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EMPLOYMENT LAW

*Paul G. Beers**

This article focuses upon Virginia employment law between spring 1995 and August 1996. Special topics, such as public sector employment,¹ unemployment compensation and workers compensation,² lie outside the scope of this article, as do developments under federal statutes.

During the period covered by this article, tort actions by employees alleging that their employers had dismissed or discriminated against them in breach of public policy were the most prevalent kind of employment law litigation in Virginia. A

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1. While statutory public sector employment actions are not covered by this article, the reader should note that a number of decisions in this area of the law have appeared since 1995. See, e.g., *Mandel v. Allen*, 81 F.3d 478 (4th Cir. 1996) (holding state employees were not entitled to due process protections prior to alteration of their employment classifications and that they lacked a property right to continued employment once governor eliminated their positions); *Virginia Dept. of Taxation v. Daughtry*, 250 Va. 542, 463 S.E.2d 847 (1995) (upholding state agencies' job transfers of employees whom grievance panels had reinstated to their employment); *Robinson v. Commonwealth*, 36 Va. Cir. 509 (1995) (holding performance evaluation was not arbitrary or capricious); *Ransome v. Commonwealth*, 36 Va. Cir. 507 (Richmond City 1995) (holding employee's complaint was not grievable); *Henty v. Leidinger*, 36 Va. Cir. 407 (Fairfax County 1995) (holding sheriff was bound by grievance panel's final ruling); *In Re Appeal of Guardacosta*, 36 Va. Cir. 308 (Rockingham County 1995) (holding negative performance evaluation of state employee is grievable only if employee demonstrates employer's appraisal was probably arbitrary or capricious).

2. Easily the most important decision in the workers compensation realm during the past year was *Stenrich Group v. Jemmott*, 251 Va. 186, 467 S.E.2d 795 (1996). There, the Supreme Court of Virginia held that a physical impairment resulting from cumulative and gradually incurred trauma is not a compensable injury by accident under the Virginia Workers' Compensation Act, VA. CODE ANN. §§ 65 2-100 to -1310 (Repl. Vol. 1995 & Cum. Supp. 1996). *Stenrich*, 251 Va. at 199, 467 S.E.2d at 802. For a discussion of the erosion of the Workers' Compensation Act exclusivity bar with respect to intentional tort claims, see Paul G. Beers, *Annual Survey of Virginia Law: Employment Law*, 29 U. RICH. L. REV. 1027, 1041-46 (1995).

second area of significant activity included actions brought by employers seeking to enforce non-competition covenants against former employees. Both employers and employees registered notable gains on these two fiercely contested fronts.

I. WRONGFUL DISCHARGE IN BREACH OF PUBLIC POLICY

During the time frame under consideration, Virginia employment law continued to be dominated by litigation concerning the scope of a seminal opinion delivered by the Supreme Court of Virginia more than one decade ago, *Bowman v. State Bank of Keyville*.³ In *Bowman*, the Supreme Court of Virginia held

3. 229 Va. 534, 331 S.E.2d 797 (1985). *Bowman* has been applied on numerous occasions by federal and state courts. See, e.g., *Ludwick v. Premier Bank North*, No. Civ. A. 95-189-A, 1996 WL 471167, (W.D. Va. July 29, 1996); *Stafford v. Radford Community Hosp.*, 908 F. Supp. 1369 (W.D. Va. 1995); *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *Scarce v. Halifax County*, No. Civ. A. 94-0020-D (W.D. Va. May 26, 1995); *Mannell v. American Tobacco Co.*, 871 F. Supp. 854 (E.D. Va. 1994); *Weaver v. Coca-Cola Bottling Co.*, 805 F. Supp. 10 (W.D. Va. 1992); *Nicol v. Imagematrix, Inc.*, 767 F. Supp. 744 (E.D. Va. 1991); *White v. Federal Express Corp.*, 729 F. Supp. 1536 (E.D. Va. 1990); *Fielder v. Southco, Inc.*, 699 F. Supp. 577 (W.D. Va. 1988); *Haigh v. Matsushita Elec. Corp. of America*, 676 F. Supp. 1332 (E.D. Va. 1987); *Clark v. Manheim Servs. Corp.*, 38 Va. Cir. 479 (Va. 1996) (per curiam); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 465 S.E.2d 806 (1996); *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 439 S.E.2d 328 (1994); *Miller v. SEVAMP, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987); *Allen v. Jenkins*, 38 Va. Cir. 496 (Roanoke City 1996); *Hoover v. Devine*, 38 Va. Cir. 455 (Winchester City 1996); *Stallings v. Leeds, Inc.*, 37 Va. Cir. 469 (Martinsville City 1996); *Litten v. Smith*, 37 Va. Cir. 467 (Fauquier County 1996); *Wilson v. Continental Cablevision*, 39 Va. Cir. 506 (Richmond City 1996); *Bailey v. Scott Gallaher, Inc.*, 37 Va. Cir. 438 (Roanoke City 1995) (writ granted); *Dowdy v. Bower*, 37 Va. Cir. 432 (Roanoke City 1995); *Smith v. Cinebar Prods., Inc.*, 37 Va. Cir. 428 (Newport News City 1995); *Jones v. Professional Hospitality Resources, Inc.*, 35 Va. Cir. 458 (Virginia Beach City 1995); *Spencer v. Tultex Corp.*, 37 Va. Cir. 15 (Henry County 1995); *Niland v. Town of Middleburg*, 36 Va. Cir. 48 (Loudoun County 1995); *Ludwig v. T2 Medical*, 34 Va. Cir. 65 (Fairfax County 1994); *Vaughn v. DynCorp*, 38 Va. Cir. 516 (Fairfax County 1994); *Shields v. PC-Expanders, Inc.*, 31 Va. Cir. 90 (Fairfax County 1993); *Cauthorne v. King*, 30 Va. Cir. 202 (Richmond City 1993); *Newman v. Medical Facilities of America*, 28 Va. Cir. 501 (Nelson County 1992); *Pierce v. Foreign Mission Bd.*, 28 Va. Cir. 168 (Richmond City 1992); *Seay v. Grace Jefferson Home*, 26 Va. Cir. 355 (Richmond City 1992); *Bussey v. Arlington Community Residences, Inc.*, 22 Va. Cir. 100 (Arlington County 1990); *Millsap v. Synon, Inc.*, 19 Va. Cir. 261 (Fairfax County 1990); *Roland v. Bon Air Cleaners, Inc.*, 19 Va. Cir. 184 (Richmond City 1990). *Bowman* claims are apparently available only to employees, and not to independent contractors. See *Derthick v. Bassett-Walker, Inc.*, 904 F. Supp. 510, 522 (W.D. Va. 1995); *Dulles Mutual Benefit Ass'n v. Air Transit, Inc.*, 15 Va. Cir. 140 (Loudoun County 1988).

that at-will employees fired in violation of public policy can bring a tort action for wrongful discharge against their former employers.⁴ The *Bowman* plaintiffs were at-will employees of the same bank in which they owned stock. The bank fired the employees in retaliation for refusing to vote their shares in favor of a proposed merger with another financial institution. The *Bowman* Court declared that the bank had trampled upon public policies impliedly enunciated in the Virginia Stock Corporation Act when it discharged the employees.⁵ This statutory scheme is founded on the basic, if implicit, right of stockholders to vote their shares without interference or intimidation from corporate management.⁶ Despite their at-will status, the *Bowman* plaintiffs had a cause of action in tort because the bank had discharged them for exercising this implied right.⁷ As restated two years later in *Miller v. SEVAMP*,⁸ a *Bowman* claim exists to redress "discharges which violate *public* policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general."⁹

The *Bowman* plaintiffs were fired in violation of a public policy that was implied rather than explicit.¹⁰ Case law developments during the period under consideration suggest that *Bowman* claims likely will fail unless plaintiffs can prove that they were fired for either exercising an express statutory right or discharging an explicit statutory duty. This narrowing of *Bowman* was evident in *Lawrence Chrysler Plymouth Corp. v.*

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

5. *Id.* at 540, 331 S.E.2d at 801; see VA. CODE ANN. §§ 13.1-1 to -200 (Repl. Vol. 1993). The Virginia Stock Corporation Act was subsequently repealed and recodified at VA. CODE ANN. §§ 13.1-601 to -780 (Repl. Vol. 1993 & Cum. Supp. 1996).

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

7. *Id.*

8. 234 Va. 462, 362 S.E.2d 915 (1987).

9. *Id.* at 465, 362 S.E.2d at 918. No cause of action exists under *Bowman* to redress discharges which violate private, nonstatutory rights or policies. See, e.g., *Derthick v. Bassett-Walker, Inc.*, 904 F. Supp. 510, 522 (W.D. Va. 1995).

10. *Bowman*, 229 Va. at 540, 331 S.E.2d at 801 ("Code § 13.1-32 conferred on these plaintiffs as stockholders the right to one vote This statutory provision contemplates that the right to vote shall be exercised free of duress and intimidation imposed on individual stockholders by corporate management.") (emphasis added). The statute in question does not expressly declare that firing a shareholder-employee in retaliation for her exercise of the corporate franchise violated Virginia's public policy. VA. CODE ANN. § 13.1-662 (Repl. Vol. 1993 & Cum. Supp. 1996).

Brooks,¹¹ a decision handed down by the Supreme Court of Virginia in 1996. Otis Brooks was a body shop repairman for Lawrence Chrysler. Brooks' superior instructed him to repair a damaged vehicle in a shoddy and unsafe manner. Lawrence Chrysler fired Brooks because he refused to fix the car in accordance with this unsafe method.¹² Brooks then sued Lawrence Chrysler for wrongful discharge in breach of public policy.¹³ The car dealership appealed a jury verdict in Brooks' favor.¹⁴

The Supreme Court of Virginia reversed this award and entered judgment for the employer.¹⁵ Although Brooks cited Virginia automobile salvage statutes,¹⁶ none of these expressly declared that firing employees for refusing to repair wrecked vehicles in an unsafe manner violates public policy.¹⁷ The supreme court rejected Brooks' argument that a plaintiff may proceed under *Bowman* even in the absence of an express statutory enunciation of public policy.¹⁸ "Brooks contends that even though he is an employee at-will, Lawrence Chrysler wrongfully discharged him in violation of Virginia's public policy and that 'the public policy of Virginia need not be found in an express statutory command.' We disagree with Brooks."¹⁹ Brooks' failure to specify the "precise statute that Lawrence Chrysler purportedly contravened" proved fatal to his claim.²⁰

Even after *Lawrence Chrysler*, the most litigated subject in Virginia employment law promises to remain *Bowman's* reach. In particular, four issues, or clusters of issues, concerning the scope of *Bowman* have been analyzed by state and federal

11. 251 Va. 94, 465 S.E.2d 806 (1996).

12. *Id.* at 96, 465 S.E.2d at 808.

13. *Id.*

14. *Id.* at 95, 465 S.E.2d at 807.

15. *Id.* at 99, 465 S.E.2d at 809.

16. *Id.* at 98, 465 S.E.2d at 809. The employee relied upon VA. CODE ANN. §§ 46.2-1600 to -1610 (Repl. Vol. 1995).

17. 251 Va. at 98, 465 S.E.2d at 89; see VA. CODE ANN. §§ 46.2-1600 to -1610 (Repl. Vol. 1995).

18. *Lawrence Chrysler*, 251 Va. at 99, 465 S.E.2d at 809.

19. *Id.* at 96, 465 S.E.2d at 808.

20. *Id.* at 98, 465 S.E.2d at 809. For other recent examples of courts refusing to recognize *Bowman-Lockhart* claims because the plaintiff failed to cite an explicit public policy forbidding her discharge, see *Ludwick v. Premier Bank North*, 935 F. Supp. 801 (W.D. Va. 1996) and *Childress v. City of Richmond*, 907 F. Supp. 934, 942 (E.D. Va. 1995).

courts in the past year. The most controversial of these unsettled questions is whether a *Bowman* claim exists to redress discriminatory discharges based on race, sex or other protected status. In a 1994 decision, *Lockhart v. Commonwealth Educational Systems Corp.*,²¹ the Supreme Court of Virginia held that at-will employees terminated because of their race or gender have common law causes of action for wrongful discharge in breach of public policy under *Bowman*.²² By a 4-3 decision, the *Lockhart* Court reasoned 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 vote her shares without management interference.²³ In reaching this conclusion, the supreme court quoted the Virginia Human Rights Act²⁴ (the VHRA), which expressly declares that employment discrimination is against the public policy of Virginia.²⁵ The majority emphasized that it was not establishing a new cause of action directly under the VHRA.²⁶ Rather, *Lockhart* represented an extension of *Bowman* to provide state-law relief to employees discharged in violation of Virginia's public policy against employment discrimination.

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.²⁷

The General Assembly responded to *Lockhart* in 1995 by amending section 2.1-725 of the VHRA.²⁸ Senate Bill No.

21. 247 Va. 98, 439 S.E.2d 328 (1994).

22. *Id.* at 104, 439 S.E.2d at 332.

23. *Id.*, 439 S.E.2d at 331.

24. VA. CODE ANN. § 2.1-714 to -725 (Repl. Vol. 1987); see VA. CODE ANN. § 2.1-714 to -725 (Repl. Vol. 1995 & Cum. Supp. 1996).

25. *Lockhart*, 247 Va. at 105, 439 S.E.2d at 331 (citing VA. CODE ANN. § 2.1-715 (Repl. Vol. 1987)).

26. *Id.*

27. *Id.*

28. S.B. 1025, Va. Gen. Assembly, (Reg. Sess. 1995) (codified at VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995)).

1025,²⁹ which became effective on July 1, 1995, was an awkward bid to eliminate *Lockhart* by legislators who were convinced that the decision left Virginia businesses unduly exposed to liability for employment discrimination. The amended VHRA actually creates an extremely weak, statutory cause of action for discriminatory discharge. This limited right of action is available only against firms that have more than five, but less than fifteen employees.³⁰ Employers of other sizes who discriminate are arguably insulated altogether from state law liability as a result of the 1995 VHRA amendments. Thus, the amendments provide that "[c]auses of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances."³¹ Apparently, the purpose of this language is to replace the viable, nonstatutory cause of action for discriminatory discharge recognized in *Lockhart* with the ineffectual, statutory cause of action set up by the legislature.

Whether the 1995 amendments to the VHRA have eliminated or even tempered *Lockhart* is a critical question. Four trial courts since August 1995 have held or strongly suggested that *Lockhart* survives the 1995 VHRA amendments unscathed.³²

29. *Id.*

30. VA. CODE ANN. § 2.1-725(B) (Repl. Vol. 1995). Under the amended statute, recoverable damages are limited to "up to twelve months' back pay," along with interest. VA. CODE ANN. § 2.1-725(c). Front pay and compensation for emotional injuries are disallowed, as are punitive damages and reinstatement. *Id.*

31. VA. CODE ANN. § 2.1-725(D) (Repl. Vol. 1995). The anti-*Lockhart* amendments almost certainly do not affect *Lockhart* claims filed prior to July 1, 1995. *See, e.g.,* *Wilson v. Continental Cablevision*, 39 Va. Cir. 506 (Richmond City 1996); *Allen v. Jenkins*, 38 Va. Cir. 496, 499 (Roanoke City 1996); *Litten v. Smith*, 37 Va. Cir. 467 (Fauquier County 1996); *Dowdy v. Bower*, 37 Va. Cir. 432, 435 (Roanoke City 1995); *Easley v. First Union Nat'l Bank*, 36 Va. Cir. 296 (Roanoke City 1995).

32. *Roberts v. Wal-Mart*, No. CIV. A. 95-0059-H, 1996 WL 403790 (W.D. Va. July 1, 1996); *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995); *Lundy v. Cole Vision Corp.*, 39 Va. Cir. 254 (Va. Cir. Richmond City, 1996); *Holmes v. Tiedeken*, 36 Va. Cir. 491 (Richmond City 1995). Other decisions underscore the availability of statutes beside the VHRA on which to base a *Bowman-Lockhart* claim for discriminatory discharge. Thus, in *Wilson v. Continental Cablevision*, 39 Va. Cir. 506 (Richmond City 1996), the circuit court thundered, "It is the opinion of this court that the Virginia Human Rights Act, both before and after the 1995 amendments, was intended to prevent common law tort actions for wrongful termination based on violations of public policy." *Id.* at 512. Despite this refusal to allow *Lockhart* claims in the aftermath of the 1995 amendments, *Wilson* is an important triumph for employees.

These courts have concentrated on the *Lockhart* majority's declaration that its recognition of a common law action for discriminatory discharge did not rest on the VHRA. The Supreme Court of Virginia might well embrace this reading of *Lockhart*. Significantly, the *Lockhart* Court rejected the employer's argument that the pre-amendment version of Virginia Code section 2.1-725(D), quoted below, nullified the VHRA as a source of public policy on which to base a *Bowman* claim.³³

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.³⁴

Despite this pre-amendment provision, the *Lockhart* Court held that a common law action exists for discriminatory discharge under *Bowman*.³⁵

The 1995 amendments restated and re-emphasized that the VHRA does not create any cause of action other than the one specified in the statute.³⁶ The amendments, however, did not overrule *Lockhart*. This is the approach taken by the United

The circuit court proceeded to find that the plaintiffs had stated a claim for discriminatory discharge under the Virginia Fair Employment Contracting Act, which provides, "It is hereby declared to be the policy of the Commonwealth of Virginia to eliminate all discrimination on account of race, color, religion, sex, or national origin from the employment practices of the Commonwealth, its agencies, and government contractors." VA. CODE ANN. § 2.1-374 (Repl. Vol. 1995). Because the defendant in *Wilson*, like many employers, was a government contractor, the plaintiffs had stated a cause of action for discriminatory discharge, even aside from the VHRA. *Wilson*, 39 Va. Cir. at 506. In addition to this statutory expression of public policy, the plaintiffs also relied on anti-discrimination policies found in City of Richmond ordinances that applied to the defendant cable television company as a franchisee of the municipality. *Id.* at 512-13. The circuit court held that these local ordinances provided an independent source of public policy on which to base a discriminatory discharge claim. *Id.* at 513. For another example of a court upholding an action for discriminatory discharge based on local ordinances and Virginia statutes other than the VHRA, see *Harris v. City of Virginia Beach*, 923 F. Supp. 869 (E.D. Va. 1996).

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

34. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1987).

35. *Lockhart*, 247 Va. at 106, 439 S.E.2d at 331.

36. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995 & Cum. Supp. 1996).

States District Court for the Eastern District of Virginia in *Ecklund v. Fuisz Technology, Ltd.*³⁷

Although the Virginia Legislature may have recently tried to overrule *Lockhart* by stating that causes of action to enforce the public policies reflected in the Virginia Human Rights Act are exclusively limited to those provided by statute, the new statute merely restates the original statute using slightly different language. The Virginia Supreme Court carefully avoided the restrictions in the old statute in relying instead on its own precedent in *Bowman*. Because *Bowman* predates [the VHRA], this line of cases is clearly unaffected by the revised statute.³⁸

The type of discriminatory discharge that may be the basis of a *Lockhart* claim also has been a subject of considerable litiga-

37. 905 F. Supp. 335 (E.D. Va. 1995).

38. *Id.* at 340. This profoundly sensitive issue is about more than statutory construction. To hold that no cause of action exists under Virginia law for race discrimination in employment comes close to holding that race discrimination once again is public policy in Virginia. Courts in 1996 were understandably reluctant to suggest that shareholder-employees such as the *Bowman* plaintiffs have a cause of action for wrongful discharge, but African-Americans fired on account of their race are left stranded outside the courthouse by the anti-*Lockhart* amendments to the VHRA. See *Holmes v. Tiedeken*, 36 Va. Cir. 491, 492 (Richmond City 1995) (holding that *Lockhart* survived the 1995 amendments to the VHRA because race and gender discrimination is incompatible with Virginia's public policy and "[t]his court refuses to entertain the notion that the General Assembly, through statute, legislative history, or otherwise, has done anything at all to even remotely suggest that it would alter that public policy.").

Several decades ago the public policy of Virginia clearly was to discriminate against African-Americans. Even the most "progressive" Virginians were committed to keeping African-Americans physically segregated and politically irrelevant. Thus Governor Harry F. Byrd, who as United States Senator led the infamous "massive resistance" campaign against school desegregation in the 1950s, warned the Virginia State Bar at its 1927 convention that the poll tax and other restrictions on the African-American franchise were essential to preventing a reemergence of "the terrible condition which existed in reconstruction days in Virginia when negroes sat side by side in the State Capitol in Richmond with the very flower of white manhood of the State." Governor Harry F. Byrd, Address to the Virginia State Bar Association (Aug. 3, 1927) (available in Papers of Harry F. Byrd, Alderman Library, University of Virginia). On Virginia's twentieth century Jim Crow statutes and public policies, see SAMUEL N. PINCUS, *THE VIRGINIA SUPREME COURT, BLACKS AND THE LAW, 1870-1902* (1990); RAYMOND H. PULLEY, *OLD VIRGINIA RESTORED, AN INTERPRETATION OF THE PROGRESSIVE IMPULSE, 1870-1930* (1968); Richard B. Sherman, *The "Teachings at Hampton Institute," Social Equality, Racial Integrity and the Virginia Public Assemblage Act of 1926*, VA. MAG. HIST. & BIOGRAPHY, July 1987, at 275; Charles E. Wynes, *The Evolution of Jim Crow Laws in Twentieth Century Virginia*, 28 PHYLON 416 (1967).

tion since 1995. For example, the VHRA declares that employment discrimination on the basis of age and disability, as well as race and gender, violates public policy.³⁹ Nevertheless, several state and federal trial courts recently have held that no cause of action exists under *Bowman-Lockhart* to redress age or disability discrimination.⁴⁰ In *Clark v. Manheim Services Corp.*,⁴¹ the plaintiff sued his former employer in the Circuit Court of Rockingham County for wrongful discharge in breach of public policy. The plaintiff alleged that in firing him the employer had engaged in age discrimination. The circuit court sustained the employer's demurrer on the grounds that age discrimination is not actionable under *Bowman-Lockhart*.⁴² In a terse, unpublished order, the Supreme Court of Virginia ruled that the circuit court had erred as a matter of law and remanded the case for trial.⁴³

The unpublished, per curiam order in *Clark* all but establishes that the Supreme Court of Virginia is prepared to uphold age discrimination claims under *Lockhart*. Whether a corresponding action is available for victims of disability discrimination remains less clear. At least three trial courts have held that an employee fired because of her disability lacks a right of action under *Bowman-Lockhart*.⁴⁴ In *Stafford v. Radford Community Hospital, Inc.*,⁴⁵ for instance, the plaintiff alleged that she was discharged because of her disability in violation of federal statutes and Virginia's public policy as expressed in the VHRA. The United States District Court for the Western Dis-

39. VA. CODE ANN. § 2.1-725 (Repl. Vol. 1995).

40. At least two courts have rejected any claim based on age discrimination. *Hunley v. First Union Nat'l Bank*, C.A. No. 95-759-R (W.D. Va. Oct. 31, 1995); *Rasnick v. WAVY TV, Inc.*, C.A. No. 2:95cv686 (E.D. Va. Oct. 3, 1995). Other courts have concluded that a *Lockhart* claim could be predicated on age discrimination. See *Stafford v. Radford Community Hosp., Inc.*, 908 F. Supp. 1369, 1375 (W.D. Va. 1995); *Allen v. Jenkins*, 38 Va. Cir. 496 (Roanoke City 1996). Several courts have held that no *Bowman-Lockhart* claim exists for disability discrimination. *Stafford*, 908 F. Supp. at 1375; *Bradick v. Northrop-Grumman Corp.*, C.A. No. 95-640-A (E.D. Va. July 27, 1995); *Mannell v. American Tobacco Co.*, 871 F. Supp. 854, 862, (E.D. Va. 1994). But see *Niland v. Town of Middleburg*, 36 Va. Cir. 48, 53 (Loudoun County 1995) (recognizing claim for disability discrimination).

41. 38 Va. Cir. 479 (Va. 1996) (per curiam).

42. *Id.*

43. *Id.*

44. See *supra* note 30.

45. 908 F. Supp. 1369 (W.D. Va. 1995).

trict of Virginia granted the employer's motion for summary judgment on this point.⁴⁶ In support of its decision, the district court relied upon the exclusivity provision of the Virginians with Disabilities Act ("VDA"), which states that "[t]he relief available for violations of this chapter shall be limited to the relief set forth in this section."⁴⁷ Pointing to this preemptive language, the district court in *Stafford* held that the plaintiffs' "action for disability discrimination must be pursued under the VDA and not as a claim for wrongful discharge in violation of public policy."⁴⁸

Decisions such as *Stafford* at least arguably contradict *Lockhart*. The employers in *Lockhart* insisted that employees fired on the basis of their race or gender should be limited to the remedies available under existing federal discrimination statutes,⁴⁹ such as Title VII of the Civil Rights Act.⁵⁰ Rejecting this defense, the *Lockhart* Court remarked that "[i]t is not uncommon that injuries resulting from one set of operative facts may give rise to several remedies, including common law tort remedies as well as federal statutory remedies."⁵¹

Whether a plaintiff may base a *Bowman* or *Lockhart* claim on a federal statute is at the center of a third area of continuing controversy. Last year in *McBroom v. DynCorp*,⁵² the Circuit Court for the County of Fairfax held that a plaintiff could build a *Bowman* claim on the federal False Claims Act.⁵³ "The citizens of the Commonwealth of Virginia are citizens of the United States, and any fraud perpetrated by a contractor on the federal government violates no lesser public policy in Virginia than a fraud on the coffers of the government of the Commonwealth."⁵⁴ In contrast, the United States District Court for the Eastern District of Virginia, in *Childress v. City of Rich-*

46. *Id.* at 1375.

47. VA. CODE ANN. § 51.5-46(C) (Repl. Vol. 1994); *Stafford*, 908 F. Supp. at 1375.

48. *Stafford*, 908 F. Supp. at 1375.

49. *Lockhart*, 247 Va. at 105, 439 S.E.2d at 332.

50. Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e (1994).

51. *Lockhart*, 247 Va. at 105, 439 S.E.2d at 332.

52. 38 Va. Cir. 109 (Fairfax County 1995).

53. 31 U.S.C. § 3729-3733 (1994). The plaintiff also relied on Virginia Code § 18.2-178. See VA. CODE ANN. § 18.26-178 (Repl. Vol. 1996) (larceny by false pretenses).

54. *McBroom*, 38 Va. Cir. at 112.

mond,⁵⁵ declared that a *Bowman-Lockhart* claim must have as its source a public policy "as embodied by state statutes, not federal ones."⁵⁶

Employers seeking to limit *Bowman-Lockhart* claims to those grounded in state statutes can construct a solid argument that this particular dispute was resolved in their favor by the Supreme Court of Virginia in *Lawrence Chrysler Plymouth Corp. v. Brooks*.⁵⁷ Because the plaintiff in that case attempted to rely only on state statutes, the viability of federal law as a source of public policy was not in question. Still, in rejecting the plaintiff's claim, the *Lawrence Chrysler* Court used language that suggests that the existence of a Virginia statute is an essential element of this tort.

In *Bowman* and *Lockhart*, the plaintiffs, who were permitted to pursue causes of action against their former employers, identified specific *Virginia* statutes in which the *General Assembly* had established public policies that the former employers had contravened. Unlike the plaintiffs in *Bowman* and *Lockhart*, *Brooks* does not have a cause of action for wrongful discharge because he is unable to identify any *Virginia* statute establishing a public policy that *Lawrence Chrysler* violated.⁵⁸

The extent to which female employees may file *Lockhart* suits for pregnancy discrimination is a fourth issue that continues to divide trial courts. Circuit Courts for Henry County and the City of Roanoke have held that because neither the VHRA nor any other Virginia statute specifically prohibits pregnancy discrimination, an employee fired on this basis has no *Lockhart*

55. 907 F. Supp. 934 (E.D. Va. 1995).

56. *Id.* at 941. *Accord* *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1550 (E.D. Va. 1990) (refusing to recognize a *Bowman* claim "based on the public policy codified in Title VII"), *aff'd*, 939 F.2d 157 (4th Cir. 1991); *Flinders v. Datasec Corp.*, 742 F. Supp. 929, 935 (E.D. Va. 1990) (dictum) (observing that *Bowman* has "thus far been correctly limited to public rights embodied in state statutes."); *Bailey v. Scott Gallaher, Inc.*, 37 Va. Cir. 438, 443 (Roanoke City 1995) (rejecting plaintiff's argument that the *Bowman* exception to the at-will rule is "large enough to encompass the entire corpus of Congressional enactments") (writ granted). *But see* *Fielder v. Southco, Inc.*, 699 F. Supp. 577, 578 (W.D. Va. 1988) (recognizing *Bowman* claim based on Title VII as the source of Virginia's public policy against sex discrimination).

57. 251 Va. 94, 465 S.E.2d 806 (1996).

58. *Id.* at 98-99, 465 S.E.2d at 809 (emphasis added).

claim.⁵⁹ The Circuit Court of Newport News, however, concluded in a searching opinion that pregnancy discrimination is actionable under *Lockhart* because Virginia's public policy in favor of protecting pregnant mothers and their fetuses is longstanding.⁶⁰ Curiously, none of these wide-ranging opinions addresses section 2.1-716 of the VHRA, which provides: "Conduct which violates any Virginia or federal statute or regulation governing discrimination on the basis of . . . sex . . . shall be an 'unlawful discriminatory practice' for the purposes of this chapter."⁶¹ Since 1978, Congress has explicitly included pregnancy discrimination in its definition of discrimination "on the basis of sex" under Title VII of the Civil Rights Act.⁶² Employees, then, can argue that by virtue of section 2.1-716 of the VHRA, pregnancy discrimination is discrimination "on the basis of sex" and violates the Commonwealth's public policy, as well as federal law.

A lack of consensus similarly surrounds whether *Lockhart* provides a remedy for sexual or racial harassment, as opposed to sex discrimination. In *Hairston v. Multi-Channel TV Cable Co.*,⁶³ the plaintiff alleged that she had resigned due to her supervisor's racial harassment. She sued the employer for wrongful constructive discharge on a number of theories, including breach of Virginia's public policy against racial harassment. Hairston appealed the district court's dismissal of her claims.⁶⁴

The United States Court of Appeals for the Fourth Circuit affirmed the district court in an unpublished opinion.⁶⁵ The court of appeals held that a constructively discharged employee lacks standing to bring a *Lockhart* action regardless of the level of harassment which preceded the employee's resignation.⁶⁶

59. *Bailey v. Scott Gallaher, Inc.*, 37 Va. Cir. 438, 444 (Roanoke City 1995) (writ granted); *Spencer v. Tultex Corp.*, 37 Va. Cir. 15, 16 (Henry County 1995).

60. *Smith v. Cinebar Prods., Inc.*, 37 Va. Cir. 428, 429 (Newport News City 1995).

61. VA. CODE ANN. § 2.1-716 (Repl. Vol. 1995).

62. 42 U.S.C. § 2000e(k) (1994) (defining "on the basis of sex" to include pregnancy discrimination for purposes of Title VII).

63. No. 95-2363, 1996 WL 119916 (4th Cir. Mar. 19, 1996).

64. *Id.* at *1.

65. *Id.* at *3.

66. *Id.* at *2 (observing that dismissal is appropriate because "no Virginia court has expanded the *Lockhart* exception to a claim of constructive discharge"). This statement by the United States Court of Appeals for the Fourth Circuit is inaccurate. See *infra* note 67. In the Title VII context, a sexually harassed employee may quit and sue for constructive wrongful discharge if she satisfies a two part test: (1) her

Lower courts have differed on whether employees can bring *Lockhart* claims for sexual harassment, which frequently involve a constructive discharge. At least five trial courts have held that sexual harassment and constructive discharge claims are cognizable under *Lockhart*.⁶⁷ Other courts have taken the position that a constructive discharge is not actionable under *Lockhart*.⁶⁸

A few courts appear to hold that no cause of action exists even if the employer *actually* discharged the employee for refusing to succumb to the harasser's demands. For example, in *Hott v. VDO Yazaki Corp.*,⁶⁹ the plaintiff was discharged because she both refused to submit to her supervisor's requests for sexual favors and subsequently complained to her employer about the harassment.⁷⁰ The United States District Court for the Western District of Virginia rejected the plaintiff's request "that this court expand the *Lockhart* court's recognition of the

working conditions must have been intolerable; and (2) the employer must have either intended to force her to quit or subjected her to conditions that made her resignation foreseeable. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1350 (4th Cir. 1995).

67. *Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335, 340-41 (E.D. Va. 1995) (same-sex harassment); *Hensler v. O'Sullivan Corp.*, C.A. No. 94-0040-H (W.D. Va. Oct. 31, 1995); *Hoover v. Devine*, 38 Va. Cir. 455, 458 (Winchester City 1996); *Lundy v. Cole Vision Corp.*, 39 Va. Cir. 254 (Richmond City 1996); *Dowdy v. Bower*, 37 Va. Cir. 432, 437 (Roanoke City 1995).

Plaintiffs suing under *Lockhart* for sexual harassment frequently include a separate count against their former employer for negligent retention or supervision of the offending employee. Relying principally upon *Chesapeake & Potomac Tel. Co. v. Dowdy*, 235 Va. 55, 61, 365 S.E.2d 751, 754 (1988), and *Spencer v. Gen. Elec. Co.*, 894 F.2d 651, 657 (4th Cir. 1990), several federal courts have held that Virginia does not recognize a cause of action for negligent retention or supervision. *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1130 (W.D. Va. 1996); *Dixon v. Denny's, Inc.*, No. 2:95cv901, slip op. at 9 (E.D. Va. July 29, 1996); *Frye v. Virginia Transformer Corp.*, CIV. A. No. 95-0399-R, at *4 (W.D. Va. Nov. 29, 1995) (mem. order). The Circuit Court of the City of Norfolk reached the opposite conclusion in *Johnson-Kendricks v. Sears, Roebuck & Co.*, 39 Va. Cir. 314, 319-20 (Norfolk City 1996).

68. *Dixon v. Denny's, Inc.*, No. 2:95cv901 (E.D. Va. July 29, 1996) ("The Court concludes as a matter of law that a claim for constructive discharge does not yet exist under Virginia law."); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1129 (W.D. Va. 1996); *Stallings v. Leeds, Inc.*, 37 Va. Cir. 469, 470 (Martinsville City 1996); *Jones v. Professional Hospitality Resources, Inc.*, 35 Va. Cir. 458, 460-61 (Va. Beach City 1995) ("It is only when the employer actually terminates the employee in violation of some established public policy that the narrow exception is applied."); *Reed v. Cardiology Assocs.*, No. 93-1481 (Va. Cir. Portsmouth City Nov. 8, 1994).

69. 922 F. Supp. 1114 (W.D. Va. 1996).

70. *Id.* at 1128.

gender discrimination exception to encompass a claim of sexual harassment.⁷¹ The Circuit Court of the City of Martinsville reached the same conclusion in *Stallings v. Leeds, Inc.*⁷² There, the circuit court sketched a ponderous and antiquated distinction between discrimination on the basis of sex and harassment on the basis of sex. "Allegations of sexual harassment do not necessarily equate to sexual discrimination. Indeed, in some instances the individual who claims sexual harassment may be treated more favorably than others similarly situated."⁷³

II. COVENANTS AGAINST COMPETITION

Courts in Virginia issued a handful of significant decisions concerning covenants against competition during the period under review. *Rash v. Hilb, Rogal & Hamilton Co. of Richmond*⁷⁴ illustrates the far reaching protection employers may receive against predatory former employees through the use of broadly worded non-competition covenants. One of the defendants in that case, Timothy Rash, was a former senior vice president of Hilb, Rogal & Hamilton Company of Richmond ("HRH"), which markets insurance plans.⁷⁵ Mr. Rash's written employment agreement contained the following covenant.

71. *Id.* at 1129.

72. 37 Va. Cir. 469 (Martinsville City 1996).

73. *Id.* at 469-70. Decisions such as *Hott*, 922 F. Supp. 1114, and *Stallings*, 37 Va. Cir. 469 are difficult to square with *Lockhart* and decades of civil rights jurisprudence. *Wright v. Donnelly & Co.*, 28 Va. Cir. 185 (Loudoun County 1992), which was consolidated on appeal with *Lockhart*, involved a claim by an employee who quit to escape unrelenting sexual harassment and then sued her employer for constructive discharge in breach of public policy. The Circuit Court of Loudoun County dismissed this action on the grounds that an employee who resigns has no right of action under *Bowman Wright*, 28 Va. Cir. at 187. The Supreme Court of Virginia, in reversing the circuit court, treated Wright's suit as a wrongful discharge action on appeal. *Lockhart*, 247 Va. at 102, 439 S.E.2d at 330. Even apart from this implicit recognition by the *Lockhart* Court of a constructively discharged female's right to sue her harasser, courts applying federal civil rights statutes have recognized that sexual harassment is an invidious form of sex discrimination. *See, e.g. Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.") (alteration in original).

74. 251 Va. 281, 467 S.E.2d 791 (1996).

75. *Id.* at 283, 467 S.E.2d at 793.

[After termination, Mr. Rash] shall not *directly or indirectly* as an owner, stockholder, director, employee, partner, agent, broker, consultant or *other participant*, for a period of three (3) years from the date of such termination:

. . .

(e) *engage in any manner in any business competing directly or indirectly with [HRH].*⁷⁶

Mr. Rash's spouse worked in the same division as her husband at HRH. Mrs. Rash, however, never executed a non-competition covenant.⁷⁷

Both Rashes resigned from HRH on the same day.⁷⁸ With financial assistance from her husband, Mrs. Rash immediately established her own insurance firm and began competing for HRH's existing clients.⁷⁹ In an attempt to stay within the confines of his non-competition covenant, Mr. Rash did not sign or place his name on any documents related to Mrs. Rash's company.⁸⁰ However, Mr. Rash allowed his wife to encumber the couple's jointly held assets to facilitate financing for the enterprise.⁸¹

After Mrs. Rash convinced several of HRH's customers to steer their business towards her new company, HRH sued to enforce its non-competition covenant.⁸² Both Rashes and Mrs. Rash's new company were named as defendants. The circuit court found in HRH's favor and imposed a constructive trust upon seventy-five percent of all commissions that the new firm garnered from HRH's former accounts.⁸³

Finding Mr. Rash had breached his covenant by indirectly engaging in a business that sought to lure away HRH's customers, the Supreme Court of Virginia affirmed.⁸⁴ The supreme court emphasized that Mr. Rash's agreement prohibited him

76. *Id.* at 285, 467 S.E.2d at 794 (emphasis in original).

77. *Id.* at 284, 467 S.E.2d at 793.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 282, 467 S.E.2d at 792.

83. *Id.*, 467 S.E.2d 793.

84. *Id.* at 286, 467 S.E.2d at 794.

from being a "participant" or "engaging in any manner in any business" that competed with HRH.⁸⁵ Although Mr. Rash had no formal affiliation with his wife's venture, his level of involvement was sufficiently deep to render him a "participant" in the new company's efforts to compete with HRH. Mr. Rash therefore had violated the covenant.⁸⁶ Additionally, the trial court determined that the Rashes had engaged in a common law conspiracy, a crucial determination that went unchallenged on appeal.⁸⁷ These findings supported the trial court's imposition of a constructive trust on a large fraction of the commissions that Ms. Rash's company earned from HRH's diverted customers.⁸⁸

The *Rash* Court's willingness to impose this constructive trust was consistent with a series of decisions by the Supreme Court of Virginia since 1993 providing relief to employers preyed upon by employees and their co-conspirators who impermissibly solicit clients or violate non-competition agreements.⁸⁹ Moreover, *Rash* suggests that employers should draft covenants against competition broadly to thwart their circumvention by clever employees bent on rustling clients. Other recent decisions, however, stand as reminders that covenants which are too broad will fail altogether, leaving the employer completely unprotected against employees turned competitors.⁹⁰

85. *Id.* at 285-86, 467 S.E.2d at 794.

86. *Id.* at 286, 467 S.E.2d at 794.

87. *Id.* at 287, 467 S.E.2d at 795.

88. *Id.* at 288, 467 S.E.2d at 795.

89. *See, e.g.*, *Hilb, Rogal & Hamilton Co. v. DePew*, 247 Va. 240, 248, 440 S.E.2d 918, 923 (1994) (enforcing non-competition covenant and finding employer had made out prima facie case against employees for various claims, including breach of fiduciary duty, conspiracy to interfere with contractual relations and tortious interference with contract.); *Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 29, 431 S.E.2d 277, 281 (1993) (holding that employer's allegations framed viable claims against employees and third party for tortious interference with contract, conspiracy to induce breach of contract and violation of duty of loyalty); *New River Media Group, Inc. v. Knighton*, 245 Va. 367, 370, 429 S.E.2d 25, 27 (1993) (enforcing non-competition covenant); *see also* *Commercial Business Sys., Inc. v. Bellsouth Servs., Inc.*, 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995).

90. The Supreme Court of Virginia applies a three-part balancing test in considering whether a non-competition covenant is valid and enforceable:

(1) 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?

(2) From the standpoint of the employee, is the restraint reasonable in the

Thus, in *Roto-Die Co., Inc. v. Lesser*,⁹¹ the covenant prohibited David Lesser from becoming an "employee" of any "Competitive Business" after his departure from Roto-Die Company, Inc.⁹² The United States District Court for the Western District of Virginia declared this provision facially void on two grounds. First, the covenant was not restricted to businesses that actually competed with Lesser's former employer.⁹³ Instead, it could be read to bar the employee from working for any company that was a member of the same industry as Roto-Die. To be enforceable, the district court reasoned, a covenant must only restrict an employee's right to work for companies which actually compete with the employer.⁹⁴ The second difficulty with this covenant was its lack of a spatial boundary.⁹⁵ The district court wrote: "Without an apparent limit in the language of the covenants themselves, I can only conclude that the covenants are meant to be world-wide in scope."⁹⁶ Finding in-

sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?

(3) Is the restraint reasonable from the standpoint of a sound public policy?

New River Media, 245 Va. at 369, 429 S.E.2d at 26 (1993). *Accord* *Blue Ridge Anesthesia and Critical Care, Inc. v. Gidick*, 239 Va. 369, 371-72, 389 S.E.2d 467, 468-69 (1990); *Paramount Termite Control, Inc. v. Rector*, 238 Va. 171, 174, 380 S.E.2d 922, 924 (1989); *Roanoke Eng'g Sales, Inc. v. Rosenbaum*, 223 Va. 548, 552, 290 S.E.2d 882, 884 (1982); *Richardson v. Paxton Co.*, 203 Va. 790, 794, 127 S.E.2d 113, 117 (1962); *Meissel v. Finley*, 198 Va. 577, 580, 95 S.E.2d 186, 188 (1956). In applying this test, courts construe covenants strictly in favor of the employee and against enforcement by the employer. *Clinch Valley Physicians, Inc. v. Garcia*, 243 Va. 286, 289, 414 S.E.2d 599, 601 (1992); *Linville v. Servisoft, Inc.*, 211 Va. 53, 55, 174 S.E.2d 785, 786-87 (1970); *Richardson*, 203 Va. at 795, 127 S.E.2d at 117.

91. 899 F. Supp. 1515 (W.D. Va. 1995). For another detailed opinion rejecting a non-competition covenant for overbreadth, see *Pais v. Automation Prods., Inc.*, 36 Va. Cir. 230, 239 (Newport News City 1995).

92. *Lesser*, 899 F. Supp. at 1518.

93. *Id.* at 1520. The district court also noted that the covenant's enforceability was questionable because it restricted Lesser from all forms of employment, even positions that were unrelated to the work that he performed for Roto-Die. *Id.*

94. *Id.*; see *Grant v. Carotek, Inc.*, 737 F.2d 410, 412 (4th Cir. 1984); *Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962). *But see* *Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 548, 553, 290 S.E.2d 882, 885 (1982) (prohibition against participation by former executive in "activities similar to the type of business conducted" by employer held reasonable).

95. *Lesser*, 899 F. Supp. at 1521.

96. *Id.* Courts in Virginia have on several occasions refused to enforce covenants that lacked a geographical limit. *E.g.*, *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 284 (4th Cir. 1974); *Power Distribution, Inc. v. Emergency Power Eng'g, Inc.*, 569 F. Supp. 54, 57-58 (E.D. Va. 1983); *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931, 935-36 (E.D. Va. 1953).

sufficient evidence that the employer was competing in world-wide markets, the district court declared the covenant void for overbreadth.⁹⁷ The district court ruled that the presence of a standard provision in which Lesser acknowledged that the covenants were reasonable and enforceable was irrelevant.⁹⁸ Virginia law requires that non-competition covenants be reasonable restraints on trade, considering the interests of the employer, the employee and the public.⁹⁹ "Employers," Judge Kiser explained, "may not circumvent this public policy merely by including boilerplate language in their employment agreements."¹⁰⁰ Finally, the district court refused to edit, or "blue-pencil," the overbroad covenant to render it enforceable.¹⁰¹ After surveying the sparse precedent on this point, Judge Kiser concluded that courts applying Virginia law are not free to salvage offensive covenants by "blue-pencilling" them.¹⁰²

Lesser reads like a primer on the hurdles drafters confront in constructing protective covenants that can withstand courtroom challenges to the reasonableness of their functional and geographic scope. But even the most well-balanced covenant will fail if the employer lacks standing to enforce it. In *Reynolds & Reynolds Co. v. Hardee*,¹⁰³ a case of first impression in Virginia, the United States District Court for the Eastern District of Virginia held that non-competition covenants are not assignable from one employer to another without the employee's

97. *Lesser*, 899 F. Supp. at 1521.

98. *Id.* at 1519.

99. See *supra* note 90.

100. *Lesser*, 899 F. Supp. at 1519-20.

101. *Id.* at 1523. While the district court struck the two overbroad, non-competition articles, it left intact other parts of the agreement which prohibited disclosure of confidential information and solicitation of Roto-Die's employees. *Id.* at 1522. These two prohibitions were severable and enforceable because they addressed legitimate concerns distinct from the non-competition covenants. *Id.*

102. *Id.* at 1523. Unlike some states, Virginia probably prohibits blue-pencilling. See *Clinch Valley Physicians, Inc. v. Garcia*, 243 Va. 286, 289, 414 S.E.2d 599, 601 (1992). The United States Court of Appeals for the Fourth Circuit has long maintained that Virginia law forbids a court from revising a non-competition covenant to render it reasonable. *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 284 (4th Cir. 1974) (holding that "the restrictive covenant must be judged as a whole and must stand or fall when so judged" (quoting *Welcome Wagon, Inc. v. Morris*, 224 F.2d 693, 701 (4th Cir. 1955))).

103. 932 F. Supp. 149 (E.D. Va. 1996).

consent.¹⁰⁴ The Reynolds and Reynolds Company ("Reynolds") purchased the goodwill and assets of Jordan Graphics, Inc. ("Jordan"). Included in the sale was an Employment Agreement between Jordan and Thomas Hardee, a sales representative.¹⁰⁵ Jordan dismissed Hardee on the day of the sale to Reynolds.¹⁰⁶ Hardee offered to work for Reynolds under the same terms as those found in his Employment Agreement with Jordan. Reynolds, however, refused to hire Hardee unless he would execute a substantially more restrictive non-competition covenant than the one found in his Employment Agreement with Jordan.¹⁰⁷ Two months later Reynolds filed suit in the United States District Court for the Eastern District of Virginia against Hardee for competing against Reynolds in alleged violation of his non-competition covenant.¹⁰⁸

The question presented by Hardee's motion to dismiss Reynolds' suit for lack of standing was "whether covenants not to compete contained in employment contracts are assignable."¹⁰⁹ Relying primarily upon Vermont case law, Judge Smith held that Reynolds lacked standing because the covenant not to compete contained in Hardee's Employment Agreement with Jordan could not be assigned without the employee's consent.¹¹⁰ The district court observed that, as a personal services contract, Hardee's Employment Agreement with Jordan was, "without question," not subject to unilateral assignment under traditional principles of Virginia law.¹¹¹ The covenant against competition was part of that unassignable personal services contract. The court opined: "Dividing defendant's contract and allowing portions of it to be assigned, while disallowing assign-

104. *Id.* at 156.

105. *Id.* at 151.

106. *Id.*

107. *Id.*

108. *Id.* at 151-52.

109. *Id.* at 153.

110. *Id.* at 155; *see* Smith, Bell & Hauck, Inc. v. Cullins, 183 A.2d 528, 532 (1962). Other courts have reasoned that assigning a non-competition covenant does not run afoul of the traditional rule against assignment of personal services contracts. *See, e.g., In Re Hearing Ctrs. of America, Inc.*, 106 B.R. 719, 722 (M.D. Fla. 1989) (holding that covenants not to compete are assignable because they attempt to prohibit performance of personal services "rather than attempt to assign the performance of a personal service").

111. *Reynolds*, 932 F. Supp. at 155.

ment of the whole is inconsistent with this Virginia precedent.¹¹²

III. CONCLUSION

Suits by employees alleging that their employers sacked them in tortious breach of public policy and equity actions by employers seeking enforcement of non-competition covenants against former employees have been the most active forms of employment law litigation in Virginia since the spring of 1995. Both employers and employees can cite limited victories on these battlegrounds. Trumpeting *Lawrence Chrysler* especially, employers can argue in the broadest terms that courts have demonstrated heightened circumspection about the types of statutes that will support a *Bowman-Lockhart* claim. Employees, however, should be at least as encouraged by the unwillingness of trial courts thus far to rule that the 1995 anti-*Lockhart* amendments to the Virginia Human Rights Act doom actions for discriminatory discharge in state court.

The decision by the Supreme Court of Virginia in *Rash* is another in a streak of important triumphs for employers over the past three years in actions against disloyal or predatory employees. As a result of *Rash*, Virginia employers likely will become more aggressive about pursuing a former employee who sidesteps a non-competition covenant to participate even informally in a newly formed, rival venture. At the same time, recent federal district court decisions illustrate that employees seeking to evade the strictures of a non-competition covenant stand a reasonable chance of success if the agreement is even arguably overbroad or otherwise contrary to public policy.

112. *Id.*