company sued for breach of contract, alleging that the employee disclosed proprietary information to his new employer in violation of the employment agreement. *Id.* The defendant challenged the non-disclosure clause because it was not limited to trade secrets and was unlimited in duration. *Id.* at 828. The court held that the clause was valid and enforceable because: (1) the information at issue did not have to qualify as a trade secret for the company to have a valid breach of contract claim; and (2) the nondisclosure agreement was narrowly tailored to actual confidential information and was "not the kind that would prohibit defendant from telling his neighbor for the rest of his life." *Id.* at 828-29.

Effective July 1, 2019, employers are prohibited from requiring an employee or a prospective employee to execute or renew any provision in a nondisclosure or confidentiality agreement that has the purpose or effect of concealing the details related to a claim of sexual assault such as rape, forcible sodomy, sexual battery or aggravated sexual battery as a condition of employment. Va. Code § 40.1-28.01. Any such provision is against public policy and is void and

unenforceable. *Id.*

D. Trade Secrets Statute

Virginia has adopted a modified version of the Uniform Trade Secrets Act, Va. Code §§ 59.1-336 *et seq.* The Virginia Act prohibits the misappropriation of a trade secret of another without express or implied consent. A person who at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use violates the Act. The Virginia Act expands the definition of “improper means” to include the unauthorized use of a computer or computer network. Va. Code § 59.1-336.

The crucial element of a trade secret is secrecy, not novelty. *See Dionne v. Southeast Foam Converting & Packaging, Inc.*, 397 S.E.2d 110, 113, 240 Va. 297, 302 (1990). Absolute secrecy is not required, provided the disclosure is made in express or implied confidence. *Id.* *See Banks v. Mario Industries of Virginia*, 650 S.E.2d 687, 274 Va. 438 (2007) (no signed confidentiality or non-compete agreement, but employee handbook covers conflicts of interest). However, mere knowledge of trade secrets by a former employee is not a sufficient basis to issue an injunction in the absence of a threatened misappropriation or disadvantageous use or disclosure. *Motion Control Sys. Inc. v. East*, 546 S.E.2d 424, 426, 262 Va. 33, 38 (2001). *But see BWX Techs. v. Glenn*, No. 680CL12007257-00, at \*2 (Lynchburg, Jan. 25, 2013) (ordering a pretrial injunction because the plaintiffs had established misappropriation by showing that the defendant knew the trade secrets and had acquired them by improper means). To date, Virginia courts have not recognized the “inevitable disclosure” doctrine, only an actual or threatened misappropriation may be enjoined. *Motion Control Sys., Inc. v. East*, 546 S.E.2d 424 (2001); *Gov’t Tech. Servs., Inc. v. Intellisys Tech. Corp.*, 51 Va. Cir. 55 (1999).

The Uniform Trade Secrets Act defines trade secrets as “information . . . that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Va. Code § 59.1-336. Price lists may qualify as trade secrets if they provide detailed information on the employer’s customers and trade practices, and if the employer has taken measures to ensure their secrecy. *MicroStrategy v. Bus. Objects, S.A.*, 331 F. Supp 2d 396 (Ed. Va. 2004); *Intl. Paper Co. v. Gilliam*, 63 Va. Cir. 485, 490 (Roanoke, 2003).

The determination of whether a trade secret exists and/or has been misappropriated ordinarily presents a question of fact to be decided by a preponderance of the evidence. *MicroStrategy v. Li*, 601 S.E.2d 580, 268 Va. 249 (2004). There is no requirement for a defendant to prove that their product as independently derived once a prima facie case is established. *Id.* Additionally, the Trade Secrets Act does not require that one who is accused of misappropriation actually use the trade secret to compete with the owner of the trade secret. *Integrated Global Services, Inc. v. Mayo*, 2017 U.S. Dist. LEXIS 148355 (E.D. Va. Sept. 13, 2017) (granting an

injunction imposed for misappropriation even absent evidence of actual use); *Collelo v. Geographic Servs.*, 727 S.E.2d 55, 61 (Va. 2012).

#### E. Fiduciary Duties and Other Considerations

All employees owe their employers a duty of loyalty while employed and to act in the best interests of their employer. *Williams v. Dominion Tech. Partners, L.L.C.*, 576 S.E.2d 752, 757 265 Va. 280, 289 (2003). In a case of far reaching implications, the Virginia Supreme Court ruled that a group of employees who resigned en masse to establish a competing business had violated their fiduciary duties. *Feddeman & Co. v. Langan Assoc., PC*, 530 S.E.2d 668,637, 260 Va. 35, 43-44 (2000). Although the employees had the right to make preparations to resign, this right had to be balanced against the employer's rights. Thus, if employees misuse proprietary information, solicit co-workers to resign with them and solicit clients before they leave, a breach of fiduciary duty arises.

Where a company shows that a fiduciary has taken a corporate opportunity without the consent of the company, the company has established a prima facie case of breach of fiduciary duty. The burden then shifts to the fiduciary to show that the taking of the corporate opportunity was not a breach of fiduciary duty. *Today Homes, Inc. v. Williams*, 634 S.E.2d 737, 744, 272 Va. 462, 473 (2006).

Va. Code §§ 18.2-499 and 18.2-500 make it illegal to conspire to injure another in trade, business or profession. The conspiracy code sections provide for a wide array of civil remedies including injunctive relief, treble damages, and attorney fees. The Supreme Court has affirmed the successful use of these sections by an employer against a former employee who had blatantly disregarded the duty of loyalty he owed his employer. *Rash v. Hilb, Roqal & Hamilton*, 467 S.E.2d 791, 251 Va. 281 (1996); *Greenspan v. Osheroff*, 351 S.E.2d 28, 232 Va. 388 (1986). These sections, however, do not provide a cause of action to an employee against his/her employer for loss of employment or damage to an employment relationship. *Andrews v. Ring*, 585 S.E.2d 780, 784, 266 Va. 311, 318-19 (2003); *Inman v. Klockner-Pentaplast of Am., Inc.*, 467 F. Supp. 2d 642, 654 (W.D. Va. 2006); *Bowers v. Rector*, No. 3:06cv00041, 2006 U.S. Dist. LEXIS 78114, at \*30-32 (W.D. Va. Oct. 24, 2006).

In *21st Century Systems, Inc. v. Perot Systems Government Services, Inc.*, 726 S.E.2d 236, 284 Va. 32 (2012), Perot sued 21st Century and other individual defendants, who were all former Perot employees, alleging breach of fiduciary duty, breach of non-disclosure, non-competition, and non-solicitation agreements, tortious interference with contract, violation of Virginia's Conspiracy Act, Code § 18.2-499 et seq., common law conspiracy, conversion, and violation of Virginia's Uniform Trade Secrets Act, Code § 59.1-336 et seq. Perot claimed that the individual defendants had conspired to willfully and maliciously destroy the company by using Perot's confidential and proprietary information so that 21st Century could establish itself in the Navy consulting business. The trial court awarded goodwill damages and treble damages for the business conspiracy claim and punitive damages for the trade secrets claim. The defendants appealed, arguing that the trial court erred in awarding the damages.

The Supreme Court of Virginia reversed the trial court's award of goodwill damages but affirmed the award of punitive damages and treble damages. The court observed that as a general rule, any entity injured as result of a conspiracy to injure its business may recover the damages sustained for loss of goodwill because of that conspiracy, and the usual method for computing goodwill damages is based on the difference between the price a business would sell for and the value of its non-goodwill assets. The plaintiff was required to demonstrate that the sale price reflected an actual loss of goodwill as a result of the conspiracy because it had relied on the actual subsequent sale of the company to prove goodwill damages. The plaintiff failed to introduce any evidence demonstrating that the plaintiff's sale price was negatively impacted by the defendants' departure from the company. Accordingly, the plaintiff was not entitled to this element of damages.

However, the Supreme Court did affirm the award of treble and punitive damages, holding that a trial court can award punitive and treble damages when the awards "are based on separate claims involving different legal duties and injuries." Accordingly, the plaintiff was entitled to the damages because it had established a business conspiracy under § 18.2-499(A) and had also demonstrated misappropriation of trade secrets under the Uniform Trade Secrets Act.

In *Dunlap v. Cottman Transmission Systems LLC*, 754 S.E.2d 313, 287 Va. 207 (2014), the owner of two AAMCO transmission shops brought suit in federal court against a competing company after it acquired a controlling interest in AAMCO. The plaintiff alleged that the Defendant conspired, in violation of Va. Code §§ 18.2-499 and 500, against plaintiff to convert all Cottman Transmission franchises into AAMCO franchises and, as a result, some existing AAMCO franchises, including the plaintiff's, had been closed. *Id.* at 212. The federal district court dismissed the business conspiracy claim on the ground that Dunlap failed to allege the necessary unlawful act or unlawful purpose. The court said all the duties and damages involved in the case arose out of the contract between Dunlap and AAMCO, and to allow a contract interference claim to support the conspiracy claim "would turn what should be contractual claims into a tort."

On appeal to the U.S. Circuit Court of Appeals for the Fourth Circuit, two questions were certified for the Virginia Supreme Court. First, it asked whether an act of tortious interference with contract or tortious interference with business expectancy can qualify as an unlawful act for purposes of a business conspiracy claim under Va. Code §§ 18.2-499 and -500. The Virginia Supreme Court distinguished *Station #2 LLC v. Lynch*, 280 Va. 166 (2010), in which it held that the nonperformance of a contract could not, without more, qualify as an unlawful act for purposes of Code §§ 18.2-499, -500. The Supreme Court distinguished *Dunlap* from *Station #2*, and ruled that tortious interference with contract and tortious interference with business expectancy are intentional torts predicated on a common law duty to refrain from interfering with another's contractual and business relationships. As such this duty does not arise from the contract itself but from common law. Thus, the Court held that tortious interference with contract and tortious interference with business expectancy each would constitute the requisite "unlawful act" to proceed on a business conspiracy claim under Code §§ 18.2-499 and -500.

## **XII. DRUG TESTING LAWS**

### **A. Public Employers**

Virginia has no general statutory scheme that regulates the administration of drug or

alcohol testing for workers employed by the Commonwealth of Virginia.

B. Private Employers

For private employers, a clear policy that requires drug screening tests is enforceable. If the policy states that the failure to pass a screening test will be considered misconduct, then a positive test can disqualify an employee from receiving benefits under either (i) Virginia's Workers' Compensation Act, *Richfood, Inc. v. Williams*, 457 S.E.2d 417, 420, 20 Va. App. 404, 410 (1995), or (ii) Virginia's unemployment compensation statute, *Carter v. Extra's, Inc.*, 427 S.E.2d 197, 15 Va. App. 648 (1993) (en banc) (affirming ruling which allowed employer to impose a random drug testing policy and discharge employees who refused to comply). Notably, it is unlawful to sell, give away or market human urine with the intent to defeat a drug or alcohol screening test, to attempt to defeat a test by the substitution of a urine sample, or to adulterate a urine or other bodily fluid sample with the intent to defraud a screening test. Va. Code § 18.2-251.4.

Virginia courts have also recognized that a qualified privilege applies to communications between testing agencies and the employer on claims of defamation. *Jones v. Pembroke Occupational Health, Inc.*, 26 Va. Cir. 206, 207 (Richmond, 1992) (dismissing suit against drug testing company for defamation after bus driver's employment was terminated as a result of an erroneously reported positive drug test).

### **XIII. STATE ANTI-DISCRIMINATION STATUTES**

Virginia has two anti-discrimination statutes, the Virginia Human Rights Act (VHRA), Va. Code §§ 2.2-3900 *et seq.*, and the Virginians with Disabilities Act (VDA). Va. Code §§ 51.5-1 *et seq.* These statutes are largely patterned after their federal counterparts.

A. Employers/Employees Covered

All employers and employees in Virginia are covered by the VHRA, but the statute only provides a cause of action against employers who employ more than five but fewer than fifteen employees. Va. Code § 2.2-2639. Any employer with 15 or more employees is covered by federal laws, so very small employers are exempt.

The VDA applies to all employers in the Commonwealth not covered by the Rehabilitation Act of 1973 and provides a private cause of action to all employees not covered by the Rehabilitation Act. Va. Code § 51.5-41.

B. Types of Conduct Prohibited

The VHRA protects all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, age (40 and over), pregnancy, (including childbirth or related medical conditions), marital status or disability in employment.

The VDA prohibits discrimination against an otherwise qualified person with a disability solely because of their disability.

C. Administrative Requirements

Under the VHRA, an employee may bring an action in a state court of appropriate jurisdiction against the employer only for an allegedly wrongful discharge in violation of the Act. Any such action shall be brought within 300 days from the date of the discharge.

An employee has the option of filing an administrative claim before proceeding with a lawsuit. Any administrative claim must be filed with the Virginia Human Rights Council within 180 days from the date of discharge. Once the Virginia Human Rights Council renders its determination, the employee has 90 days to file a lawsuit.

The VDA has no formal administrative complaint procedures.

D. Remedies Available

Under the VHRA, the court may only award up to 12 months' back pay with interest at the judgment rate. However, if the court finds that either party engaged in tactics to delay resolution of the complaint, it may diminish the award or award back pay to the date of the judgment without regard to the 12-month limitation. In any case where the employee prevails, the court shall award attorney's fees from the amount recovered at a rate not to exceed 25 percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.

The VDA allows recovery of back pay and compensatory damages. Back pay, however, is capped at 180 days. Moreover, damages for "pain and suffering" are not recoverable, and neither are punitive damages. Attorney's fees are available to the prevailing party, but a prevailing employer must show that the employee's lawsuit was frivolous.

**XIV. STATE LEAVE LAWS**

A. Jury/Witness Duty

No employee may be discharged or forced to use vacation or sick leave for taking time off to serve jury duty or testify in a court proceeding. No employee who serves on jury duty for four hours or more may be forced to work any shift that starts between 5:00 p.m. on the day of jury service and 3:00 a.m. on the following day. It is a Class 3 misdemeanor for an employer to take any adverse action against an employee because the employee is on jury duty or responding to jury summons. Va. Code § 18.2-465.1.

B. Voting

Persons serving as officers of election may not be required to use sick or vacation leave for absences related to such service. No employee who serves as an officer of election for four hours or more may be forced to work any shift that starts between 5:00 p.m. on the day of service and 3:00 a.m. on the following day. Va. Code § 24.2-118.1.

C. Family/Medical Leave

Virginia has no statute granting employees any fixed amount of leave for medical or family issues. However, it is unlawful for an employer to dismiss an employee for attendance problems if the time missed from work is the result of a compensable work-related injury. Va. Code § 40.1-27.1. An employer will not violate this statute if the employee's absence exceeds six months, or circumstances have changed so that it is impossible or unreasonable for the employer to retain the employee. *Id.*

D. Pregnancy/Maternity/Paternity Leave

Virginia does not require an employer to offer its employees paid vacation, maternity/paternity leave, or sick leave.

E. Day of Rest Statutes

Virginia's "Day of Rest" statute, previously codified at Va. Code §§ 40.1-28.1 through 40.1-28.4, was repealed during the 2005 session of the General Assembly.

F. Military Leave

Va. Code §§ 44-93.2 through 44.93.5 provide certain rights and protections to military service members, including the right to take unpaid leave for military service, restoration rights, and the right to be free from discrimination or retaliation for their military service. Employees may also recover reasonable attorney's fees and costs incurred because of an employer's violation of these statutes. Va. Code § 44-93.5.

G. Sick Leave

Virginia does not require an employer to offer its employees sick leave, either paid or unpaid.

H. Domestic Violence Leave

Employers must "allow an employee who is a victim of a crime to leave work to be present at all criminal proceedings relating to a crime against the employee, as long as the employee has provided the employer with a copy of the form provided to the employee by the law-enforcement agency." Va. Code § 40.1-28.7:2(B). The term "proceeding" is not limited to trials but is broadly defined to include initial appearances and hearings regarding bail, plea deals, sentencing and probation. Va. Code § 40.1-28.7:2(A). The statute applies a broad definition of "victim" that extends this entitlement not only to the specific individual directly victimized, but also to (a) the spouse or child of such a person; (b) the parent or legal guardian of such a person who is a minor; and (c) a spouse, parent, sibling or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide. *Id.*; Va. Code § 19.2-11.01(6)(B).

An employer may "limit" an employee's victim's rights leave if it would create an

“undue hardship,” which the statute defines as “significant difficulty and expense to a business and includes the consideration of the employer’s business and the employer’s critical need of the employee.” Va. Code § 40.1-28.7:2(A)-(B). Employers are not required to compensate the employee-victim that takes leave from work for court appearances. Va. Code § 40.1-28.7:2(D).

The statute also includes anti-retaliation and discrimination provisions that prohibit adverse action taken against employees or prospective employees exercising their rights under the statute. Va. Code § 40.1-28.7:2(E).

I. Other Leave Laws

Virginia does not have additional leave laws.

**XV. STATE WAGE AND HOUR LAWS**

Salaried employees must be paid at least once per month; hourly employees must be paid at least once every two weeks or twice each month. Va. Code § 40.1-29(A)(1). Effective January 1, 2020, employers are required to provide employees on each regular pay date a written statement, by a paystub or online accounting, that show the name and address of the employer, the number of hours worked during the pay period, and the rate of pay.

A. Current Minimum Wage in State

Every employer shall pay each of his employee wages at a rate not less than the federal minimum wage and a training wage as prescribed by the U.S. Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*). Va. Code § 40.1-28.10. The current minimum wage in Virginia is \$7.25.

B. Deductions from Pay

No employer can require an employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee’s wages for time worked as a condition of employment or the continuance of employment, except as provided by law. Va. Code § 40.1-29(D).

An employer may not withhold any part of the wages or salaries of any employee except for payroll, wage, or withholding taxes or in accordance with the law without the written and signed authorization of the employee. Upon written request of the employee, an employer must furnish a written statement of the gross wages earned by the employee during any pay period and the amount and purpose of any deduction. Va. Code § 40.1-29(C).

A written, signed permission must be obtained from an employee in order for an

employer to offset losses or benefits conferred during employment. The Virginia Department of Labor and Industry (DOLI) takes the position that authorizations to deduct from wages, to be effective, must be voluntary and not a condition of employment. Thus, blanket authorizations at the outset of employment are impermissible and ineffective. Moreover, an employer cannot make deductions that bring the employee's wages below minimum wage.

In *Coley v. Historic Hotels, Inc.*, 60 Va. Cir. 466 (2000), the plaintiff was employed by the defendant and was injured on the job, entitling him to workers' compensation benefits. The employer then required the plaintiff to sign a wage deduction authorization "as part of reinstatement to work." The plaintiff attempted to revoke this deduction authorization and was fired. He sued for wrongful termination, alleging that his termination violated § 40.1-29. The court granted the defendant's demurrer and held that the pleadings demonstrated the plaintiff had left the defendant's employ at some point and then was re-employed later because the plaintiff received severance and then was "reinstated" with conditions. Thus, the facts did not establish the employee was required to give up wages as a condition of continued employment.

#### C. Overtime Rules

Virginia does not require the payment of overtime to employees. Overtime pay, if it exists in Virginia, must be based only under federal law.

#### D. Time for Payment Upon Termination

Upon termination of employment, an employee shall be paid all wages and salaries due him or her for work performed prior to termination. The payment shall be made on or before the date on which the employee would have been paid for the work if his or her employment had not been terminated. Va. Code § 40.1-29(A)(1).

##### 1. Administrative Enforcement

In *Mar v. Malveaux*, 732 S.E.2d 733, 60 Va. App. 759 (2012), Mar submitted a claim for unpaid wages against a construction company to the Virginia Department of Labor and Industry (DOLI). Because Mar provided no documentation of his employment with the construction company and the DOLI was unable to verify if he was an employee of the company, the DOLI closed the complaint. The circuit court dismissed Mar's petition for review of the DOLI decision, and Mar appealed to the Court of Appeals, arguing that the circuit court should have required the Department to apply Article 3 of the Virginia Administrative Process Act (Va. Code §§ 2.2-4018 – 2.2-4023) because it did not interfere with the discretion the DOLI was granted to pursue wage claims under the Wage Payment Act (Va. Code § 40.1-29).

The Court of Appeals affirmed the circuit court's ruling. The court found that Va.

Code § 40.1-29 (specifically 40.1-29(F)), clearly granted the Commissioner of the DOLI discretion in deciding whether to “institute proceedings to enforce compliance with the Wage Payment Act on behalf of the employee.” *Id.* at 738, 770. This discretion directly conflicted with the provisions of Article 3, which required that agencies provide notice and hearing before a claim was dismissed. *Id.* The court further concluded that Article 3 of the Virginia Administrative Process Act did not apply to the Commissioner’s exercise of discretion because the Act only governs an agency’s actions where that agency’s basic laws do not provide due process or where the Act does not expressly exempt a particular agency or its actions. *Id.* at 739, 771. The court concluded that the Wage Payment Act satisfied due process and stated that even if Article 3 did not conflict with the Wage Payment Act, it would still decline to burden the DOLI with additional procedures where due process had already been satisfied. *Id.* at 739-40, 773.

E. Breaks and Meal Periods

Virginia has no law regulating the meal breaks or rest periods. However, employees under the age of sixteen shall not work more than five hours without a continuous 30 minute break period. Va. Code § 40.1-80.1

F. Employee Scheduling Laws

Virginia has no law regarding employee scheduling.

**XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

A. Smoking in the Workplace

Smoking is prohibited in all enclosed areas not specifically exempted by statute under the Virginia Clean Indoor Air Act. Va. Code § 15.2-2820, et. seq. Subject to certain requirements, an employer has the right to limit or ban smoking in the workplace. Va. Code § 15.2-2828.

The Virginia Supreme Court has narrowly construed a provision of the Virginia Indoor Clean Act which exempts “retail tobacco stores” from the Act. In *Va. Dep’t of Health v. Kapa, Inc.*, 766 S.E.2d 884 (Va. 2015), the Court construed narrowly “retail tobacco store,” and found that the appellant restaurant, which was a hookah lounge, did not qualify as a “retail tobacco store” and instead was properly labeled a “restaurant” for purposes of VICAA.

B. Health Benefit Mandates for Employers

Va. Code § 38.2-3411 requires health maintenance organizations that provide insurance coverage or healthcare plans for a family member of the insured or subscriber to also provide coverage to the newly born child of the insured or subscriber from the moment of birth. Va. Code

§ 38.2-3411(A). This coverage must be identical to coverage provided to the insured regardless of whether such coverage would be provided under the insurance policy or health care plan and must include coverage for the treatment of congenital defects, birth abnormalities, oral surgery, and other orthodontic services that are necessary for the treatment of medically diagnosed cleft lip, cleft palate or ectodermal dysplasia. Va. Code § 38.2-3411(B)(1) - (2).

C. Immigration Laws

It is a Class 1 misdemeanor for an employer, its agent, or a labor union to knowingly employ, continue to employ, or refer to for employment any alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States. Va. Code § 40.1-11.1. All employment application forms used by businesses operating in Virginia must ask prospective employees if they are legally eligible for employment in the United States. *Id.* However, § 40.1-11.1 does not require any employer to use employment application forms. *Id.*

D. Right to Work Laws

It is the public policy of Virginia that “the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.” Va. Code § 40.1-58. Agreements or combinations between an employer and any labor union or labor organization to deny employees who are not members of the union or organization the right to work or that make membership a condition of employment are illegal and against public policy. Va. Code § 40.1-59. Further, an employer may not require a person to become or remain a member of any labor union or labor organization as a condition of or continuation of employment. Va. Code § 40.1-60. An employer is also prohibited from requiring an employee to pay union dues as a condition of or continuation of employment. Va. Code § 40.1-62.

On the other hand, an employer may not require an employee to abstain from membership or holding an office in a labor union or organization as a condition of or continuation of employment. Va. Code § 40.1-61.

1. Union Voting Rights

As of July 1, 2013, in any procedure where the designation, selection, or authorization of a union to represent employees is at issue, the individual employees have a fundamental right to vote in such a procedure by secret ballot. This right may not be infringed. Va. Code § 40.1-54.3

E. Lawful Off-duty Conduct (including lawful marijuana use)

Virginia does not have a law protecting smokers from discrimination, nor does it have a law protecting employees from discipline or discharge based on their off-duty conduct generally. The Virginia General Assembly passed and the Governor signed a bill into law in 2015 which allows the use of medical marijuana oil for people suffering from severe epilepsy. Medical marijuana for the treatment of cancer and glaucoma has been legal in Virginia since 1979, but there has never been a legal avenue for prescription or distribution of the drug. Va. Code. § 18.2-251.1.

F. Gender/Transgender Expression

Virginia law does not include protections against workplace discrimination based on either sexual orientation or gender identity and expression.

G. Other Key State Statutes

1. State Contractors

The Virginia Fair Employment Contracting Act, Va. Code § 2.2-4200, prohibits employment discrimination on account of race, color, religion, sex, or national origin by state agencies and government contractors.

2. Medical Conscience Protection

No employee of a hospital or medical practice may be disciplined or denied employment for refusing to participate in an abortion on moral, religious, personal or ethical grounds. Va. Code § 18.2-75.

3. Breastfeeding

A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present, including any property owned, leased, or controlled by the State of Virginia. Va. Code §§ 2.2-1147.1; 18.2-387.

4. Child Labor

Under 2007 revisions to Va. Code § 40.1-113, employers who have employed children in violation of child labor statutes may be fined up to \$10,000 for offenses that result in the serious injury or death of a child.

5. Sex Trafficking Rule

Any employer who operates a truck stop must post notice of the existence of a human trafficking hotline in the same location where other employee notices required by state and federal law are posted. Va. Code § 40.1-11.3(B). An employer who fails to post a notice is subject to a civil penalty of \$100 per truck stop, but the penalty will not be assessed until after 72 hours' notice of the failure to post notice. While the Department of Labor and Industry will assess the penalties, no civil penalties will be assessed before January 1, 2014.

6. Anti-Retaliation Provisions

There are several anti-retaliation provisions in the Virginia Code. An employer shall not retaliate against an individual because that individual:

- Has filed or is about to file a claim, or has testified or is about to testify, in a proceeding where workers compensation benefits are sought. Discharge of an

employee filing a fraudulent claim does not violate this section. Va. Code § 65.2-308(A).

- Had his or her earnings garnished for any one indebtedness. Va. Code § 34-29(g).
- Has filed a complaint or participated in an investigation under the Virginia Occupational Safety and Health Act. Va. Code § 40.1-51.2:1.
- Has a genetic characteristic that is known as a result of a genetic test or otherwise. Va. Code § 40.1-28.7:1.
- Has filed a claim with the Commissioner of Labor and Industry for unpaid or untimely wages. Va. Code §40.1-29
- Served in the Virginia National Guard, Virginia Defense Force, or naval militia. Va. Code § 44-93.4.

#### 7. Equal Pay

The Virginia Equal Pay Act makes the requirement of equal pay for equal work applicable to employees not covered by the Fair Labor Standards Act. Va. Code § 40.1-28.6.