

1986

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Recommended Citation

Gary S. Marshall & Maris M. Wicker, *The Status of the At-Will Employment Doctrine in Virginia after Bowman v. State Bank of Keysville*, 20 U. Rich. L. Rev. 267 (1986).

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THE STATUS OF THE AT-WILL EMPLOYMENT
DOCTRINE IN VIRGINIA AFTER *BOWMAN v. STATE
BANK OF KEYSVILLE*

Gary S. Marshall*
Maris M. Wicker**

I. INTRODUCTION

The development of the employment-at-will doctrine has tracked the changing character of the work force from the days of simple master-servant domestic relations to the commercial realities of twentieth-century industrial capitalism. The rule grew out of the humane principle that it would be unjust to employ a laborer during the planting and harvesting months, only to discharge that laborer during the harsh winter. Hence, the realities of the agrarian economy of the British Isles and the closeness of the master and domestic servant relationship shaped the yearly hiring rule. This rule developed into a presumption that a hiring for an indefinite term was a hiring for a year and extended to all types of workers.¹

Yearly hiring migrated to America, at least insofar as agricultural and domestic servants of colonial times.² Gradually, however, the rule of the yearly hiring lost its purpose as the industrial revolution began to alter the socioeconomic landscape. No longer were servants part of the domestic relation; workers became part of a labor market which generally did not communicate directly with the master or owner.

The yearly hiring tradition was suddenly replaced by employment-at-will when, in a late nineteenth century treatise, an Al-

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1. For an excellent discussion of the history of the employment-at-will doctrine, see Feinman, *The Development of the Employment-At-Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

2. *Id.* at 122.

bany, New York, lawyer named H.G. Wood declared in absolute terms that "an indefinite hiring . . . is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants."³ As questionable as were Wood's motive for stating this rule and his scholarship in arriving at it, the employment-at-will rule was embraced quickly nationwide.⁴

The employment-at-will rule became firmly embedded in the American economic structure during the first half of this century, but has undergone significant reshaping in recent years.⁵ This doctrine has been attacked on two fronts. First, legislatures have studied the employment relationship and enacted a plethora of statutes to deal with specific types of unfair treatment of employees.⁶ These include statutes protecting employees from termination due to their membership in particular protected classes⁷ and statutes such as OSHA,⁸ the Clean Air Act,⁹ and ERISA,¹⁰ which prohibit retaliatory discharge of employees who report employer violations of these particular laws. In addition, federal labor policy affords job security to unionized employees through collective bargaining agreements.¹¹

Second, some courts have decided to add to these remedies by

3. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

4. For an early application, see *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

5. See generally Feinman, *supra* note 1, at 119; Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 332-35 (1982).

6. For an excellent discussion of the employee's precarious situation, see Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951)):

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

Id. (emphasis in original).

7. Federal statutes protect against discriminatory termination due to: (1) race, sex, color, religion or national origin (prohibited by Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2a (1982) (Title VII)); (2) age (prohibited by Age Discrimination in Employment Act of 1967 § 4(a), 29 U.S.C. § 623(a) (1976)); (3) physical handicap (prohibited by Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1982)); (4) union activity (prohibited by National Labor Relations Act of 1935 § 8(a)(3), 29 U.S.C. § 158(a) (1982)).

8. Occupational Safety and Health Act of 1970 § 11(c), 29 U.S.C. § 660(c) (1982).

9. Clean Air Act Amendments of 1977 § 12(a), 42 U.S.C. § 7622(a) (1982).

10. Employment Retirement Income Security Act of 1974 § 510, 29 U.S.C. § 1140 (1982).

11. National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982).

creating exceptions to the at-will rule in both contract and tort. The contract actions are based on express contracts which may be derived, for example, from employer representations or company handbooks,¹² or on implied covenants of good faith and fair dealing.¹³ Tort actions include the public policy exception, which has the effect of affording a remedy to an employee who has been terminated for taking some action in furtherance of public goodwill.¹⁴

In *Bowman v. State Bank of Keysville*,¹⁵ the Supreme Court of Virginia recognized for the first time a public policy exception to the at-will rule. This narrow exception was based on Virginia Code section 13.1-32 which guarantees the right of an employee/shareholder to "vote freely his or her stock in [a] corporation."¹⁶ This article will examine the implications of *Bowman* against the backdrop of a Virginia tradition of adherence to at-will employment. In doing so, it will fix *Bowman's* place on the current continuum of public policy exceptions and will discuss its precedential prospects. It is suggested that *Bowman's* message is not one of departure from the Virginia at-will tradition, but rather another instance where the Virginia Supreme Court properly deferred to a legislative scheme rather than engaging in judicial legislation. In essence, *Bowman* represents the enforcement of Virginia Code section 13.1-32, rather than any startling new policy announcement by the court.

12. See, e.g., *Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978) (just cause termination provision based on employer handbook), *aff'd without opinion*, 624 F.2d 1092 (3d Cir. 1980); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, ___, 292 N.W.2d 880, 884 (1980) (The court found employer had contractually bound itself not to discharge the plaintiff except for just cause because employer had told plaintiff when it hired him that he would be with the company "as long as [he] did [his] job.").

13. See, e.g., *Savage v. Holiday Inn Corp.*, 603 F. Supp. 311 (D. Nev. 1985) (female plaintiff in early fifties stated cause of action for employer violation of implied covenant of good faith and fair dealing where termination allegedly due to plaintiff's age and sex); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980) (implying a "covenant of good faith and fair dealing . . . in all contracts, including employment contracts"); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (covenant implied where employer acted in bad faith by discharging employee to avoid paying commission due for large sale); *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487, 491 (Mont. 1984) (finding that covenant arises out of the employment relationship and exists "apart from, and in addition to, any terms agreed to by the parties" and applies to probationary as well as regular employees); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, ___, 316 A.2d 549, 551 (1974) ("termination . . . motivated by bad faith or malice . . . constitutes a breach of the employment contract").

14. See *infra* notes 17-68 and accompanying text.

15. 229 Va. 534, 331 S.E.2d 797 (1985).

16. *Id.* at 540, 331 S.E.2d at 801 (quoting VA. CODE ANN. § 13.1-32 (Repl. Vol. 1985) (repealed 1986)).

II. AN OVERVIEW OF PUBLIC POLICY EXCEPTIONS

A. *Standards for Defining Public Policy Exceptions*

The public policy exception to the at-will rule provides employer accountability for the discharge of an employee when the reason for and effect of the discharge conflict with an established public policy.¹⁷ The spectrum of public policy exceptions forms a continuum, ranging from narrow exceptions founded on clearly defined rights and prohibitions to broad exceptions based on employee action taken in furtherance of a vague moral or social obligation. Generally, a discharge in contravention of public policy creates a cause of action in tort, thereby allowing potentially expansive damages.¹⁸ Some courts recognize only a contract action, however, thereby effectively limiting the employee's remedies to backpay and reinstatement.¹⁹

An employee alleging wrongful discharge in contravention of public policy has the burden of showing causation between the reason for termination and some established public policy.²⁰ The existence of causation is an issue of fact, while the determination of whether a "public policy" is a phenomenon worthy of rebutting the at-will presumption is generally one of law.²¹

Courts confronted with this public policy determination have been troubled by the vagueness inherent in the term.

The question, what is public policy in a given case, is as broad as the question of what is fraud Public policy is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story, in his work on Contracts . . . , says: "It has never been defined by the courts, but has been left loose and free of defini-

17. See generally Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449 (1985); Murg & Scharman, *supra* note 5, at 343-55; Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

18. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (plaintiff allegedly wrongfully discharged for refusal to participate in illegal retail gasoline price-fixing scheme allowed to go forward with tort action).

19. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (employer breached employment contract by terminating employee for her refusal to date supervisor).

20. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, ___, 417 A.2d 505, 512 (1980).

21. See *Pierce*, 84 N.J. 58, 417 A.2d 505. *But see* *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, ___, 436 A.2d 1140, 1145 (1981) (existence of public policy sufficient to give rise to wrongful discharge action is properly left to jury).

tion in the same manner as fraud." By "public policy" is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good²²

Some courts have found the determination of public policy so problematic that they refrain entirely from acknowledging any public policy exceptions, deferring instead to state legislative action.²³ For example, in *Murphy v. American Home Products Corp.*,²⁴ the plaintiff had been fired for revealing to defendant corporate directors illegal manipulation of pension funds. The New York court refused to recognize a wrongful discharge action, stating that "[i]f the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants."²⁵

The general standard applied by those courts which do recognize public policy exceptions involves two criteria: (1) identification of public interests that are sufficiently important to override the employers' interests in freely conducting business; and (2) sufficient consistency in their administration to provide predictable results.²⁶ The difficulty with this standard is that the criteria are at odds with one another. Because courts must weigh public versus employer interests on a case-by-case basis where there has been no

22. *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, ___, 344 P.2d 25, 27 (1959) (emphasis in original).

23. See, e.g., *Reich v. Holiday Inn*, 454 So. 2d 982 (Ala. 1984) (no cause of action for plaintiff who was fired after she refused to pay certain invoices submitted to her employer, where she believed that payment would have been a criminal act); *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594, 595 (Ala. 1980) (even though jury duty constitutes public policy exception in other jurisdictions, Alabama refused to recognize); *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130, 1131 (Ala. 1977) (where plaintiff had been fired after refusing to falsify certain medical records, court found public policy exception "too nebulous a standard to justify its adoption"); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, ___, 251 S.E.2d 51, 52 (1978) (where plaintiff allegedly terminated because he was about to report illegal employer activities, court stated that "[t]here is no room for this exception in Georgia"); *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 876-77 (Miss. 1981) (Where the plaintiff was allegedly discharged for filing a workers' compensation claim, the court stated: "[t]his public policy decision is not only a proper, but an exclusive, subject for the legislature to consider.").

24. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

25. *Id.* at 302, 448 N.E.2d at 90, 461 N.Y.S.2d at 236.

26. This standard is suggested in *Mallor*, *supra* note 17, at 461.

direct legislative pronouncement,²⁷ employers are left to speculate in advance as to whether a specific discharge will be wrongful. Furthermore, the case-by-case determination may foster litigation of frivolous claims, causing an economic burden on employers and a case-load burden on the courts—consequences in themselves contrary to the public interest.

B. *The Continuum of Public Policy Exceptions*

1. Employee Refusal to Commit Unlawful Act or Employee Exercise of a Statutory Right—The Narrowest Exceptions

The narrowest exceptions are those arising from termination due either to employee refusal to commit a specific unlawful action or to employee exercise of a statutory right. This type of exception is the most widely accepted, probably because the particular statutory scheme involved supplies an indicator of both the significance of the public interest and the predictive value to employers.

In the seminal public policy case of *Petermann v. International Brotherhood of Teamsters*,²⁸ the Supreme Court of California had no difficulty in identifying the public policy advanced by the plaintiff because it was articulated in a state statute making the commission of perjury a crime. There, the plaintiff, who had been employed as a business agent by the defendant union, alleged that he had been dismissed for refusing to testify falsely under oath to a legislative committee. The court found that

in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law.²⁹

Over twenty years later, in *Tameny v. Atlantic Richfield Co.*,³⁰ the California court reaffirmed the principle of *Petermann* that "a duty [is] imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal stat-

27. *Id.*

28. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

29. *Id.* at —, 344 P.2d at 27.

30. 27 Cal. 3d 170, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

utes."³¹ The facts of *Tameny* were similar to those of *Petermann* in that the defendants had pressured the plaintiff to violate federal and state antitrust laws by fixing retail gasoline prices. While the court spoke expansively of "[t]his development at common law [that] shows that the employer is not so absolute a sovereign of the job that there are not limits to his prerogative,"³² it was careful to limit the exception to employer insistence on *statutorily prohibited* conduct.

North Carolina and Texas, states generally more conservative than California, have recently recognized the narrow *Petermann*-type exception to at-will employment. In *Sides v. Duke Hospital*,³³ the North Carolina Supreme Court reversed the dismissal of a tort claim brought for wrongful discharge allegedly due to the plaintiff's testimony in a medical malpractice case. The plaintiff had been advised by attorneys for the defendant, Duke Hospital, that her job would be in jeopardy if she were to testify truthfully against the defendant. The court held that "no employer in this State, notwithstanding that employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case."³⁴

In *Sabine Pilot Service, Inc. v. Hauck*,³⁵ the Supreme Court of Texas reversed summary judgment for the defendant employer where the plaintiff was allegedly discharged for refusing to pump the bilge of a boat on which he worked into water, where such pumping was prohibited by federal law. The court carefully limited its decision, holding that

public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a *very narrow exception* to the employment-at-will doctrine. . . . That narrow exception covers only the discharge of an employee for the *sole* reason that the employee refused to perform an illegal act.³⁶

In each of these cases, two factors were present. First, the public

31. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844.

32. *Id.* at 178, 610 P.2d at 1336, 164 Cal. Rptr. at 845.

33. 74 N.C. App. 331, 328 S.E.2d 818 (1985).

34. *Id.* at ___, 328 S.E.2d at 826.

35. 687 S.W.2d 733 (Tex. 1985). For a comprehensive discussion of this case at the court of appeals level, see Note, *Master and Servant*, 16 ST. MARY'S L.J. 457 (1985).

36. *Sabine*, 687 S.W.2d at 735 (emphasis added).

policy was enunciated clearly by a written state or federal law. Second, the discharge presented a threat of frustrating that policy.

These factors are also characteristic of cases where employees were terminated for the exercise of a statutory right. For example, in *Frampton v. Central Indiana Gas Co.*,³⁷ an employee was terminated for filing a workers' compensation claim. Although the workers' compensation act did not provide a remedy for retaliatory discharge, the court held that "in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal."³⁸ Accordingly, while reaffirming the terminable-at-will rule, the Indiana court created a narrow public policy exception. Had it not done so, employees with valid workers' compensation claims would likely be forced to choose between filing their claims or losing their jobs. Many state legislatures, including Virginia's, have responded to this judicially created exception by statutorily prohibiting the discharge of an employee for participating in workers' compensation.³⁹

Several courts have recognized a public policy exception where employees were discharged for refusing to take a polygraph examination. In *Perks v. Firestone Tire & Rubber Co.*⁴⁰ and *Cordle v. General Hugh Mercer Corp.*,⁴¹ the courts considered statutes which limit the use of polygraph tests by employers as indicative of state recognition of an individual's right to privacy.⁴² To give effect to this recognition, these courts deemed it necessary to afford a wrongful discharge remedy to an employee who had exercised that right.

Another line of cases recognizes wrongful discharge claims where at-will employees have been terminated due to performance of a legal duty, such as jury service. In *Nees v. Hocks*,⁴³ the Supreme

37. 260 Ind. 249, 297 N.E.2d 425 (1973).

38. *Id.* at ___, 297 N.E.2d at 427.

39. *See, e.g.*, VA. CODE ANN. § 65.1-40.1 (Cum. Supp. 1985).

40. 611 F.2d 1363, 1364 (3d Cir. 1979).

41. 325 S.E.2d 111 (W.Va. 1984).

42. In *Cordle*, the court stated;

It is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment and . . . the public policy against such testing is grounded upon the recognition in this state of an individual's interest in privacy.

Id. at 117.

43. 272 Or. 210, 536 P.2d 512 (1975); *see also* *Reuther v. Fowler & Williams, Inc.*, 255 Pa.

Court of Oregon based its recognition of the public policy exception on the Oregon Constitution,⁴⁴ which provides that jury trials shall be preserved in civil cases, and on the Oregon statute⁴⁵ which provides a penalty for failure of a juror to report for duty. The court stated, "If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected . . . [and] [t]he will of the community would be thwarted."⁴⁶

In summary, all of these cases represent the narrowest type of public policy exception. They share the common denominator of a clear, legislatively expressed public policy which would be effectively thwarted without a judicially created remedy.

2. Employee "Whistle-Blowing"—The Midpoint

The midpoint on the public policy continuum consists of what are commonly called "whistle-blower" cases. These cases involve employees who have been terminated for allegedly upholding some important public obligation. Exceptions advanced in this area are broader in that they are not always grounded in a statutory right or policy. As the public policies move farther from articulated legislative policy, courts are less willing to permit any disturbance of the at-will relationship. Courts have been willing, however, to accept public policy exceptions where an employee has been terminated for reporting a violation of some specified law, particularly when the implementation of that law allegedly affects the public at large.⁴⁷

*Harless v. First National Bank*⁴⁸ is an excellent example of a

Super. 28, 386 A.2d 119 (1978).

44. OR. CONST. art. I, § 17.

45. OR. REV. STAT. § 10.990 (1983).

46. *Nees*, 272 Or. at ___, 536 P.2d at 516.

47. *See, e.g., Cooke v. Alexander & Alexander*, 40 Conn. Supp. 246, 488 A.2d 1295 (1985) (employee stated wrongful discharge cause of action when fired so that employer could avoid payment of bonuses and vesting of thrift plan benefits; public policy based on state statute requiring payment of compensation). For somewhat unusual case authorizing a cause of action based on the exercise of constitutional rights, see *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (public policy exception based on federal and state constitutional guarantees of free speech, where employee had been discharged for refusing to participate in employer's lobbying effort and had privately stated opposition to company's political stand); *cf. Ring v. River Walk Manor*, 596 F. Supp. 393 (D. Md. 1984) (remanded to state court to determine whether first amendment constitutes Maryland public policy on which wrongful discharge claim can be based).

48. 246 S.E.2d 270 (W. Va. 1978).

“whistle-blower” case. In *Harless*, a loan officer was fired after reporting to the appropriate authorities that the bank was overcharging customers on the prepayment of their installment loans. In recognizing a wrongful discharge action, the Supreme Court of Appeals of West Virginia based the public policy exception on the legislative pronouncement of the West Virginia Consumer Credit and Protection Act⁴⁹ which was designed to protect a large segment of the population.⁵⁰

In *Sheets v. Teddy's Frosted Foods, Inc.*,⁵¹ the Supreme Court of Connecticut embraced a similar public policy exception. The plaintiff, who was employed as a quality control director for a frozen food producer, reported to his superiors production deviations from the standards required for packaging frozen foods. These deviations resulted in misleading labels which were in violation of a Connecticut statute. The court based a public policy exception on the plaintiff's corporate responsibility to “exercise independent, expert judgment in matters of product safety”⁵² and on the necessity of upholding the packaging laws.

Most courts have shied away, however, from creating public policy exceptions encompassing the performance of a non-statutory public obligation.⁵³ The Supreme Court of Pennsylvania acknowledged that a discharge might give rise to a tort cause of action where a recognized, but non-statutory, public policy is threatened, but declined to do so in *Geary v. United States Steel Corp.*⁵⁴ In this case, the plaintiff Geary asserted that “he was acting in the best interests of the general public as well as of his employer in opposing the marketing of a product which he *believed* to be defec-

49. W. VA. CODE § 46A-1-101 (Repl. Vol. 1980).

50. *Harless*, 246 S.E.2d at 275-76.

51. 179 Conn. 471, 427 A.2d 385 (1980).

52. *Id.* at ___, 427 A.2d at 388.

53. *See, e.g.,* *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978) (no cause of action where nurse who was fired after refusing to reduce the amount of hours worked by nurses based public policy argument on broad policy statement giving State Board of Nursing regulatory authority); *Warthen v. Toms River Community Memorial Hosp.*, 119 N.J. Super. 18, 488 A.2d 229 (1985) (no cause of action for nurse fired after refusing to dialyze a patient because of her moral and philosophical objections to the procedure); *Maus v. National Living Centers Inc.*, 633 S.W.2d. 674 (Tex. Ct. App. 1982) (no cause of action where nurse fired after complaining about poor patient care, even though required to do so by Texas statute; court left recognition of cause of action to legislature).

54. 426 Pa. 171, 319 A.2d 174 (1974). *But see* *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (court found cognizable expression of public policy from U.S. CONST. amend. I and PA. CONST. art. I, § 7, which provides that “[e]very citizen may freely speak, write and print on any subject”).

tive.”⁵⁵ In failing to recognize Geary’s wrongful discharge claim, the court was influenced by the facts that Geary’s duties did not include making judgments in matters of product safety and that Geary failed to allege any employer violation of a statute or clearly established public policy.⁵⁶

*Pierce v. Ortho Pharmaceutical Corp.*⁵⁷ shares a similar perception of the public policy exception. The plaintiff in *Pierce* urged the Supreme Court of New Jersey to create an exception based on a professional code of ethics, specifically the Hippocratic Oath. The plaintiff was fired after refusing to continue research on the development of a drug containing saccharin because she believed the drug might produce harmful effects when tested on children or elderly persons. Like the *Geary* court, the *Pierce* court acknowledged the validity of a public policy exception when a discharge has been contrary to a clear expression of public policy. It even conceded that a professional code of ethics could, under appropriate facts, represent such an expression.⁵⁸ However, because the plaintiff had alleged only that saccharin was controversial, but not conclusively dangerous, the court found “no public policy against conducting research on drugs that may be controversial, but potentially beneficial to mankind, particularly where continuation of the research is subject to approval by the FDA.”⁵⁹

The minority approach within this area of public policy exceptions is to shelter acts which an employee had no legal or statutory duty to perform or which effectuate no specific public policy. This radical approach is exemplified by *Palmateer v. International Harvester Co.*⁶⁰ There, the Supreme Court of Illinois found a public policy favoring citizen crime-fighters that was strong enough to rebut the at-will presumption. *Palmateer* had been discharged in retaliation for reporting to the authorities that a co-employee was *possibly* engaging in criminal activities and agreeing to assist in the investigation and prosecution of the crime.⁶¹ The court’s language indicates the extreme to which the public policy exception can be taken:

55. *Geary*, 426 Pa. at —, 319 A.2d at 178 (emphasis added).

56. *Id.* at —, 319 A.2d at 178-79.

57. 84 N.J. 58, 417 A.2d 505 (1980).

58. *Id.* at —, 417 A.2d at 512.

59. *Id.* at —, 417 A.2d at 514.

60. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

61. *Id.* at —, 421 N.E.2d at 879.

No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters. . . . Public policy favors Palmateer's conduct in volunteering information to the law-enforcement agency. *Once the possibility of crime was reported, Palmateer was under a statutory duty to further assist officials when requested to do so.*⁶²

It is significant that the court found a statutory basis for the exception in Palmateer's duty to assist officials *after* the possible crime was reported. This strained rationale raises the possibility that all vigilante-type employees will find themselves within the "safe harbor" of clear legislative policy simply by making reports of "possible" criminal activity.

Indeed, one of the dissenting justices, who had supported a public policy exception in a previous case, feared that the *Palmateer* court was venturing into dangerous territory by embracing a public policy exception not founded on legislative policy. He warned that:

[t]he new tort for retaliatory discharge is in its infancy. In nurturing and shaping this remedy, courts must balance the interests of employee and employer with the hope of fashioning a remedy that will accommodate the legitimate expectations of both. In the process of emerging from the harshness of the former rule, we must guard against swinging the pendulum to the opposite extreme.⁶³

In summary, the middle range of public policy exceptions will disturb the at-will relation to protect employees who have reported specific illegal employer activity. A small minority of courts have gone so far as to recognize the exception for an employee who reported *possible* illegal activities of co-employees. It is the very unpredictability inherent in this latter approach that has prompted some states to enact "whistle-blower" statutes. These laws generally protect employees from being discharged for reporting violations or suspected violations of state or federal law or regulation, or municipal ordinance or regulation.⁶⁴ They represent a studied approach to this issue and embody specific prohibitions and specific remedies.

62. *Id.* at ___, 421 N.E.2d at 880 (emphasis added).

63. *Id.* at ___, 421 N.E.2d at 884.

64. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1985); MICH. COMP. LAWS ANN. § 15.362 (West 1981).

3. Employee Complaints Over Matters of Public Well-Being—The Outer Limit

The outer limit of the public policy continuum is the area in which judicial intervention is the least likely because the facts involve private matters with minimal impact on public well-being.⁶⁵ Most courts clearly refrain from creating a new cause of action when faced with such circumstances. For example, the plaintiff in *Rossi v. Pennsylvania State University*⁶⁶ urged the court to recognize substantial public policy based on an employee's well-founded complaint about the waste of tax dollars and ineffective management practices of his state employer. Consistent with Pennsylvania wrongful discharge case law, the court refused to do so. "An exception has been introduced to [the at-will] . . . rule under the public policy limitations, but there must be a *clear mandate of public policy that has been violated*, in order to trigger the exception."⁶⁷ While it is arguable that management of tax dollars indirectly affects a large segment of the population, the court focused only on whether a clear, presumably legislatively mandated policy had been violated. Finding only broad generalizations rather than allegations of specific misconduct, the court rejected the employee's good intentions as grounds for the exception.⁶⁸

III. THE AT-WILL DOCTRINE IN VIRGINIA

Virginia consistently has embraced the at-will doctrine throughout this century. In general, its courts have adhered to the rule "that where no specific time is fixed determining the duration of the employment, it is presumed to be an employment at-will, terminable at any time by either party, and this is so even when the consideration is to be paid at specific intervals"⁶⁹

65. See Mallor, *supra* note 17, at 466.

66. 340 Pa. Super. 39, 489 A.2d 828 (1985).

67. *Id.* at —, 489 A.2d at 836 (emphasis added).

68. *Id.* For cases where employee's good intentions or personal grievances have not constituted public policy, see Borensen v. Rohm & Haas, Inc., 526 F. Supp. 1230 (E.D. Pa. 1981) (employee terminated for complaining about internal mismanagement), *aff'd without opinion*, 729 F.2d 1445 (3d Cir. 1984); Scrogan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977) (employee terminated for announcing intention to attend night school); Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (employee terminated after reporting numerous inadequacies and potential illegalities in management); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (employee terminated for smoking marijuana in presence of other employees and for having an affair with secretary).

69. Hoffman Specialty Co. v. Pelouze, 158 Va. 586, 594, 164 S.E. 397, 399 (1932); *see also*

A. *Virginia Supreme Court Decisions*

The foundation for Virginia's at-will employment tradition was laid in *Stonega Coal & Coke Co. v. Louisville & Nashville Railroad*,⁷⁰ which stands for the proposition that where there is an agreement to render services, either party may terminate the agreement at any time unless the agreement expressly provides for a *definite* completion date. In *Stonega*, Virginia Coal & Iron Co., Stonega's assignor, agreed to build a railroad line from its mines and plants to the railroad yard in return for free railroad service. Several years later, however, the railroad notified the coal company that it would no longer adhere to the agreement. The railroad's demurrer to the coal company's complaint was sustained, and the Virginia Supreme Court affirmed.⁷¹ The controlling question was whether defendants had the right to terminate the contract.

The contract sued on was one for the rendition of services on the part of the railroad company. There is nothing said in the agreement as to the time during which it should continue. . . . [W]hen a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot be determined by a fair inference from its provisions, *either party is ordinarily at liberty to terminate it at-will*. . . .⁷²

This contract principle was applied in the employment context in two 1932 cases. In *Hoffman Specialty Co. v. Pelouze*,⁷³ the plaintiff asserted that he had a contract of employment for a one-year term based on the statement of his pay as twenty-four hundred dollars annually. His former employer contended that plaintiff's contract was of an indefinite duration or, at most, for a month's duration. Thus, the critical issue for the court was whether there had been a hiring for a definite period or merely a general hire of indefinite duration. The Virginia Supreme Court reaffirmed "the settled doctrine . . . that where *no specific time is fixed determining the duration of the employment*, it is presumed

Boyette, *Terminating Employees in Virginia: A Roadmap for the Employer, the Employee, and Their Counsel*, 17 U. RICH. L. REV. 747 (1983) (general discussion of employment-at-will in Virginia).

70. 106 Va. 223, 55 S.E. 551 (1906).

71. *Id.* at 226-30, 55 S.E. at 552-54.

72. *Id.* at 226, 55 S.E. at 552 (emphasis added).

73. 158 Va. 586, 164 S.E. 397 (1932).

to be an employment at will."⁷⁴

On the same day it decided *Hoffman*, the court issued a similar opinion in *Title Insurance Co. v. Howell*.⁷⁵ Again the court stated that a contract of employment for an *indefinite term* may be terminated at the will of either party. Finding that the plaintiff was never promised employment for a definite period, but had "merely a general contract of hiring,"⁷⁶ the court found the plaintiff's employment terminable at will.

Almost twenty years later the court was asked to reexamine the *Stonega* doctrine in *Plaskitt v. Black Diamond Trailer Co.*⁷⁷ In this case, the plaintiffs entered into an agreement with Black Diamond whereby they were appointed "exclusive railway sales agents" entitled to a two percent commission on all sales. Approximately two years later Black Diamond informed the plaintiffs that, because it was going "in-house," their services were no longer needed. The plaintiffs then instituted a contract action to which Black Diamond demurred. The trial court sustained Black Diamond's demurrer, and the plaintiffs appealed.⁷⁸

Because the plaintiffs admitted that their agreement "did not provide a specific time for its duration," Black Diamond argued that *Stonega* controlled.⁷⁹ Noting that it had been over fifty years since *Stonega* was decided, the plaintiffs asked the court to adopt a different rule. In declining this invitation, the court wrote:

Manifestly the agreement of September, 1960 between the parties . . . was terminable at will by either party. For us to hold otherwise would necessitate our making a contract for the Plaskitts and Black Diamond which they did not make for themselves. *We would have to insert an essential element that is omitted—a date for its termination.*⁸⁰

Stonega and its progeny were reaffirmed two years later in *Wards Co. v. Lewis & Dobrow, Inc.*⁸¹ In *Wards Co.*, the parties

74. *Id.* at 594, 164 S.E. at 399 (emphasis added).

75. 158 Va. 713, 164 S.E. 387 (1932).

76. *Id.* at 717-18, 164 S.E. at 389.

77. 209 Va. 460, 164 S.E.2d 645 (1968).

78. *Id.* at 460-61, 164 S.E.2d at 646.

79. *Id.* at 462, 164 S.E.2d at 647.

80. *Id.* at 465, 164 S.E.2d at 649 (emphasis added).

81. 210 Va. 751, 173 S.E.2d 861 (1970).

entered into an agreement whereby Lewis & Dobrow was hired to provide Wards with advertising services. Wards canceled the arrangement shortly thereafter. Lewis & Dobrow sued, claiming breach of a one-year agency contract. Wards asserted, and the supreme court agreed, that the contract was for an indefinite period and thereby terminable at-will.⁸² Citing *Stonega, Title Insurance* and *Plaskitt* as authority, the court stated: "We have long held that a contract to furnish services or a contract of employment for an *indefinite period* is, upon reasonable notice, terminable at will by either party."⁸³

While Virginia courts traditionally have defined "definite time" to be a period certain in either years, months or days, the Virginia Supreme Court has on one occasion departed from this definition. In *Norfolk Southern Railway Co. v. Harris*,⁸⁴ the court stated that to rebut the at-will presumption one must show that a specific time was fixed for the duration of the employment.⁸⁵ However, the court went on to hold that a contractual right to continued employment until the employer has "just cause to end it" also constitutes a "definite time."⁸⁶

Norfolk Southern involved a unique factual situation. The case arose in the Virginia courts after a decision by the United States Supreme Court that state courts had concurrent jurisdiction with the Railway Adjustment Board to resolve discharge grievances under the Railway Labor Act.⁸⁷ Thus, although *Norfolk Southern* was brought in state court, it involved a collective bargaining agreement required under the Railway Labor Act. As such, it was a federal contract and therefore governed and enforceable by federal law.⁸⁸ The plaintiff was a railroad engineer who brought suit in state court to contest his discharge under the collective bargaining agreement that governed his employment. Like other railroads in the 1940's, Norfolk Southern had an agreement with the union which specifically limited the railroad's right to discipline or dismiss engineers during the agreement's term:

(a) Engineers will not be disciplined or dismissed from the service

82. *Id.* at 756, 173 S.E.2d at 865.

83. *Id.* (emphasis added).

84. 190 Va. 966, 59 S.E.2d 110 (1950).

85. *Id.* at 976, 59 S.E.2d at 114.

86. *Id.*

87. 45 U.S.C. §§ 151-88 (1982).

88. *Norfolk S. Ry. Co.*, 190 Va. 966, 59 S.E.2d 110.

without a just cause. They will be given a hearing within five days if removed from service pending investigation and may hear the evidence submitted. They will be promptly notified in writing of the action taken against them, and should the charge be unfounded, they will be paid for the time lost. Disciplinary action must be taken within thirty days after investigation or none will be applied.⁸⁹

On appeal, one of the railroad's argument was that the plaintiff "was not employed for any particular time or term; that he could terminate the employment at will, and defendant had the same right."⁹⁰ Although the argument raised by the railroad makes sense in the context of an individual employment agreement, it clearly did not apply to Norfolk Southern's agreement with the union. The whole purpose of the Railway Labor Act is to make such contracts enforceable to avoid labor disputes that could cripple American industry.

Ordinarily, collective bargaining agreements have a term of two to five years.⁹¹ During the term of the contract, the union agrees that it will not seek wages or benefits not provided in the contract, will not strike, and will not engage in activities inconsistent with the agreement. Although the individual engineer could terminate his employment at will, the union's agreement with the railroad had a specific duration. The Virginia Supreme Court, therefore, clearly reached the correct result in upholding the contract, but incorrectly analyzed the issues in the context of the at-will rule. Because *Norfolk Southern* involved a collective bargaining agreement of definite duration, it does not contradict the at-will employment doctrine in Virginia.

Another Virginia case which recognized a specific contract of employment, but which, because of its unique facts, did not alter the employment-at-will rule, is *Sea-Land Services, Inc. v. O'Neal*.⁹² In *Sea-Land*, the employee asked to be transferred to her former tele-

89. *Id.* at 976, 59 S.E.2d at 111. The quoted language, as well as the nature of the railroad industry and of the plaintiff's occupation, makes it obvious that this is a contract with the union, not with the plaintiff as an individual. Indeed, the briefs filed in the case refer to the agreement as a contract "made with the union." See, e.g., Appellant's Petition for Writ of Error and Supersedeas at 2, Record No. 2643, *Norfolk S. Ry. Co.*, 190 Va. 966, 59 S.E.2d 110.

90. *Id.* at 975, 59 S.E.2d at 114.

91. See S. SLICHTER, J. HEALY & G. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 15 (1960).

92. 224 Va. 343, 297 S.E.2d 647 (1982).

type job so she could attend night school. Her employer agreed but required her to quit her sales representative job first. Pursuant to this agreement, the plaintiff submitted her letter of resignation on a Friday and, for the weekend at least, was unemployed. She then reported for the teletype job the following Monday, only to be told she would not be hired. She thus was left without employment, having quit one job in reliance upon her employer's promise of another.⁹³

The court found that the parties had a contract to obtain employment that was "*separate and apart* from any contract covering the particular position involved."⁹⁴ This separate contract was not even subject to any presumption of terminability at will" that might otherwise have applied.⁹⁵ Significantly, the court stated that, contrary to the way it dismissed plaintiff, the employer "*may have had the right to terminate [her] employment at will either while she was still a sales representative or in the event she became a teletype operator/messenger.*"⁹⁶ Thus, while the employer became contractually obligated to re-hire the plaintiff, it was under no obligation to retain her in its employ.

From *Stonega* through *Norfolk Southern* to *Sea-Land*, it is clear that Virginia adheres to the at-will rule absent an agreement of employment for a definite time.

B. Virginia Federal Court Decisions

Although Virginia's federal courts also have followed the employment-at-will rule, they have been more inclined to find circumstances that rebut the at-will presumption. Other than Judge Merhige's decision in *Griffith v. Electrolux Corp.*,⁹⁷ federal judges have interpreted Virginia law so as to erode the at-will doctrine.

In *Griffith*, a discharged employee sued his former employer claiming, among other things, breach of an employment contract. Electrolux moved for summary judgment on the contract claim because the plaintiff was at all times employed pursuant to an oral hiring agreement "which made no provision for any specific dura-

93. *Id.* at 349, 297 S.E.2d at 650.

94. *Id.* (emphasis added).

95. *Id.*

96. *Id.* (emphasis added).

97. 454 F. Supp. 29 (E.D. Va. 1978).

tion of term.”⁹⁸ Judge Merhige granted Electrolux’s motion and wrote:

The law is well established in Virginia . . . that a contract for personal services *which does not specify any term or duration of employment is terminable at will by either party . . .* Under the Virginia rule, plaintiff’s contract was terminable at will by the defendant and the reasons for the termination are immaterial.⁹⁹

More recent federal court cases, however, have charted their own course in changing the at-will rule, despite any significant pronouncement from the Virginia Supreme Court. For example, in *Frazier v. Colonial Williamsburg Foundation*,¹⁰⁰ the federal court erroneously applied *Norfolk Southern Railway Co. v. Harris*¹⁰¹ and implied a “just cause for termination” provision even though there was no written contract (such as the collective bargaining agreement relied on in *Norfolk Southern*). The employee in *Frazier* based his contract on: (1) Colonial Williamsburg’s policy of encouraging long-term employment; (2) Colonial Williamsburg’s practice of terminating employees only for cause; (3) Colonial Williamsburg’s oral assurances that Frazier would be fired only for cause; and (4) the Colonial Williamsburg employee handbook which contained a written assurance of termination only for cause.¹⁰²

Despite the absence of any contract mutually bargained for and agreed upon, the court held that evidence of a just cause termination standard in company documents or practices could rebut the at-will presumption. In addition, the court misinterpreted Virginia’s law concerning the Statute of Frauds. In *Silverman v. Bernot*,¹⁰³ the Virginia Supreme Court distinguished between *termination by operation of law* and *completion by performance*. The *Frazier* court did not. In *Frazier*, the court ruled that the Statute of Frauds did not bar enforcement of an alleged oral agreement to dismiss the plaintiff only for just cause.¹⁰⁴ In stating that the oral contract could have been performed within one year because the plaintiff could have been discharged for good cause

98. *Id.*

99. *Id.* at 31 (emphasis added).

100. 574 F. Supp. 318 (E.D. Va. 1983).

101. 190 Va. 966, 59 S.E.2d 110 (1950).

102. *Frazier*, 574 F. Supp. at 320.

103. 218 Va. 650, 239 S.E.2d 118 (1977).

104. *Frazier*, 574 F. Supp. at 320.

within his first year of employment, the court in *Frazier* failed to recognize the distinction between full performance and excusing performance. Had the plaintiff in *Frazier* been discharged for cause within his first year of employment, neither party would have fully "performed." Rather, the plaintiff simply would have breached his promise to render satisfactory service, and his breach would have excused the employer from further performance. Because full performance within a year was not possible under the alleged oral agreement, the *Frazier* court should have held any "contract" unenforceable. Thus, *Frazier* misapplied Virginia law and should not be used as authority for creating a just cause standard absent a written contract.

In *Barger v. General Electric Co.*,¹⁰⁵ the federal court turned to *Frazier* for the proposition that an employee may state a wrongful discharge cause of action based on provisions of an employee handbook. As in *Frazier*, the court declined to rule that the provisions of an employee manual constituted an employment contract since the Virginia Supreme Court had not addressed the question.¹⁰⁶ The court did state, however, that the trier of fact should resolve the issue of whether the policies stated in the handbook are merely gratuitous or are contractual inducements for continued employment.¹⁰⁷

This approach assumes that the employee's consideration for the contract is supplied by continued employment based on reliance on the handbook provisions. This assumption misconstrues the promises on which contracts were based in *Sea-Land Services, Inc. v. O'Neal*¹⁰⁸ and *Twohy v. Harris*.¹⁰⁹ In both of these cases, the employees did more than merely continue employment; they gave up other *specific* employment opportunities in reliance on *specific* promises from the employers. In contrast, the broad holding of *Barger* contemplates consideration flowing from the mere continuation of employment alone. This concept is a misinterpretation of Virginia cases, where only consideration *in addition to* continued

105. 599 F. Supp. 1154 (W.D. Va. 1984).

106. *Id.* at 1161.

107. *Id.* at 1164.

108. 224 Va. 343, 297 S.E.2d 647 (1982).

109. 194 Va. 69, 72 S.E.2d 329 (1952). *Twohy* involved an employee who threatened to resign due to inadequate compensation. The employer promised to hold corporate stock for the benefit of the employee in consideration of the employee's continued employment. The court found in this arrangement a contract based on valid consideration. *Id.* at 81, 72 S.E.2d at 336.

employment has been found to supply the contractual element of consideration. Application of the analysis of *Barger* threatens to expand Virginia law in a direction not borne out by Virginia case law and would imply expectations of the parties where none have been expressed.

Another recent Virginia federal decision, *Thompson v. American Motor Inns*,¹¹⁰ represents an expansion of Virginia law by the federal courts. There, the plaintiff brought a diversity action for breach of an employment contract based on an employee handbook and a federal age discrimination action against his former employer. After dismissing the age discrimination claim, the court expounded on the "erosion of the doctrine of employment-at-will." It boldly stated that the Virginia Supreme Court has "limited its application,"¹¹¹ giving as examples *Norfolk Southern Railway Co. v. Harris*¹¹² and *Twohy v. Harris*.¹¹³ The court referred to both cases as representing contracts of employment for a definite term, but failed to mention the unique facts of each case which gave rise to those contracts: a collective bargaining agreement in *Norfolk Southern*¹¹⁴ and additional consideration flowing from both employee and employer in *Twohy*.¹¹⁵ Interestingly, no reference is made to *Bowman v. State Bank of Keysville*¹¹⁶ and the very limited tort exception recognized there.

The *Thompson* court's dicta concerning the status of employment-at-will in Virginia is misleading. Furthermore, its factual findings of an implied contract of employment for a definite term based on an employee handbook and of breach of that contract are findings which Virginia courts have rejected. Although it may have been inappropriate for the court to have abstained from hearing the breach of contract issue,¹¹⁷ the court should have adhered strictly to the *Erie v. Tompkins*¹¹⁸ diversity rule of federal court application of state law. Because Virginia law has rebutted the at-will presumption only when faced with unique facts supplying ad-

110. 623 F. Supp. 409 (W.D. Va. 1985).

111. *Id.* at 413.

112. 190 Va. 966, 59 S.E.2d 110 (1950).

113. 194 Va. 69, 72 S.E.2d 329 (1952).

114. *See supra* notes 84-91 and accompanying text.

115. *See supra* note 109.

116. 229 Va. 534, 331 S.E.2d 797 (1985); *see infra* notes 126-50 and accompanying text.

117. For a discussion of abstention, see 1A J. MOORE, U. TAGGART, A. VEGTAL & J. WICKER, *MOORE'S FEDERAL PRACTICE* 203 (2d ed. 1985).

118. 304 U.S. 64 (1938).

ditional consideration or a collateral agreement, *Thompson* should not have recognized an implied contract.

In contrast with the Western District's bold assertion in *Thompson* that employment-at-will is an archaic doctrine which should be limited at every opportunity, the Eastern District of Virginia, in *Mason v. Richmond Motor Co.*,¹¹⁹ declined to assert jurisdiction over state wrongful discharge claims. There, the plaintiff brought Age Discrimination in Employment Act (ADEA), breach of employment contract, and wrongful discharge claims in federal court. Judge Warriner declined to assert pendent jurisdiction over the state claims.¹²⁰ In an opinion which indicates consideration for the principles of federal-state comity, Judge Warriner questioned whether he even had the power to hear the state claims since ADEA, breach of contract, and wrongful discharge claims share only the common factual element of the plaintiff's discharge. He observed that the elements of proof for each claim differ to such an extent that "there is no 'common nucleus of operative facts' shared by plaintiff's ADEA claims and his breach of employment contract and tort claims."¹²¹

Furthermore, Judge Warriner stated that even if he had the power to hear the state claims, he would exercise discretion and dismiss those claims.¹²² Citing *United Mine Workers v. Gibbs*¹²³ as authority for dismissal of pendent claims where "needless decisions of State law might be made by the federal court and 'surer-footed reading of applicable law' would be made in the State court,"¹²⁴ Judge Warriner acknowledged that any alterations to the at-will rule should be left to the state judiciary and legislature.¹²⁵ Where the *Thompson* court was eager to herald the demise of employment-at-will, the better-reasoned *Mason* decision acknowledged that any alteration of long-standing state law should be accomplished by the state, not by the federal judiciary.

119. *Mason v. Richmond Motor Co.*, No. 85-0808-R, slip op. (E.D. Va. Jan. 8, 1986).

120. *Id.* at 10-11.

121. *Id.* at 11.

122. *Id.* at 14.

123. 383 U.S. 715 (1966).

124. *Mason*, No. 85-0808-R, slip. op. at 14.

125. *Id.* at 17.

IV. *BOWMAN V. STATE BANK OF KEYSVILLE*¹²⁶A. *The Narrowest of Public Policy Exceptions*

A survey of public policy exceptions indicates that only those specifically derived from a statute are consistently successful in tempering the at-will rule. *Bowman v. State Bank of Keysville*¹²⁷ has acknowledged just that type of public policy exception—one narrowly derived from established legislative policy. Accordingly, *Bowman* is situated, along with other narrow exception cases, on the initial point of the public policy continuum.

Since *Bowman* came before the Virginia Supreme Court on the trial court's decision to sustain the defendant's demurrer, the plaintiffs' allegations were taken as true for purposes of argument. The plaintiffs, Betty P. Bowman and Joyce T. Bridges, allegedly were fired in 1979 from their jobs as bookkeepers for the State Bank of Keysville ("the Bank"). During their employment, Bowman and Bridges had owned five and six State Bank shares, respectively. Before terminating Bowman and Bridges, the Bank had entered into an agreement providing for its merger into a subsidiary of another corporation. In anticipation of shareholder opposition to this merger, the plaintiffs contended that several of the Bank's directors instructed them to vote for the merger or risk losing their jobs. The plaintiffs did vote their eleven shares in favor of the merger, creating an affirmative vote only eight shares in excess of the necessary two-thirds approval.¹²⁸

Following the shareholder meeting held for voting on the merger, the plaintiffs allegedly wrote a joint letter to the Bank president stating that "their proxies were invalid, illegally obtained, 'improper and null and void.'"¹²⁹ The letter also stated that the effect of the invalid proxies was that fewer than the necessary number of votes had been cast for approval. Shortly after receipt of this letter, the Bank terminated both plaintiffs.¹³⁰

The plaintiffs sought compensatory and punitive damages for wrongful discharge and conspiracy to interfere with contractual relations. On appeal, the supreme court affirmed the dismissal of the

126. 229 Va. 534, 331 S.E.2d 797 (1985).

127. *Id.*

128. *Id.* at 536-37, 331 S.E.2d at 799.

129. *Id.*

130. *Id.* at 537, 331 S.E.2d at 800.

conspiracy claim. The plaintiffs had alleged that, by attempting to influence their vote and by discharging them, the Bank and Davis, the director of the other corporation, had conspired to interfere with the plaintiffs' contractual relations with the Bank. Because the Motion for Judgment contained no factual allegations supporting Davis' participation in the decision to discharge the plaintiffs or to influence their vote, the trial court had dismissed the conspiracy claim. The supreme court agreed, citing the well-established rule that "a corporation, like an individual, cannot conspire with itself."¹³¹

As to the wrongful discharge claim, however, the court reversed. The court stated: "[A]pplying a narrow exception to the employment-at-will rule, we hold that the plaintiffs have stated a cause of action in tort against the Bank and the named directors for improper discharge."¹³² Although the court did not elaborate on its conception of a "narrow exception," the cases cited for authority uniformly recognize only the narrowest exception as a means of upholding a legislatively mandated policy.¹³³

The legislative basis of the *Bowman* public policy exception is Virginia Code section 13.1-32,¹³⁴ which as the court noted:

[confers] on these plaintiffs as stockholders the right to vote, for each outstanding share of stock held, on each corporate matter submitted to a vote at a meeting of stockholders. This statutory provision contemplates that the right to vote shall be exercised free of duress and intimidation imposed on individual stockholders by corporate management. 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*

131. *Id.* at 541, 331 S.E.2d at 801.

132. *Id.* at 540, 331 S.E.2d at 801.

133. *See, e.g.,* *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (at-will employee fired in retaliation for his insistence that his employer comply with state laws relating to food labeling); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee fired for refusing employer's request to ask for excuse from jury duty); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985) (employee discharged for refusal to perform an illegal act); *Harless v. First Nat'l Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978) (bank employee discharged in retaliation for his efforts to require employer to comply with state and federal consumer protection laws).

134. *Bowman*, 229 Va. at 540, 331 S.E.2d at 801.

*employee as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation.*¹³⁵

Just as the court in *Petermann*¹³⁶ found it necessary to restrain an employer's unlimited right to discharge in order to "fully effectuate the state's declared policy against perjury,"¹³⁷ the Virginia Supreme Court chose to uphold shareholder rights through a judicially created remedy. Accordingly, it represents the affirmation of a legislatively created right, not the opening of the public policy floodgate or the decay of the at-will rule.

Because of the language of *Bowman* and the strong at-will tradition in Virginia, a shift to more expansive exceptions in Virginia is highly unlikely. Indeed, even in jurisdictions where the exception has not been based on legislative policy, but rather on judicial sympathy for do-gooders, the trend has been to retract rather than to expand. For example, an Illinois appellate court has attempted to hold the reigns on the expansive implications of *Palmateer v. International Harvester Co.*¹³⁸ In *Wheeler v. Caterpillar Tractor Co.*,¹³⁹ the plaintiff was terminated for refusing to work with a live source of radiation called Cobalt 60 Unit. His wrongful discharge action advanced a public policy exception based on "the public policy of Illinois . . . that a worker should not be discharged for refusing to work with allegedly unsafe equipment."¹⁴⁰ The plaintiff also alleged violations of Nuclear Regulatory Commission rules. Because the plaintiff only advanced his subjective determination that such conditions existed without presenting any hard evidence of unsafe conditions, the court did not find a "clear or well-defined public policy that has been contravened."¹⁴¹ In contrast to the *Palmateer* decision, the appellate court here was not disposed towards protecting one who had acted on suspicions alone.

The statutory provisions relied on by the Virginia Supreme Court in *Bowman* arguably do not create rights for a large number of people, but rather only for the relatively small segment of the

135. *Id.* (emphasis added).

136. *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

137. *Id.* at ___, 344 P.2d at 27.

138. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

139. 123 Ill. App. 3d 539, 462 N.E.2d 1262 (1984).

140. *Id.* at ___, 462 N.E.2d at 1265.

141. *Id.* at ___, 462 N.E.2d at 1267.

population which owns stock. While this aspect may weaken the soundness of the decision, it is not uncharacteristic of cases recognizing the narrow exception. Generally, courts look at the *clarity* of the policy advanced, i.e., whether it is statutorily derived, rather than the portion of the populace to be affected.¹⁴²

To this extent, *Bowman* indicates strong judicial deference to the legislature. If the legislature has created a right or scheme, the courts will look carefully for an exception to the at-will rule when employer action threatens the integrity of that scheme. Conversely, where a plaintiff bases a wrongful discharge action on a plaintiff's "good intentions" or personal perceptions of public interest, courts have no business altering the at-will rule.

The Virginia Supreme Court's policy of deferring to the legislature, particularly in regard to employment matters, is a sound one. Legislatures, both state and federal, are well structured to study the employment relationship and have not hesitated to deal with certain specific types of unfair treatment of employees by employers. For example, Title VII prohibits discrimination on the basis of race, sex, color, creed or national origin.¹⁴³ The Age Discrimination in Employment Act¹⁴⁴ and the Equal Pay Act¹⁴⁵ provide additional protections to employees. The National Labor Relations Act governs the relationship between employers and employees who have unionized,¹⁴⁶ while the Consumer Credit Protection Act prohibits an employer from discharging an employee on the basis of a single garnishment.¹⁴⁷ Virginia has similar statutes, prohibiting wage discrimination on the basis of sex,¹⁴⁸ prohibiting discrimination against the handicapped,¹⁴⁹ and prohibiting the discharge of an employee based on participation in workers' compensation.¹⁵⁰

These are but a few examples of the many statutes controlling the employment relationship. It is significant that these statutes vary widely with respect to both the procedures for invoking them and the remedies they provide. They clearly illustrate the legislature's function of studying specific problems and, if necessary, en-

142. See *supra* notes 26-63 and accompanying text.

143. 42 U.S.C. § 2000e (1982).

144. 29 U.S.C. § 621 (1982).

145. *Id.* § 206.

146. *Id.* § 151.

147. 15 U.S.C. § 1674 (1982).

148. VA. CODE ANN. § 40.1-26.6 (Repl. Vol. 1981).

149. *Id.* § 51.01-41 (Cum. Supp. 1985).

150. *Id.* § 65.1-40.1.

acting measures designed to address them. This specific legislative approach to the employer-employee relationship obviously would be frustrated if the supreme court were to adopt a general tort cause of action for "wrongful discharge" based on some vague, unarticulated notion of public policy. Accordingly, only where a statutorily conferred right would be thwarted by termination or where the employee has reported specific employer illegality should the employer's discretion to discharge be reconsidered.

B. *Post-Bowman Affirmation of Employment-At-Will In Virginia*

The Virginia Supreme Court's most recent post-*Bowman* affirmation of the at-will doctrine was the denial of a petition for appeal in the Henrico County Circuit Court case of *James v. HCA Health Services of Virginia*.¹⁵¹ In *James*, the plaintiff nurse alleged that her discharge breached a just cause standard "implicit" in the employee handbook. She also contended that the discharge was contrary to public policy, even though no statutory right was mentioned.

The plaintiff advanced *Frazier v. Colonial Williamsburg Foundation*¹⁵² for the proposition that an employee handbook could create a "just cause" termination standard, even though the handbook in question contained no such specific language. Her public policy argument was tenuously grounded on a "Patient's Bill of Rights," which did not even cover nursing personnel. The circuit court found no just cause standard derived from the hospital's employee handbook, nor did it find any public policy violation. The supreme court agreed.¹⁵³ By ruling that the circuit court had not erred in its decision, the court contradicted the federal court approach in *Frazier* and *Barger*. The supreme court has thus held the line on employment-at-will and, in doing so, indicated that *Bowman* does not open a Pandora's Box of public policy exceptions.

151. No. 850303 (Va. Dec. 3, 1985).

152. 574 F. Supp. 29 (E.D. Va. 1978); see *supra* notes 100-07 and accompanying text.

153. *James*, No. 850303.

V. CONCLUSION

Within the realm of public policy exceptions, the exception announced in *Bowman v. State Bank of Keysville* is extremely narrow. Because the Virginia Supreme Court used the public policy exception only to give effect to a clearly established legislative scheme, Virginia courts have not been given carte blanche to create rights and remedies where no legislative action is at stake. Indeed, the legislature is the proper forum to redress the perceived wrongs that have led to the erosion of the at-will doctrine. That body can study the employment relationship in depth, balance the interests of both employer and employee, and enact measures in furtherance of the public good. This approach has the advantage of putting all parties on notice prospectively of acceptable conduct and would clearly and definitively set forth the state's public policy.