Annual Survey of Virginia Law: Employment Law

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EMPLOYMENT LAW

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The focus of this article is upon employment law in Virginia during 1993 and the first half of 1994.1 In addition, significant judicial decisions from 1992 are covered. Workers' compensation and unemployment compensation are excluded as topics. Public sector employment law also lies outside the scope of this article. Nevertheless, two decisions of the Supreme Court of Virginia which involve public employees are analyzed. The most turbulent and rapidly evolving area of Virginia employment law lies in tort. The decisions discussed below indicate that employees stand only a modest chance of recovering against their employers in wrongful discharge suits based on implied contract or promissory estoppel theories. Recently, however, employees have made notable gains in the Supreme Court of Virginia, as new

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1. The article discusses only judicial developments. The 1994 session of the Virginia General Assembly produced little significant legislation in the field of employment relations. Two legislative enactments in 1994, both of which concern garnishment, are relevant here. The General Assembly amended and reenacted §§ 8.01-512.3 and 8.01-512.4 of the Code of Virginia to require that the statutory garnishment notice issued to the debtor reveal the creditor's telephone number and the name, address and telephone number of the creditor's lawyer. This new legislation also adds certain retirement benefits under section 34-34 of the Code of Virginia to the list of garnishment exemptions debtors may select. Act of Mar. 7, 1994, ch. 40, 1994 Va. Acts 113 (codified at VA. CODE ANN. §§ 8.01-512.3, -512.4 (Cum. Supp. 1994)). In another legislative change, the General Assembly amended and reenacted section 8.01-512.2 of the Code of Virginia to allow all employers to charge a $10.00 fee for processing garnishments. Previously, only employers with more than 10,000 employees could charge this fee. Act of Apr. 10, 1994, ch. 664, 1994 Va. Acts 967 (codified at VA. CODE ANN. § 8.01-512.2 (Cum. Supp. 1994)). One other legislative enactment in 1994 is notable. The General Assembly adopted a new statute prohibiting any law enforcement agency from requiring employees to submit to a lie detector rest or discriminating against employees who refuse to take those examinations. Act of Apr. 9, 1994, ch. 561, 1994 Va. Acts 787 (codified at VA. CODE ANN. § 40.1-51.4:4 (Cum. Supp. 1994)).
decisions have expanded their right to recover against employers in tort for unjust dismissal and intentional infliction of emotional distress. On the other hand, employers have had resounding success as plaintiffs, suing former employees in tort for breach of fiduciary duty and intentional interference with contractual relations.

I. ACTIONS AGAINST EMPLOYERS

A. At-Will Contracts of Employment

The "at-will" rule, which raises a strong presumption that all employment is terminable without cause, is alive in Virginia. Recent decisions by the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit, in breach of contract actions brought by discharged employees, confirm the rule's vitality in Virginia. Decided in September, 1992 by the Supreme Court of Virginia, Progress Printing Co., Inc. v. Nichols\(^2\) underscored the challenges discharged employees face in seeking to overcome the "at-will" rule. As a result of the interplay between the Virginia Supreme Court's traditional adherence to the employment "at-will" rule in Progress Printing and the court's unconventional application of the statute of frauds in decisions such as Graham v. Central Fidelity Bank,\(^3\) employers may easily avoid becoming contractually bound by promises of job security contained in their personnel manuals.

In Progress Printing, the employer gave its employee, Nichols, a personnel handbook on his first day at work. The manual provided that the employer would not discharge or suspend any employee "without just cause and shall give at least one warning notice . . . in writing."\(^4\) Another section of the manual stated that employees must serve a thirty-day probationary period.\(^5\) The manual failed to specify whether probationary personnel were at-will employees. Thirteen days later, the employer obtained Nichols' signature on an acknowledgment form

\(^4\) Progress Printing, 244 Va. at 339, 421 S.E.2d at 429.
\(^5\) Id. at 342, 421 S.E.2d at 430-31.
stating that the employment relationship was "at-will and may be terminated by either party at any time."  

Progress Printing fired Nichols two years later without a written warning. Nichols sued his former employer, claiming that Progress Printing breached the employee handbook by discharging him without warning or cause. Progress Printing argued that the written disclaimer rendered Nichols an at-will worker and superseded contrary language in the handbook.  

Following a bench trial, the Circuit Court of Campbell County awarded Nichols damages. The trial court harmonized the conflicting documents, finding that the disclaimer merely clarified Nichols' status as an at-will employee during his thirty-day probationary period. According to the court, Progress Printing had breached the parties' contract by discharging Nichols without cause or the written warning promised in the handbook.  

In reversing the circuit court, the Supreme Court of Virginia initially analyzed the issues by reiterating familiar principles and enunciating new ones. Citing its own precedent, the court confirmed that an employee may rebut the at-will presumption in at least two ways: by proving that the employer has agreed to retain him or her for a fixed period of time, or by establishing that the employer agreed unambiguously to fire the employee only for just cause. In either case, the promise of continued

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6. Id. at 339, 421 S.E.2d at 429.
9. Progress Printing, 244 Va. at 340-41, 421 S.E.2d at 429-30. A contract terminable only for just cause is the equivalent of an agreement of fixed duration. Miller v. SEVAMP, Inc. 234 Va. 462, 466, 362 S.E.2d 915, 917 (1987). In addition to recognizing these two common methods of rebuttal, the Supreme Court of Virginia has held that consideration exists for a binding promise of employment if it requires conduct by the employee wholly apart from performance of ordinary job duties, such as resigning from one position with the employer to accept the employer's offer of a new post. Sea-Land Serv., Inc. v. O'Neal, 224 Va. 343, 349, 297 S.E.2d 647, 650 (1982). But see Sneed v. American Bank Stationery Co., 764 F. Supp. 65, 67 (W.D. Va. 1991) (holding an offer of at-will employment revocable without cause even though an employee had sold a home in California to accept a job in Virginia); Sartin
employment must be unequivocal, written, and signed by the employer.\textsuperscript{10} An employee handbook can rebut the at-will presumption, the court reasoned, provided the manual satisfies the statute of frauds by bearing the employer's signature.\textsuperscript{11}

Declining to decide whether this particular manual met the signature requirement of the statute of frauds, the court held Nichols had failed to rebut the presumption of at-will employment.\textsuperscript{12} While the handbook may have been a unilateral contract which Nichols was free to accept, the disclaimer was a valid modification by Progress Printing. Nichols' decision to continue working for Progress Printing, standing alone, supplied the consideration necessary to support this modified contract.\textsuperscript{13}

\textit{Progress Printing} was the first occasion the Virginia Supreme Court recognized that promises of job security contained in a personnel manual could rebut the at-will presumption and be

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  \item v. Mazur, 237 Va. 82, 85, 375 S.E.2d 741, 742 (1989) (holding that an offer of at-will employment is terminable by an employer even if a promisee has resigned a former job and moved to Virginia in order to accept a job offer). For a good analysis of employment contracts supported by separate consideration, see Henry H. Perritt, Jr., \textit{The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?} 58 U. Cin. L. Rev. 397, 412-16 (1989).
  \item 10. The employer's promise of continued employment must be unambiguous. Thus, in Addison v. Amalgamated Clothing & Textile Workers Union, 236 Va. 233, 372 S.E.2d 403 (1988), the employee alleged that his employer had agreed he could keep his job "as long as he wanted one and as long as one existed." Addison, 236 Va. at 235, 372 S.E.2d at 404. The court found this promise too indefinite to rebut the at-will presumption. Similarly, the plaintiff in \textit{Miller}, 234 Va. at 462, 362 S.E.2d at 915, claimed she had been promised employment with a non-profit agency as long as "adequate federal funding" was available. According to the court, because the employer's promise "bespoke indefiniteness," the plaintiff had failed to rebut the at-will presumption. \textit{Miller}, 234 Va. at 467, 362 S.E.2d at 918. \textit{See also} Graham v. Central Fidelity Bank, 245 Va. 395, 399 & n.5, 428 S.E.2d 916, 918 & n.5 (1993). Circuit courts in the period under review have rejected breach of contract claims based on personnel manuals which contained precatory or aspirational suggestions of job security. Spiller v. James River Corp., 32 Va. Cir. 300, 306, (Richmond City 1993) (sustaining a demurrer to a claim that a personnel handbook constituted a contract because "precatory language expressing [employer's] expectations and hopes for employment relationships falls short of an expression of an offer of a unilateral contract of employment which could be terminated only for cause"); Burton v. Overnite Transp. Co., No. LU-2450-1, slip op. at 5, (Richmond City June 29, 1993) (sustaining an employer's demurrer to a breach of contract claim and reasoning that "[t]hings aspirational are non-binding without any writing stating a contract term to permit employment discharge only for cause.").
  \item 11. \textit{Progress Printing}, 244 Va. at 341, 421 S.E.2d at 430.
  \item 12. \textit{Id.} at 342, 421 S.E.2d at 431.
  \item 13. \textit{Id.} at 343, 421 S.E.2d at 431.
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enforced in contract.\textsuperscript{14} On balance, however, \textit{Progress Printing} was a clear victory for employers. It made clear that an employer can immunize itself as a matter of law from liability for job security provisions in a personnel manual through the simple expedient of a written disclaimer.\textsuperscript{15} In reaching this conclusion, the \textit{Progress Printing} court implicitly rejected the view espoused by a number of courts that any inconsistencies between a termination for cause provision in an employee handbook and a subsequent disclaimer by the employer may create an evidentiary issue to be resolved by the trier of fact.\textsuperscript{16}

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\item \textsuperscript{15} \textit{Progress Printing}, 244 Va. at 343, 421 S.E.2d at 431.

\item \textsuperscript{16} The focus of this approach is upon the totality of the circumstances, including the promises of job security contained in the employee handbook; the conspicuousness and clarity of the disclaimer; the extent to which the employee assented to the employer's purported modification of those promises; the nature of any consideration the employee received for the contract modification; and whether the employer, in modifying the manual, was motivated by a bad faith desire to retaliate against a particular employee. \textit{See, e.g.}, Burtill v. GTE Gov't Sys. Corp. 804 F. Supp. 1356, 1360-61 (D. Colo. 1992); Seehawer v. Magnecraft Elec. Co., 714 F. Supp. 910, 914-15 (N.D. Ill. 1989); Toth v. Square D Co., 712 F. Supp. 1231, 1235-36 (D.S.C. 1989); Thompson v. Kings Entertainment Co., 674 F. Supp. 1194, 1196 (E.D. Va. 1987); Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 787-88 (Alaska 1989); Allabashi v. Lincoln Nat'l Sales Corp., 824 P.2d 1, 2-3 (Colo. Ct. App. 1991); Preston v. Claridge Hotel &
While Nichols' failure to rebut the at-will presumption was the focus of Progress Printing, another discharged employee's inability to overcome the statute of frauds' one-year rule figured prominently in Graham v. Central Fidelity Bank. Betty Graham was a head teller for Central Fidelity Bank who insisted her employer had told her she would not be terminated "except for cause." The bank fired Graham while she was on a ninety-day probation for a series of shortages in her cash drawer. Graham sued the bank, claiming it had discharged her without cause. To rebut the at-will presumption, Graham cited the bank's oral promises of continued employment absent just cause for dismissal, various provisions in the company's personnel manual, and two disciplinary memoranda placing her on the ninety-day probation.

In holding that the statute of frauds' one-year rule barred Graham's oral contract claims, the court reaffirmed Falls v. Virginia State Bar. The Falls court set Virginia apart from nearly all other jurisdictions by declaring that the statute of frauds bars employees from enforcing oral "just cause" contracts of indefinite duration. In virtually every jurisdiction, the stat-

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17. 245 Va. 395, 428 S.E.2d 916 (1993). The Virginia statute of frauds provides in relevant part:

§ 11-2. WHEN WRITTEN EVIDENCE REQUIRED TO MAINTAIN ACTION.

Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases:

8. Upon any agreement that is not to be performed within a year;
18. Graham, 245 Va. at 398-99, 428 S.E.2d at 918.
19. Id. at 398, 428 S.E.2d at 918.
21. Id. at 419, 397 S.E.2d at 673. But see Silverman v. Bernot, 218 Va. 650, 655,
ute of frauds prohibits enforcement of oral contacts that cannot be performed within one year. Traditionally, however, courts have maintained that oral "just cause" contracts of indefinite duration lie outside the statute of frauds because they can be performed within one year. In this conventional view, the employee's death, resignation or discharge within the first year of the employment relationship completes the contract. In *Falls*, and again in *Graham*, the court adopted the novel position that the employee's death or resignation during her first year on the job would cause a contract of indefinite length to terminate by operation of law, rather than by completion. In the event of discharge or resignation, the parties' expectations would be frustrated rather than fulfilled. Applying these principles, the court in *Graham* held that the oral assurances alleged by the fired bank teller "cannot be considered in deciding whether she had an employment contract that could be terminated only for cause." The court also dismissed Graham's strained argument that various written statements rebutted the at-will presumption by making the parties' contract into one of fixed duration. The

239 S.E.2d 118, 121 (1977) (holding that a promise of employment until a worker turns 62 or the employer dies, whichever should occur first, was not barred by the statute of frauds since the employer might die during first year, thereby completing the contract).

22. See, e.g., Badgett v. Northwestern Resources Co., 818 F. Supp. 998, 1001 (W.D. Tex. 1993); Strzelecki v. Schwarz Paper Co., 824 F. Supp. 821, 828 (N.D. Ill. 1993); Hodge v. Evans Fin. Corp., 823 F.2d 559, 562 n.2 (D.C. Cir. 1987); Ford v. Tandy Transp., Inc., 620 N.E.2d 996, 1008 (Ohio App. 1993); C. R. Klewin, Inc. v. Flagship Properties, Inc., 600 A.2d 772, 779 (Conn. 1991); Hejmadi v. AMFAC, Inc., 249 Cal. Rptr. 5, 16 (1988); Kestenbaum v. Pennzoil Co., 766 P.2d 280, 283 (N.M. 1988), cert. denied, 490 U.S. 1109 (1989); 2 CORBIN ON CONTRACTS § 446, at 549-50 (1950) ("A contract for 'permanent' employment is not within the one-year clause for the reason that such a contract will be fully performed, according to its terms, upon the death of the employee."); 3 WILLISTON ON CONTRACTS § 495, at 582 (3d ed. 1960) ("A promise of permanent personal performance is on fair interpretation a promise of performance for life, and therefore is not within the Statute."); Frank Vickory, The Erosion of the Employment-At-Will Doctrine and the Statute of Frauds: Time to Amend the Statute, 30 AM. BUS. L.J. 97, 99 (1992) (discussing the traditional rule that "a contract for 'permanent' or 'lifetime' employment is not governed by the statute [of frauds] since such a contract would be fully performed if, for instance, the employee were to die within the year").

23. *Graham*, 245 Va. at 399, 428 S.E.2d at 918; *Falls*, 240 Va. at 419, 397 S.E.2d at 672-73.


25. *Id.* at 400, 428 S.E.2d at 918.
court found dispositive the bank’s clearly written disclaimer that employees could be terminated at any time “with or without cause.” Despite this handbook disclaimer, Graham argued that the bank’s policy of holding annual employee reviews indicated she could have performed her contract within one year, a line of reasoning the court refused to adopt. Similarly, Graham failed to convince the court that the bank’s two disciplinary memoranda imposing a ninety-day probation rebutted the at-will presumption by transforming the parties’ agreement into one of fixed duration. “[I]n the absence of proof of a clear intent to do so, disciplinary letters should not be construed to convert at-will employment contracts into contracts for fixed periods.”

In sum, the Virginia Supreme Court’s decisions in Progress Printing and Graham limit an employee’s prospects of succeeding on a claim that her employer should be held accountable in contract for violating oral or written termination rules.

The ponderous opinion of the United States Court of Appeals for the Fourth Circuit in Swengler v. ITT Corp., Electro-Optical Products Division is a more dramatic step in the same direction. There, ITT extended a written offer of employment to Swengler which was silent as to whether the company needed cause to fire him. Swengler accepted by letter. During his orientation, Swengler asked for copies of ITT employment policies that applied to him. The corporation’s personnel department responded by handing Swengler a policy memorandum usually reserved for supervisory personnel, rather than employees in Swengler’s position. The memorandum declared that ITT could discharge employees only if their personnel records

26. Id. at 399, 428 S.E.2d at 918.
27. Id. at 400, 428 S.E.2d at 918. See Smithson v. Juby, No. CL 92-179, slip op. at 4 (Fredricksburg City Cir. Ct. Mar. 4, 1994) (“The American, or majority, view is that a contractual expression of compensation in terms of a time unit does not, without more, give rise to a hiring for that or any other particular, definite period.”); Ashley v. Wintergreen, No. CL 1967, slip op. at 2 (Amherst County Cir. Ct. Dec. 6, 1993) (“The phrase ‘annual starting salary’ is insufficient to establish a contract of employment for at least one year.”).
29. 993 F.2d 1063 (4th Cir. 1993).
30. Id. at 1066.
31. Id.
When Swengler was fired, he sued ITT on several liability theories including breach of contract. Swengler alleged that, in addition to giving him the termination memorandum during his initial interview, company officials indicated that employees could be fired only "for cause" and that the position would be "permanent and full time." The United States District Court for the Western District of Virginia granted ITT's motion for a directed verdict, finding that the corporation had sufficient cause under the policy memorandum to fire Swengler.

The court of appeals affirmed on different grounds, holding that neither the alleged oral promise nor the policy memorandum removed Swengler's employment from the at-will category. The parole evidence rule barred Swengler from supplementing the written employment offer with testimony concerning the oral promise of continued employment absent just cause for dismissal. Pointing to Virginia law, the court of appeals explained that parties may supplement written contract terms with evidence of oral agreements "only if: (1) the parties did not reduce their entire agreement to writing; (2) the extrinsic evidence does not contradict or vary the written terms; and (3) the extrinsic evidence involves items on which the parties agreed contemporaneously with the writing." The court of appeals found that ITT's written offer contained the parties' entire agreement. In addition, the alleged oral promise, which came during Swengler's initial interview, was not contemporaneous with the letter confirming the terms of his employment which was sent thirty to forty days later.

Even more groundbreaking was the court's conclusion that the company's written termination provisions were inapplicable to Swengler. In the court's view, the policy memorandum protected only those employees who received it without asking:

32. Id.
33. Id. at 1068.
34. Id. at 1066.
35. Id. at 1068.
36. Id. at 1069-70.
37. Id. at 1069.
38. Id.
The general rule recognizes that no implied contract arises from policy manuals which are not generally distributed to employees. We think that, under Virginia law, this rule should also apply when an employer does not generally distribute a policy manual, but instead provides such a manual only upon request by an employee.

Because ITT does not generally distribute its internal policy memo to employees and provided the memo to Swengler only after he requested a copy, the internal policy memo cannot be used to create an implied condition to Swengler's employment contract.39

The court's curious rationale could lead to anomalous results. Apparently, Swengler allows employers to avoid liability for written job security policies simply by giving the documents only to those employees who are sufficiently concerned about job security to request a copy of the rules governing dismissal.40

B. Express Contracts Of Employment

In addition to decisions concerning at-will employees, the Supreme Court of Virginia published two opinions in 1993 construing express contracts of employment.41 Pinkerton Tobacco

39. Id. at 1070.
40. The court remarked in a footnote that no binding contract could exist since Swengler understood he was free to quit at any time. "Under the doctrine of mutuality, if Swengler could quit at any time, ITT could also fire Swengler at any time." Id. at 1070 n.4. This alternative basis for finding Swengler an at-will employee is difficult to square with Norfolk Southern Ry. Co. v. Harris, 190 Va. 966, 976, 59 S.E.2d 110, 115 (1950) (holding that "the doctrine of mutuality is inapplicable" when the employer has made a written commitment not to fire an employee without just cause, even in the absence of a corresponding promise on the part of the employee to remain with the company for any definite time).
41. The United States Court of Appeals for the Fourth Circuit also construed an express contract of employment in Dyncorp v. Carnicero, 996 F.2d 55 (4th Cir. 1993). Under the parties' agreement, the employer, a corporation, agreed to retain the employee as a consultant following termination of the employment relationship. Id. at 56. The consultancy was to last a minimum of five years, "and thereafter on a year-to-year basis," which the corporation could terminate "at any time" upon "one year's prior written notice" or by paying him "one year's salary." Id. At the end of the fourth year, the employer notified the employee that it would not retain him after the conclusion of the fifth year. Id. at 57. The district court agreed with the employee that the employer was required by the contract to wait until the year-to-year
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Co. v. Melton, 42 dealt with whether a discharged corporate vice president was contractually entitled to an accrued award under a performance incentive plan. Pinkerton Tobacco's plan guaranteed key management personnel enhanced compensation if the corporation reached financial performance goals during a three-year cycle. 43 According to the plan: "[i]f a participant leaves the Company before the end of a performance cycle for reasons other than death, disability or retirement, the units awarded to the incumbent would be forfeited and reclaimed for distribution to other participants." 44 Pinkerton Tobacco fired Melton in the midst of a three-year cycle. Although at first company officials said Melton would receive at least a pro-rated share of an award under the plan, the company subsequently denied his claim on the ground that Melton's dismissal was a disqualifying event. 45 Melton then filed a motion for judgment in the Circuit Court of Chesterfield County, contending that the words, "leaves the Company," suggest strongly that only participants who voluntarily depart Pinkerton Tobacco forfeit their interest under the plan. 46 The trial court, concluding that the plan was ambiguous, allowed a jury to decide whether Melton was entitled to an award. 47 The employer appealed a jury verdict in Melton's favor. 48

The Supreme Court of Virginia held that the trial court erred in permitting a jury to construe the plan. 49 The court decided that discharged employees plainly had no right to an award. The court acknowledged that the words "leaves the Company" would render the plan ambiguous if these terms stood alone. 50

43. Id. at 357, 437 S.E.2d at 924.
44. Id. at 358, 437 S.E.2d at 924.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id. at 361, 437 S.E.2d at 926.
50. Id. at 359, 437 S.E.2d at 924-25.
In the majority's view, however, by enumerating "death, disability and retirement" as exceptions, the parties had agreed that an employee who departs under any other circumstances would lose plan benefits. Finding the majority's construction untenable and the plan inherently ambiguous, Justice Lacy dissented declaring that the jury's award to Melton should be affirmed.

Meanwhile, the employee in Fun v. Virginia Military Institute fared better. Winnie Fun was a librarian employed on an annual basis by Virginia Military Institute ("VMI"). Under its personnel regulations, VMI could terminate Fun either by electing not to renew her contract at the end of the year or by dismissing her at any time. To exercise its nonrenewal option, the regulations required VMI to notify Fun of its decision at least six months prior to the end of her annual contract term. While an elaborate grievance procedure was available to dismissed employees, Fun had no grievance rights in the event VMI terminated her through nonrenewal.

In November 1989, Fun's supervisor notified her by letter that she would be removed from the university payroll no later than six months prior to the end of her annual contract term.

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51. Id. at 360, 437 S.E.2d at 925.
52. Id. at 364, 437 S.E.2d at 927.
53. 245 Va. 249, 427 S.E.2d 181 (1993). Although public sector employment law is beyond the scope of this article, Fun is included here because the decision is a good example of an employee seeking to enforce her rights under an express contract. Readers should note that Virginia courts recently delivered several other interesting opinions concerning the statutory grievance rights of public employees. See County Sch. Bd. of York County v. Epperson, 246 Va. 214, 435 S.E.2d 647 (1993) (holding that complaints filed by two public school teachers concerning their involuntary transfers from one school to another within the same division failed to qualify as "grievances" within the meaning of the statute); Underwood v. Henry County Sch. Bd., 245 Va. 127, 427 S.E.2d 330 (1993) (rejecting the challenge of a teacher who had achieved continuing contract status to school board's decision to terminate her as part of a reduction in force while retaining a probationary instructor in her place); Burk v. Loudoun County Sch. Bd., 31 Va. Cir. 426 (Loudoun County 1993) (holding that a letter written to a teacher by her supervisor implying criticism of the teacher's performance and placed in her personnel file was grievable); Lee v. Fairfax County, 29 Va. Cir. 300 (Fairfax County 1992) (finding a county employee's complaint that the county misapplied policies in failing to promote her to head teacher was non-grievable before the Fairfax County Civil Service Commission); Lasus v. George Mason Univ., 29 Va. Cir. 51 (Fairfax County 1992) (upholding the decision by a university official to deny a professor a grievance panel hearing concerning a negative performance evaluation the professor received).
54. Fun, 245 Va. at 251, 427 S.E.2d at 182.
55. Id.
than the following October. The letter stated, "[a]s I explained to you, the regulations for *dismissal* of an administrative staff member of your seniority require only four month's notice, and a year's notice is generous." Several months later, after the university had rebuffed Fun's request for a hearing, the dean of faculty wrote her that the November letter from the supervisor "was intended to be notification of non-renewal [sic]." Fun filed an action in the Circuit Court of Rockbridge County, joining state law breach of contract counts with a procedural due process claim under both the Fourteenth Amendment and 42 U.S.C. § 1983.

The issue on appeal to the supreme court was whether the circuit court had erred in sustaining VMI's demurrer to Fun's motion for judgment. The supreme court held that Fun had successfully pled a cause of action for breach of her contractual right to proper notice of termination. Fun alleged in her pleading that the employer's November letter was a notice of dismissal rather than nonrenewal and thus entitled her to use the university grievance procedure afforded discharged employees. The court observed that the November letter referred only to "regulations for dismissal." The letter's silence on the subject of contract nonrenewal lent credence to Fun's claim. Reasoning that on demurrer "doubts must be resolved in favor of the construction given the letter by Fun in her pleadings," the supreme court reversed the trial court and remanded Fun's breach of contract claims for trial.

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56. Id.
57. Id.
58. Id.
59. Id. at 252, 427 S.E.2d at 182-83.
60. Id. at 253, 427 S.E.2d at 183.
61. Id. at 183.
62. Id. While the employee in *Fun* overcame the defendant's demurrer to her state law breach of contract claims, the court dismissed her procedural due process count. *Id.* The court noted that Fun did not claim VMI's grievance procedure was facially unconstitutional. Instead, Fun's claim was that her superiors at VMI had committed wrongs that the court characterized as "random and unauthorized acts of state officials or employees in contravention of established procedures . . . ." *Id.* Comparing *Fun* to *Parratt* v. *Taylor*, 451 U.S. 527, 541 (1981), the court held that random violations of facially constitutional procedures do "not offend due process requirements when adequate post-deprivation remedies exist." *Fun*, 245 Va. at 253, 427 S.E.2d at 183. See generally *Zinermon* v. *Burch*, 494 U.S. 113, 136-38 (1990) (stating preconditions for application of *Parratt*). In the court's view, VMI's failure to provide
C. Tort Claims Against Employers

While employers have won most breach of contract battles brought by discharged employees that have reached appellate courts in the last two years, just the opposite is true in the tort arena. The Supreme Court of Virginia within the last year delivered four opinions addressing tort actions brought by employees charging their employers with misconduct. Employees prevailed in three of these actions.

The question presented in Lockhart v. Commonwealth Education Systems was "whether former employees who allege they were terminated from their respective at-will employments because of their race and sex have causes of action against their former employers for wrongful discharge." Lawanda Lockhart, an African-American, sued Commonwealth College in Norfolk Circuit Court for discharging her because of her race.

In an unrelated case, Nancy Wright filed a tort action in the Circuit Court of Loudoun County against a sole proprietorship, Donelly & Company, charging that its owner had terminated her for refusing to accede to his sexual advances. The trial court in each action sustained the employer's demurrer.

The issue raised by both suits on appeal was whether the public policy exception to the at-will rule recognized in Bowman v. State Bank of Keysville was broad enough to cover discharges rooted in racial and gender discrimination. In Bowman, the plaintiffs were at-will employees working at the same bank

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Fun with a post-deprivation hearing in accordance with the due process clause did not rise to the level of a constitutional tort because the plaintiff could obtain complete relief through filing a breach of contract action in state court. Fun, 245 Va. at 253, 427 S.E.2d at 183. Although limited precedent supports this application of Parratt in the context of employment termination, see Hartwick v. Board of Trustees of Johnson City Com. Col., 782 F. Supp. 1507, 1515 (D. Kan. 1992), one federal court in Virginia has rejected essentially the same argument accepted by the supreme court in Fun. Bockes v. Fields, 798 F. Supp. 1219, 1222 (W.D. Va. 1992), modified on other grounds, 999 F.2d 788 (4th Cir. 1993).

64. Id. at 100, 439 S.E.2d at 328.
65. Id. at 101, 439 S.E.2d at 329.
66. Id. at 102, 439 S.E.2d at 330.
in which they owned stock. The plaintiffs alleged they were discharged for refusing to vote their shares in favor of a proposal by the bank's directors to merge with another corporation. Overruling the directors' demurrer, the Virginia Supreme Court held that the at-will employees had a cause of action in tort for retaliatory discharge because the Virginia Stock Corporation Act guarantees stockholders the right to vote their shares freely. As narrowed by Miller v. SEVAMP, Inc., an employee may bring a cause of action under Bowman to redress only "discharges . . . underlying existing laws designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general."71

68. Id. at 539, 331 S.E.2d at 800.
69. Id. at 540, 331 S.E.2d at 801.
71. Id. at 465, 362 S.E.2d at 918. Courts applying Virginia law have read Miller to require that the "public policy" at stake must be clearly enunciated by statute. Most courts have recognized a cause of action in tort under Bowman only when the discharge is in retaliation either for the employee's refusal to commit an illegal act or for his or her exercise of a statutory right. See, e.g., Weaver v. Coca-Cola Bottling Co., 805 F. Supp. 10, 11 (W.D. Va. 1992) ("When no statute is implicated, the discharge of an at-will employee is lawful, and the employee's wrongful discharge suit must be dismissed."); Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332, 1351 (E.D. Va. 1987) (holding that the public policy exception to the at-will rule is "triggered only when the discharge is in response to the employee's refusal to commit an unlawful act or in the employee's exercise of a statutory right"). Compare Roland v. Bon Air Cleaners, Inc., 19 Va. Cir. 184, 186 (Richmond City 1990) (holding that an employee fired for filing a claim for partial unemployment compensation benefits has a Bowman claim) and Millsap v. Synon, Inc., 19 Va. Cir. 261, 262 (Fairfax County 1990) (holding that an at-will employee discharged in retaliation for filing a wage claim with Virginia Employment Commission has a Bowman claim) with Pierce v. Foreign Mission Bd., 28 Va. Cir. 168, 177 (Richmond City 1992) (holding that an employee fired for lodging a grievance in accordance with an employer's internal policies and procedures has no Bowman claim). An employee who is fired for reporting illegal activity by the employer also may state a claim for breach of public policy. Compare Seay v. Grace Jefferson Home, 26 Va. Cir. 355, 361 (Richmond City 1992) (holding that an employee fired for whistle-blowing to a state inspector regarding the illegal practices of his employer, has a Bowman claim) with Newman v. Medical Facilities of Am., 28 Va. Cir. 501, 504 (Nelson County 1992) (holding that an employee fired for reporting illegal incidents in a health care facility to an employer fails to state a Bowman claim). Most jurisdictions share the view expressed by the Virginia Supreme Court in Miller; only firings which directly implicate statutes or at least matters of widespread public importance give rise to a cause of action for breach of public policy, Miller, 234 Va. at 467-69, 362 S.E.2d at 918-19. Deprivations of an at-will employee's private rights do not support a cause of action. See, e.g., Clark v. Modern Group Ltd., 9 F.3d 321, 328 (3d Cir. 1993) (predicting that "Pennsylvania will not recognize a wrongful discharge claim when an at-will employee's discharge is based on a disagreement with management about the legality of a proposed course of
In Lockhart, the court held that the plaintiffs had successfully pled Bowman claims. In a 4-3 majority opinion written by Justice Hassell, the court noted that "the personal freedom to pursue employment free of discrimination based on race or gender" was even more important than a stockholder's right "to exercise the right to vote stock free of duress and intimidation from corporate management." The court pointed to the General Assembly's declaration that employment discrimination based upon race or gender violates parole policy in the Virginia Human Rights Acts. The court brushed aside the employers' formidable defense that the Virginia Human Rights Act expressly provides that it does not create private causes of ac-

action unless the action the employer wants to take actually violates the law.

Prince v. Rescorp Realty, 940 F.2d 1104, 1110 (7th Cir. 1991) (holding that an employee who was fired for reporting violations of the State Fire Marshall Act to state officials has a claim for wrongful discharge under Illinois law); Niesent v. Homestake Mining Co., 505 N.W.2d 781, 783 (S.D. 1993) (confirming the existence of a tort cause of action for breaches of public policy and stating that "[p]ublic policy is found in the letter or purpose of a constitutional or statutory provision or scheme, or in a judicial decision."); Percell v. Int'l Business Machs., Inc., 765 F. Supp. 297, 300 (E.D.N.C. 1991) (dismissing a breach of public policy claim and reasoning that "[t]he question of how defendant handled appeals of management decisions is not a matter which implicates general public policy concerns and is instead largely a matter of interest only to the private parties involved."); Scroghan v. Kraftco Corp. 551 S.W.2d 811, 812 (Ky. Ct. App. 1977) (dismissing a claim by an employee fired for electing to attend night school); Bleich v. Florence Crittenton Services, 632 A.2d 463, 471 (Md. App. 1993) (holding that an employee fired for exercising a statutory duty to report child abuse and neglect states a claim for wrongful discharge in violation of public policy); Lee v. Denro, Inc., 605 A.2d 1017, 1023 (Md. App. 1992) (holding that when an at-will employee "fails to demonstrate that his or her grievance is anything more than private dispute regarding employer's execution of normal management operating procedures, there is no cause of action for abusive discharge"); Sides v. Duke Univ., 328 S.E.2d 818, 828-27 (N.C. App. 1985) (recognizing a cause of action by an employee fired for refusing the employer's demands that she commit perjury); Ressler v. Humane Soc'y, 460 N.W.2d 429, 492 (N.D. 1992) (stating that the public policy exception to the at-will rule applies to retaliatory discharge for honoring subpoena and testifying truthfully); Smith v. Farmers Coop. Ass'n, 825 P.2d 1323, 1326 (Okla. 1992) (holding that the public policy exception to the at-will rule was applicable to an employee fired in retaliation for denying a zoning variance while acting in his capacity as mayor and voting member of a town's board of trustees); Campbell v. Ford Indus., 546 P.2d 141, 146 (Or. 1976) (dismissing a breach of public policy claim by a corporate employee fired for exercising his rights as a shareholder to inspect the corporation's records); Nees v. Hocks, 536 P.2d 512, 515-16 (Or. 1975) (recognizing a cause of action by an employee fired for serving as a juror).

72. Lockhart, 247 Va. at 106, 439 S.E.2d at 332.
73. Id. at 104, 439 S.E.2d at 331.
74. Id. at 105, 439 S.E.2d at 331 (citing VA. CODE ANN. § 2.1-715 (Repl. Vol. 1987).
The majority responded that the Virginia Human Rights Act, which was enacted in 1987, merely codified the commonwealth’s pre-existing public policy against racial and sexual discrimination in the workplace.

We recognize that the Virginia Human Rights Act does not create any new causes of action. Code § 2.1-725. Here, we do not rely upon the Virginia Human Rights Act to create new causes of action. Rather, we rely solely on the narrow exception that we recognized in 1985 in Bowman, decided two years before the enactment of the Virginia Human Rights Act.

As a result of Lockhart, employees discharged on the basis of race or gender have a choice between filing a wrongful discharge action in state court or proceeding in federal court under Title VII of the Civil Rights Act of 1964. Opting for state court holds several advantages for plaintiffs. For instance, the Title VII scheme requires employees to submit discrimination complaints to the Equal Employment Opportunity Commission before filing suit in federal court. Title VII, moreover, applies only to employers with fifteen or more employees and caps the amount of damages employees may recover. Thus, a Lockhart claim in state court, free of these federal limitations, may prove attractive to employees with discrimination complaints.

One of the most significant aspects of Lockhart is that the availability of adequate statutory remedies is irrelevant to whether the employee has a Bowman claim. A few courts in

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75. Id. at 105, 439 S.E.2d at 331. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1987) provides:

Nothing in this chapter creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions. Nor shall the policies or provisions of this chapter be construed to allow tort actions to be instituted instead of or in addition to the current statutory actions for unlawful discrimination.

76. Lockhart, 247 Va. at 105, 439 S.E.2d at 331.

77. Id.


79. Id. § 2000e-5.


81. Lockhart, 247 Va. at 105, 439 S.E.2d at 332. The court relied upon 42 U.S.C. § 2000e-7 (1988), which provides: “Nothing in this subchapter . . . shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provid-
Virginia have held that a plaintiff may bring a *Bowman* claim only when he or she lacks another remedy to redress his or her wrongful discharge. Thus in *Cauthorne v. King*, the plaintiffs alleged they were discharged for protesting the racially-motivated discrimination practices of their employer, a real estate broker, aimed toward African-American home buyers. The plaintiffs brought a *Bowman* claim as well as an action under the Virginia Fair Housing Law for retaliatory discharge. The Circuit Court of the City of Richmond sustained the employer's demurrer to the plaintiffs' *Bowman* claim but allowed them to proceed with their Fair Housing Law count.

...ed by any present or future law of any State or political subdivision of a State . . ."  


Courts applying the law of other states have reached varying decisions when confronted with claims by employees that their discriminatory discharges give rise to a cause of action in tort for breach of public policy. See, e.g., *Hughes v. Matthews*, 986 F.2d 1168, 1170 (8th Cir. 1992) (holding that Arkansas would refuse to recognize a wrongful discharge action based on pregnancy discrimination); *Harrison v. Edison Bros. Apparel Stores*, 924 F.2d 530, 533 (4th Cir. 1991) (holding that a plaintiff who alleges that she was fired for refusing her employer's sexual advances has a tort claim despite the availability of federal remedies under Title VII); *Smith v. Colorado Interstate Gas Co.*, 777 F. Supp. 854, 858 (D. Colo. 1991) (holding that there is no breach of public policy claim for discriminatory discharge based on race or gender); *Watson v. Peoples Ins. Co.*, 588 A.2d 760, 766 (Md. 1991) (holding that there is no common law cause of action for an abusive discharge for sexual discrimination because federal "statutes provide the remedies for their violation"); *Foster v. Albertsons, Inc.*, 835 P.2d 720, 726 (Mont. 1992) ("Montana has recognized a common law cause of action for retaliatory discharge related to sexual harassment.").

83. 30 Va. Cir. 202 (Richmond City 1993).  
86. *Id.* at 205.
The court reasoned that "[t]he public policy exception recognized in Bowman contemplated the absence of another remedy ...." 87

In *Shields v. PC-Expanders, Inc.* 88 the plaintiff alleged that he was fired in retaliation for complaining to the Federal Department of Labor that his employer refused to pay him for working overtime hours. The plaintiff asserted that the company's action violated both public policy under *Bowman* and federal labor statutes. 89 The Circuit Court of Fairfax County framed the question posed by PC-Expanders' demurrer as "whether the existence of that federal remedy should dissuade this Court from recognizing the alleged violation as a public policy exception to the at-will doctrine of employment in Virginia." 90 Answering its own question in the affirmative, the circuit court held that *Bowman* claims should be limited to those unique circumstances when exceptions to the at-will rule are both appropriate and necessary. 91 Since the plaintiff had an "extensive and ample" remedy under federal statutes, the court declined to recognize a public policy exception to the at-will rule and dismissed his *Bowman* claim. 92 After *Lockhart*, the circuit court's reading of *Bowman* is in question.

In contrast to *Lockhart*, where the Plaintiff filed a *Bowman* claim for breach of public policy, *Norfolk Airport Authority v. Nordwall* 93 involved a plaintiff seeking to recover from a retaliatory discharge by invoking available statutory remedies. In *Nordwall*, the court held that the Virginia Right to Work Law 94 prohibits municipal subdivisions from retaliating against their supervisory personnel for joining labor unions. 95

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87. Id. at 204.
88. 31 Va. Cir. 90 (Fairfax County 1993).
90. Shields, 31 Va. Cir. at 93.
91. See id.
92. Id.
95. Nordwall, 246 Va. at 395, 436 S.E.2d at 437.
Nordwall served as a captain of the Norfolk Airport Authority's fire department. The Authority discharged Nordwall solely because he joined the International Association of Fire Fighters, the same union to which several of his subordinates belonged. Nordwall sued the Authority, alleging that it had violated Virginia Code section 40.1-61, which provides that "[n]o person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment." The Authority argued that this broad language excludes supervisory employees. In the defendant's view, extending Virginia's Right to Work Law to supervisory employees would "innovate upon, unsettle and disregard an entire body of labor law" because neither the National Labor Relations Act nor the Federal Labor Management Relations Act protects supervisors. Unpersuaded by the Authority's reliance on federal law, the court indicated that these federal labor laws do not apply to employees of states or their political subdivisions and affirmed the order of the Circuit Court of Norfolk reinstating Nordwall with back pay.

Employees also scored an important triumph in Middlekauff v. Allstate Insurance Co. Texanna Middlekauff sued her former employer for intentional infliction of emotional distress. The Circuit Court of Roanoke County sustained the employer's plea in bar and held that Middlekauff's exclusive remedy lay under the Virginia Workers Compensation Act. Middlekauff tested the vitality of Haddon v. Metropolitan Life Insurance Co. In Haddon, the Supreme Court held that the Workers Compensation Act contained the exclusive remedy for a claim of

96. Id. at 393, 436 S.E.2d at 437.
98. Nordwall, 246 Va. at 394, 436 S.E.2d at 438.
100. Id. §§ 141-188.
103. Nordwall, 246 Va. at 394, 436 S.E.2d at 439.
105. Id. at 152, 439 S.E.2d at 395-96.
intentional infliction of emotional distress based on persistent sexual harassment.\footnote{107}

The Middlekauff court overruled Haddon "to the extent it placed gradually incurred injuries within the definition of 'injury by accident.'\footnote{108} The court emphasized that the Workers' Compensation Act\footnote{109} provides the exclusive form of relief for an "injury by accident arising out of and in the course of employment." Middlekauff's employer had intentionally denigrated her over an extended period because of her heavy weight.\footnote{110} Middlekauff's emotional injuries represented the cumulative result of long term abuse.\footnote{112} The statutory terms, "injury by accident," however, mean a sudden, precipitating event causing immediate harm.\footnote{113} Since Middlekauff's injury fell outside this definition, she was free to pursue common law remedies rather than file a claim for workers' compensation.\footnote{114}

While certainly less far reaching than either Lockhart or Middlekauff, the Supreme Court of Virginia's recent decision in Evaluation Research Corp. v. Alequin\footnote{115} is a good illustration of the difficulty employees encounter meeting the heightened standard of proof for fraud in suits against their employers, particularly when no written employment agreement exists. Alequin sued the defendant, Evaluation Research Corporation (ERC), for actual and constructive fraud after a government contractor dismissed him from his post as a technician. Alequin's termination came on the heels of the ERC's loss of a subcontract for work at Elgin Air Force Base.\footnote{116} Alequin alleged that the defendant had fraudulently induced him to resign from his previous employment and join a team of ERC

\begin{footnotes}
\item[107] Id. at 399, 389 S.E.2d at 713-14.
\item[108] Middlekauff, 247 Va. at 154, 439 S.E.2d at 397. Middlekauff left unclear whether intentional torts that do not cause "gradually incurred injuries" lie outside the scope of the Workers' Compensation Act. See id. at 155, 439 S.E.2d at 397.
\item[110] Middlekauff, 247 Va. at 153, 439 S.E.2d at 396.
\item[111] Id. at 151, 439 S.E.2d at 395.
\item[112] Id. at 153, 439 S.E.2d at 396.
\item[113] Id. at 154, 439 S.E.2d at 397. See also Merillat Indus. v. Parks, 246 Va. 429, 433, 436 S.E.2d 600, 602 (1993); Morris v. Morris, 238 Va. 578, 584, 385 S.E.2d 858, 862 (1989).
\item[114] Middlekauff, 247 Va. at 154-55, 439 S.E.2d at 397.
\item[116] Id. at 145, 439 S.E.2d at 388.
\end{footnotes}
employees assigned to the Elgin Air Force Base project. At trial, Alequin testified that ERC and its manager had assured him the firm "did not hire on a contract basis." The plaintiff insisted that this statement necessarily was equivalent to a representation that ERC hired on an "overhead" basis, meaning that Alequin would be retained even if the employer lacked a specific contract on which he could work at a given time. Witnesses for ERC testified that the company never hired employees on a short-term, single-contract basis, although they acknowledged that the company had a policy against keeping "people on overhead for an extended period of time." ERC officials also testified that the company told Alequin "there are no guarantees in this business," but that they would try to find another job for him within the company once the Elgin Air Force Base project ended. A jury in the Circuit Court of Fairfax County returned a $100,000 verdict for Alequin.

In upending the jury's verdict, the Supreme Court emphasized that Alequin's burden had been to prove each element of fraud by clear and convincing evidence. The record consisted of conflicting testimony. Even assuming ERC promised Alequin that it was not hiring him on a "contract basis," he did not prove by clear and convincing evidence that this statement amounted to a false representation that he was being employed on a long term "overhead" basis.

II. ACTIONS AGAINST EMPLOYEES

Since 1992, the Supreme Court of Virginia has delivered a series of decisions in both tort and contract concerning employ-

117. Id. at 145, 439 S.E.2d at 389.
118. Id.
119. Id. at 147, 439 S.E.2d at 390.
120. Id.
121. Id.
122. Id. at 148, 439 S.E.2d at 390. The plaintiff must prove six elements to prevail on an actual fraud claim: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) with reliance by the party misled, and (6) resulting damage to the party misled. Id. The court explained that constructive fraud, in contrast, involves an innocent or negligent misrepresentation of material fact, rather than intentional misrepresentation. Id. Otherwise, this same test applies to both species of fraud. Id.
123. Id. at 149, 439 S.E.2d at 391.
ees and former employees. Viewed as a whole, these opinions increase, for employers, the utility of plainly written covenants against competition in their contracts with employees.

A. Restraints on Competition from Former Employees

The Supreme Court of Virginia continues to uphold only those non-competition covenants that are narrowly drafted and unambiguous in scope. In *Garcia v. Clinch Valley Physicians*, Garcia, a physician, entered into the following non-competition agreement as part of his employment contract with Clinch Valley Physicians, Inc. (CVP): "Practice after Termination: Upon termination of this agreement, for any reasons whatsoever, the Physician shall not, for a period of three (3) years thereafter, engage in the practice of medicine or surgery in a radius of twenty-five (25) miles of Richlands."

The Supreme Court of Virginia affirmed the Circuit Court of Tazewell County's decision that this restriction was inapplicable to Garcia. The *Garcia* Court emphasized that it must construe the non-competition covenant strictly against the employer as a disfavored restraint upon economic liberty. Guided by this rule of strict construction, the court held that Garcia had not breached the covenant and also stressed that the parties' contract restrained Garcia from competing freely upon termination of the agreement "for any reasons whatsoever . . . ." Construing this language narrowly, the court held that the covenant applied only to those instances in which CVP had terminated an employee for cause. The covenant was inapplicable because CVP had not terminated Garcia for cause. Instead, the employer had declined to renew Garcia's contract upon expiration.

*Garcia* stands for the proposition that employers must define critical terms explicitly in their non-competition agreements.

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125. Id. at 288, 414 S.E.2d at 600.
126. Id. at 290, 414 S.E.2d at 601.
127. Id. at 289, 414 S.E.2d at 601.
128. Id. at 290, 414 S.E.2d at 601 (emphasis added).
129. Id.
130. Id.
Courts will not undertake a searching analysis of the parties' intent. After Garcia, even the most technical distinctions between the circumstances surrounding termination of employment and those described in the parties' contract may render the non-competition covenant inoperative.131

The Supreme Court of Virginia's reluctance to hamstring the marketplace ventures of former employees without an unambiguous non-competition covenant was also evident in Peace v. Conway.132 The employer, Apollo Hair Systems, supplied hair replacement units to customers in accordance with a written contract.133 Wendy Dickens and Sally Peace sold hair replacements as at-will employees who worked without a written agreement governing their employment or post-employment conduct.134

Peace and Dickens left Apollo without taking any supplies, customer lists or other documents and opened a competing hair salon on March 18, 1992. They aggressively solicited more than 100 of Apollo's clients, successfully luring away many.136 Apollo then secured a permanent injunction in the Circuit Court of Chesterfield County that prohibited Peace and Dickens from contacting or dealing with any person who had been an Apollo customer as of March 1, 1992.136

The Virginia Supreme Court dissolved the circuit court's injunction.137 Peace and Dickens had relied solely upon their memories in compiling a list of Apollo's customers. Citing the Restatement (Second) of Agency,138 the court held that in the absence of a covenant not to compete, an employee may solicit her former employer's customers.139 Provided the employee

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131. Id. The court stated that even if its construction of the non-competition covenant "may not have been what CVP intended when it drafted this provision, we are limited to the language of the contract, strictly construed." Id.
133. Id. at 279, 435 S.E.2d at 134.
134. Id.
135. Id.
136. Id.
137. Id. at 282, 435 S.E.2d at 134-35.
139. Peace, 246 Va. at 281-82, 435 S.E.2d at 135. The court observed that Apollo could have protected its client base by having employees execute agreements not to solicit the company's customers. Id. In other decisions, the court has appeared to
does not misappropriate a written client list or engage in other "improper methods," she may compete fiercely with her former employer.\textsuperscript{140}

While the Virginia Supreme Court is disinclined to restrain employees in the absence of a clearly drafted non-competition agreement, the court has demonstrated that it will enforce covenants that are reasonable in scope, duration and geographic reach. Thus, a unanimous court found the non-competition agreement in \textit{New River Media Group, Inc. v. Knighton}\textsuperscript{141} reasonable. David Knighton had the highest profile of any of radio station WPSK's disc jockeys. The Pulaski country music station, which was owned by New River Media Group, Inc. (New River), had a signal strength of sixty air miles.\textsuperscript{142}

On the same date New River terminated Knighton's employment in 1992, the parties entered into a non-competition agreement for the first time. In exchange for $2000, Knighton covenanted that he would not engage in a business that competed with WPSK within sixty air miles of the broadcast station for

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\end{quote}

\textsuperscript{140} Peace, 246 Va. at 282, 435 S.E.2d at 135. In reviewing the appropriateness of injunctive relief against Peace and Dickens, the court considered whether the employees had used "improper methods" when they solicited Apollo's customers. \textit{Id.} at 281, 435 S.E.2d at 135. See Duggin v. Adams, 234 Va. 221, 226-27, 360 S.E.2d 832, 836 (1987) (holding that to establish a \textit{prima facie} showing of tortious interference with an at-will contract, the plaintiff must prove the interferer used "improper methods" in bringing about a termination of contract).

\textsuperscript{141} 245 Va. 367, 429 S.E.2d 25 (1993).

\textsuperscript{142} \textit{Id.} at 369, 429 S.E.2d at 26. Knighton also had extensive management responsibilities. \textit{Id.} at 369-70, 429 S.E.2d at 26.
twelve months. The agreement also provided that New River would be entitled to injunctive relief in the event Knighton breached this covenant.\textsuperscript{143}

Knighton breached the covenant two weeks later when he went to work for WPSK's rival, a country music station in nearby Radford.\textsuperscript{144} After the Circuit Court of Montgomery County refused to enjoin Knighton from working at the Radford station, New River sought appellate review. The Virginia Supreme Court reversed the circuit court and remanded the action with instructions that Knighton be enjoined from competing for twelve months from the date of the trial court's injunction.\textsuperscript{145} The supreme court had no difficulty finding that the non-competition agreement was "reasonable" under the three-part test used since 1956 to evaluate the enforceability of non-competition covenants:

\begin{enumerate}
\item Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?
\item 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?
\item Is the restraint reasonable from the standpoint of a sound public policy?\textsuperscript{146}
\end{enumerate}

The court deemed the sixty-mile limit imposed by the covenant to be reasonable, particularly since it corresponded with WPSK's broadcast range. Thus, the agreement was no broader than necessary to protect the employer's legitimate interests.\textsuperscript{147} The court also found that the relatively brief, twelve-

\textsuperscript{143} \textit{Id.} at 368, 429 S.E.2d at 26.
\textsuperscript{144} \textit{Id.} Knighton returned the $2000 check to New River when he accepted the other radio station's offer of employment. \textit{Id.}
\textsuperscript{145} \textit{Id.} at 370, 429 S.E.2d at 27.
\textsuperscript{147} \textit{Knighton}, 245 Va. at 370, 429 S.E.2d at 26. The court's emphasis upon
month temporal condition was also reasonable from the perspective of both Knighton and New River. Finally, nothing in the agreement trampled upon public policy.

Circuit courts in Virginia during the period under review also decided challenges by employees to the reasonableness of covenants restricting competition. In *Crawley v. Cox*, for example, the Circuit Court of Fredricksburg enforced a covenant not to compete that prohibited a dentist from practicing within ten miles of his former office for two years following termination of his employment. The court rejected the employee's argument that the two-year limitation was unreasonably disproportionate to the parties' one-year employment contract. In *Clute v. H & R Block*, an employee convinced the Circuit Court of Wise County to enjoin H & R Block from enforcing a two-year non-competition covenant. The plaintiff had worked preparing tax returns for just six weeks before H & R Block discharged her. Judge Stump ruled that imposing a two-year restriction upon an employee whom the company fired after such a brief relationship would be unreasonable. Meanwhile, *McKeever & Assocs. v. Giusseppe* involved an agreement not to solicit a former employer's clients for three years following the conclusion of the employment relationship. Unlike a conventional covenant not to compete, the anti-solicitation agreement lacked a geographical restriction. The Circuit Court

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Knighton's status as a "valued employee" of the radio station who had "the highest profile of any of its personalities," *Id.* at 367, 429 S.E.2d at 26, is consistent with earlier decisions in which the relatively high status of the employee within the company was a factor weighing in favor of enforcing a covenant against competition; see *Foti v. Cook*, 220 Va. 800, 806, 263 S.E.2d 430, 433 (1980) (enforcing a non-competition covenant against a senior partner in an investment firm and stating that "[w]e are not dealing here with employer and employee but with senior partners who stood upon equal footing at the bargaining table"); *Meissel*, 198 Va. at 583, 95 S.E.2d at 191 ("In judging whether restrictive provisions are unreasonably harsh and oppressive on the covenantor, it is relevant to consider the personalities involved as well as the circumstances of the transaction.").

149. *Id.* at 370, 429 S.E.2d at 27.
150. 27 Va. Cir. 188 (Fredricksburg City 1992).
151. *Id.* at 193.
152. *Id.* at 192.
154. *Id.*
155. 29 Va. Cir. 362 (Fairfax County 1992).
of Fairfax County upheld the agreement, noting that the covenant "did not prevent the [employee] from entering another business, even a competing one."\textsuperscript{106}

B. Tort Actions Against Employees

Tort actions by companies against employees guilty of disloyalty or improper solicitation of the employer’s clients have been the subject of several instructive decisions in Virginia since 1993.\textsuperscript{107} The supreme court in these opinions has shown a strong reluctance to deprive plaintiffs of a trial on the merits.

\textsuperscript{106} Id. at 365.

\textsuperscript{107} Circuit courts in Virginia have also considered claims by employees against employers or third parties for tortious interference with a contractual relation in the last two years. The Circuit Court of the City of Petersburg held that the plaintiff had successfully pled a cause of action for tortious interference with a contract against her former employer. Murray v. Cees of Virginia, Inc., 29 Va. Cir. 95 (Petersburg City 1992). The requisite improper methods consisted of unjustified threats by the plaintiff’s former employer to publicize detrimental information about the plaintiff’s fitness to work for a competing business. Id. at 97. In Jones v. Pembroke Occupational Health, Inc., 26 Va. Cir. 206 (Richmond City 1992), the plaintiff sued a drug testing laboratory for erroneously reporting a test sample as positive to his employer. The court sustained the laboratory’s demurrer to the plaintiff’s claim of tortious interference with an at-will contract, finding that the defendant’s conduct, while damaging to the employee, was not intentional. Id. at 207. None of the supreme court decisions in this area address the applicable statutes of limitations. In F.D.I.C. v. Cocke, 7 F.3d 396 (4th Cir. 1993), however, the United States Court of Appeals for the Fourth Circuit held that the one-year, "catch all" limitation period set out in Va. CODE ANN. § 8.01-248 (Repl. Vol. 1992) applies to claims against a corporate officer or director for breach of fiduciary duty. 7 F.3d at 402. Accord C-T of Virginia, Inc. v. Barrett, 124 B.R. 689, 693 (W.D. Va. 1990); Lavay Corp. v. Dominion Fed. Sav. & Loan Ass’n., 830 F.2d 522, 527 (4th Cir. 1987).

While employers have only one year in which to sue disloyal employees for breach of fiduciary duty, the five-year statute of limitations applicable to injuries to property, Va. CODE ANN. § 8.01-243B (Repl. Vol. 1992), may govern tortious interference with contract claims. In Handley v. Boy Scouts of Am., No. 16777-RF (Newport News City Dec. 2, 1993), the circuit court held that "the applicable statute of limitations for a tortious interference action is five years." Id. at 12. Other courts in Virginia have reached varying conclusions concerning which statute of limitations applies to tortious interference with contract claims. See, e.g., Unlimited Screw Products, Inc. v. Malm, 781 F. Supp. 1121, 1128 (E.D. Va. 1991) (holding that a two-year statute of limitations for injuries to a person applies to a claim for tortious interference with a contract); Welch v. Kennedy Piggly Wiggly Stores, Inc., 63 B.R. 886, 898 (Bankr. W.D. Va. 1986) (holding a five-year statute of limitations applicable to tortious interference with prospective business opportunity); Johnson v. Plaisance, 25 Va. Cir. 264, 266 (Charlottesville City 1991) (applying a one-year, "catch-all" statute of limitations to a claim for tortious interference with a contract).
In *Hilb, Rogal & Hamilton Co. of Richmond v. DePew*,¹⁵⁸ the question presented on appeal was whether the employer, a pension plan administrator, had established a prima facie case against employees for breach of fiduciary duty, conspiracy to interfere with contractual relations and tortious interference with contract.¹⁶⁹ Just prior to resigning from Hilb, Rogal and Hamilton Company of Richmond ("HRB"), Edward DePew and Edward Menster steered at least one of HRB's pension plan clients toward a competing pension plan business they had recently established.¹⁶⁰ Soon after their departure from HRB, the two former employees executed contracts with businesses that until then had their pension plans administered by HRB under agreements that were terminable at-will.¹⁶¹

The Supreme Court of Virginia began its analysis of the several counts contained in HRB's motion for judgment by confirming that the tort of intentional interference with an at-will contract has four elements: (1) the existence of a valid contractual relationship; (2) knowledge on the part of the interferer of that contractual relationship; (3) the use of "improper methods" in the intentional interference causing a termination of the contract; and (4) resultant damage to the party whose contract has been disrupted.¹⁶² In *Hilb*, the only element in question was the third—the use of "improper methods." The court found sufficient evidence that the employees had used two improper methods.¹⁶³

The first improper method, the employees' breach of their fiduciary duties to HRB, occurred during the employment relationship.¹⁶⁴ DePew and Menster, while still employed by HRB, breached their fiduciary duties by attempting to steal the company's customers. This mischief was tortious in its own right.¹⁶⁵ In addition, the defendants' on-the-job misconduct satisfied the "improper methods" prong of the four-part test for

¹⁵⁹. Id. at 248-49, 440 S.E.2d at 923.
¹⁶⁰. Id. at 243, 440 S.E.2d at 920.
¹⁶¹. Id.
¹⁶². Id. at 245-46, 440 S.E.2d at 921 (emphasis in original).
¹⁶³. Id. at 245, 440 S.E.2d at 922.
¹⁶⁴. Id.
¹⁶⁵. Id.
intentional interference with an at-will contract and conspiracy to interfere. In reaching this conclusion, the court pointed to its decision in Duggin v. Adams that the interferer's breach of a fiduciary duty constitutes a sufficiently improper method to satisfy the third element of the four-part test for tortious interference with an at-will contract.

The second "improper method" evident from the record concerned the post-employment activities of DePew and Menster. Both employees had entered into broadly written non-competition agreements that, in the court's view, prohibited them from doing business with HRB's customers for two years following termination of their employment. By executing contracts with customers of HRB, within two years after their resignations, DePew and Menster breached the non-competition agreement. The employees' violation of this agreement qualified as an "improper method" under the test for intentional interference with at-will contracts articulated in Duggin.

In keeping with its recent decision in Peace v. Conway, the court held that DePew's execution of these post-termination contracts with HRB's former customers was not an independent breach of fiduciary duty. An employee has a fiduciary duty to refrain from acting adversely to his employer's interests only during the employment relationship. Fiduciary obligations, however, end with the employment relationship.

The supreme court also demonstrated its willingness to up-

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166. Id. at 247, 440 S.E.2d at 921.
168. Hilb, 247 Va. at 245-46, 440 S.E.2d at 921.
169. Id. at 248, 440 S.E.2d at 923.
170. Id.
171. Id.
173. Hilb, 247 Va. at 249, 440 S.E.2d at 923.
175. 247 Va. at 246, 440 S.E.2d at 922.
176. Id. at 249, 440 S.E.2d at 923.
hold tort claims by employers in *Catercorp, Inc. v. Catering Services, Inc.*. Like *Hilb*, *Catercorp* involved conspiratorial efforts by two employees to circumvent a non-competition covenant and draw their employer's customers to a rival business they had furtively organized. Seeking monetary and injunctive relief, the employer, Catercorp, sued one of the former employees and a third party for tortious interference with contract, statutory and common law conspiracy to induce the breach of a contract, and violation of various duties of loyalty. The Circuit Court of Hanover County sustained the defendant's demurrer. However, the supreme court reversed on appeal stating that "[t]his is another case in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits."  

178. Id. at 26, 431 S.E.2d at 280.
179. Id. at 27, 431 S.E.2d at 281.
180. Id. at 29, 431 S.E.2d at 281.
181. Id. at 24, 431 S.E.2d at 279. Writing for a unanimous bench, Justice Compton emphasized that the defendant employee had conceded that he, "as an employee at-will," owed his employer "the duties of good faith and fair dealing during the time period he was actually employed by the plaintiff." Id. at 28-29, 431 S.E.2d at 282. The supreme court found the plaintiff's allegations sufficient to state a claim for "breach of the employment duties that defendants say exist." Id. To the extent that this amounts to a recognition by the supreme court that employers may sue employees for breach of an implied covenant of good faith and fair dealing, as opposed to a breach of fiduciary duty, it could prove to be a boon for employees. Courts in at least ten jurisdictions recognize the covenant of good faith and fair dealing as an exception to the employment at-will rule. These courts point to the Restatement (Second) of Contracts § 205 (1979) for the principle that a covenant of good faith and fair dealing is implied in all contracts. See Kimberly K. Geariety, Comment, *At-Will Employment: Time for Good Faith and Fair Dealing Between Employers and Employees*, 28 WILLAMETTE L. REV. 681 (1992) (surveying case law in ten states which recognize implied covenants of good faith and fair dealing as exceptions to at-will doctrines). Employees can argue in the wake of *Catercorp* that if employers have a cause of action against disloyal at-will employees for breach of this implied covenant, at-will employees must have a corresponding cause of action when their employers act in plain bad faith. An argument along these lines even after *Catercorp* is unlikely to succeed given Virginia's attachment to the at-will rule. Trial courts applying Virginia law have consistently declined to recognize a cause of action for breach of an implied covenant of good faith and fair dealing. See, e.g., Sneed v. American Bank Stationery Co., 764 F. Supp. 65, 67 (W.D. Va. 1991); Mason v. Richmond Motor Co., 625 F. Supp. 883, 890 (E.D. Va. 1986), aff'd, 825 F.2d 407 (4th Cir. 1987); Murray v. Lees, 29 Va. Cir. 95, 96-97 (Petersburg City 1992); Spiller v. James River Corp., No. WL-2216-3, (Richmond City Dec. 23, 1993); Nichols v. Progress Printing Co., Inc., 24 Va. Cir. 301, 305 (Campbell County 1991), rev'd on other grounds, 244 Va. 333, 421
Krantz v. Air Line Pilots Ass'n is another recent instance of the supreme court overruling a trial court's decision to sustain a demurrer to a plaintiff's claim of tortious interference with contractual relations. The plaintiff, Aron Krantz, was a pilot for Eastern Air Lines who declined to support his union's strike against the airline. Krantz filed a motion for judgment against the union, the Air Line Pilots Association (ALPA), and another pilot, charging that the defendants had spoiled his prospects for obtaining a job in the airline industry. Krantz alleged that ALPA had encouraged union members to wage a disinformation campaign against him, which caused prospective employers to reject his job applications. The union demurred on the ground that the Railway Labor Act preempted Krantz's state law tort claim. The Circuit Court of Fairfax County agreed and dismissed Krantz's suit.

The supreme court reversed, holding that the plaintiff had pled a cause of action that was not preempted by the Railway Labor Act. Federal labor statutes, the court acknowledged, may well proscribe blacklisting in retaliation for employees' refusal to support a strike. The court also recognized that a plaintiff who asserts a federally protected right is limited to remedies available under federal law for a violation of that right. Krantz, however, as a mere applicant for employment, had no federally protected right. Particularly since Krantz had no remedy under federal law, Justice Whiting wrote, Virginia courts should allow him to enforce his common law rights.

S.E.2d 428 (1993); Schryer v. VBR, 25 Va. Cir. 464, 468 (Fairfax County 1991). But see Keiler v. Valley Proteins, Inc., 25 Va. Cir. 548, 550 (Fairfax County 1989) (overruling a demurrer to a claim based on a breach of an implied promise of good faith and fair dealing in a contract of employment for a specific number of years).

183. Id. at 204, 427 S.E.2d at 327.
184. Id. at 204-05, 427 S.E.2d at 327-28.
186. 245 Va. at 208-09, 427 S.E.2d at 329-30.
187. Id. at 209, 427 S.E.2d at 330.
189. 245 Va. at 208-09, 427 S.E.2d at 329-30.
190. Id. at 209, 427 S.E.2d at 330. The Circuit Court of King George County also considered a pre-emption defense in Walker v. White Packing Co., Inc.-Virginia, 31 Va. Cir. 220 (King George County 1993). The plaintiff sued under VA. CODE ANN. § 65.2-308 (Repl. Vol. 1991), which prohibits an employer from discharging an employee
Perhaps through oversight, the Krantz Court held that the test adopted in Chaves v. Johnson\(^{191}\) for intentional interference with a contract applied to the pilot's claim for intentional interference with a prospective contract.\(^{192}\) Under Chaves, the plaintiff need not allege that the defendant used "improper methods" to interfere with her contract. In other decisions, however, the court has held that the use of "improper methods" by the interferer is an essential element of the tort of interference with a prospective contract.\(^{193}\) After Krantz, plaintiffs can argue that they need allege only the Chaves elements without also asserting that the defendant's methods were "im-

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for filing a workers' compensation claim. The plaintiff also sued under Va. Code Ann. § 51.5-41 (Repl. Vol. 1991), which prohibits employment discrimination on the basis of a disability. The employer argued that these claims were pre-empted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) because the plaintiff was a member of a union which had a collective bargaining contract with the employer. Walker, 31 Va. Cir. at 224. The circuit court, applying Lingle v. Norge Div. Magic Chef, 486 U.S. 399 (1988), held that neither claim was pre-empted by federal law, because neither required interpretation of the collective bargaining agreement. Walker, 31 Va. Cir. at 224. In a subsequent letter opinion, Judge Haley also held that the plaintiff's claims for retaliatory discharge and disability discrimination are not subject to arbitration provisions contained in the collective bargaining agreement between the union and her employer. Walker v. White Packing Company, Inc., Ch. No. 93000088, slip op. at 3 (King George County Feb. 16, 1994).

191. 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985). In Chaves, the court adopted the following test for tortious interference with contract:

1. the existence of a valid contractual relationship or business expectancy;
2. knowledge of the relationship or expectancy on the part of the interferer;
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 had been disrupted.

Id.

192. 245 Va. at 206, 427 S.E.2d at 328.

193. Allen Realty Corp. v. Holbert, 227 Va. 441, 449, 318 S.E.2d 592, 597 (1984); see also Duggin v. Adams, 234 Va. 221, 226-27, 360 S.E.2d 832, 836 (1987) (citing Allen Realty for the proposition that a "cause of action for intentional interference with prospective contract arises when interference is both intentional and improper.")

In a case factually similar to Krantz, Beleña v. Air Line Pilots Ass'n, 31 Va. Cir. 413 (Fairfax County 1993), the Circuit Court of Fairfax County considered whether the plaintiffs had pled a cause of action for intentional interference with prospective contractual relations. "Where a plaintiff seeks recovery for interference with a prospective contract," Judge Annunziata remarked, "plaintiff must demonstrate both an intentional interference and interference which was improper." Id. at 414. The Beleña plaintiffs were recalcitrant members of the ALPA who accused the union of interfering with their bids to work for various air lines. Id. at 413-14. The union's techniques included threats of reprisal against the plaintiff's potential employers, methods that the circuit court found sufficiently improper to overcome the union's demurrer. Id. at 416.
proper” to state a cause of action for intentional interference with prospective contractual relations.

III. CONCLUSION

Both employers and employees can point to gains in the recent developments outlined above. Whether viewed from the perspective of the employer or employee, the judicial opinions reviewed here suggest that the most dynamic area of Virginia employment law is in tort. Implied contract actions premised on personnel memoranda, handbooks, or remarks made in passing by supervisors hold little promise for discharged workers. Yet Lockhart and Middlekauf represent stunning achievements in tort for workers. Employers, too, have made important advances in tort actions during the past year. Catercorp and Hilb clarify and expand the tort remedies available to employers preyed upon by disloyal employees, and former employees who violate non-competition covenants. These and other recent decisions increase the value of non-competition agreements to employers. An employee who flouts a well-drafted non-competition covenant can now be sued in tort for intentional interference with contractual relations, as well as in contract for breach of the agreement not to compete.