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Annual Survey of Virginia Law: Labor and Employment Law

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LABOR AND EMPLOYMENT LAW

*Thomas M. Winn, III**

This article discusses four principal areas of employment and labor law in which there was significant activity in Virginia's courts and/or the legislature over the past year: (1) public policy wrongful discharge; (2) negligent hiring, retention, and supervision; (3) employment references; and (4) covenants not to compete and the employee's fiduciary duties owed to the employer. Beyond the scope of this article are decisions rendered in other areas of law affecting the employment relationship, including workers' compensation,¹ unemployment, wage payment,² and public sector employment.³

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1. *See, e.g.*, *Combs v. Va. Elec. & Power Co.*, 259 Va. 503, 525 S.E.2d 278 (2000) (holding that workers' compensation exclusivity bar precludes civil action for negligence where plaintiff injured with an aneurysm at work); *Cooley v. Tyson Foods, Inc.*, 257 Va. 518, 514 S.E.2d 770 (1999) (holding that the plaintiff failed to prove he was terminated in violation of Virginia Code section 65.2-308 solely because he intended to file a workers' compensation claim).

2. *See, e.g.*, *Pallone v. Marshall Legacy Inst.*, 97 F. Supp. 2d 742, 746 (E.D. Va. 2000) (holding that there is no private right of action under the Virginia Wage Payment Act); *Coley v. Historic Hotels, Inc.*, No. LF-1933-1, slip op. at 4 (Va. Cir. Ct. May 31, 2000) (Richmond City) (holding that an agreement to repay a severance payment through a wage deduction plan, even as a condition of reinstatement, does not violate the Virginia Wage Payment Act).

3. *See, e.g.*, *Arlington County v. White*, 259 Va. 708, 528 S.E.2d 706 (2000) (holding that the county lacked authority under the Dillon rule to extend insurance coverage to same-sex domestic partners under the county's self-funded health benefits plan); *City of Virginia Beach v. Hay*, 258 Va. 217, 518 S.E.2d 314 (1999) (holding that the city properly denied assistant city attorney access to the city's grievance procedure).

I. CLAIMS OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY⁴

Litigants continue to test the boundaries of the tort of wrongful discharge in violation of public policy. Undaunted by the recent defense victories in *Doss v. Jamco Inc.*,⁵ *Dray v. New Market Poultry Products, Inc.*,⁶ and *Connor v. National Pest Control Ass'n*,⁷ creative plaintiffs have continued to roam the legislative landscape for statutes expressive of Virginia's "public policy." In many recent cases, their search has not been in vain.

A. Virginia Human Rights Act / Discriminatory Discharge Claims⁸

In its 1994 decision in *Lockhart v. Commonwealth Education Systems Corp.*,⁹ the Supreme Court of Virginia, in a four to three decision, ruled that employees could maintain wrongful discharge actions for racial and gender discrimination based on the public policies underlying the Virginia Human Rights Act ("VHRA").¹⁰ The court reasoned that since the VHRA prohibits employment discrimination based on race and sex, employees discharged on the basis of such protected characteristics could challenge their discharges in a state tort action under the narrow public policy exception to employment-at-will announced in *Bowman v. State Bank of Keyville*.¹¹ The majority in *Lockhart* held that the public policy contained in the

4. For a comprehensive overview of the evolution of wrongful discharge in violation of public policy claims, see generally Thomas R. Bagby & Thomas M. Winn, III, Connor v. National Pest Control Association: *The Death Knell for Public Policy Discriminatory Discharge Claims?*, 11 J. CIV. LITIG. 149 (Summer 1999); Thomas M. Winn, III, *Annual Survey of Virginia Law: Employment Law*, 33 U. RICH. L. REV. 965 (1999); see also Thomas M. Winn, III, *The Supreme Court Opens the Back Door for Public Policy Discriminatory Discharge Claims*, 12 J. CIV. LITIG. 1 (Spring 2000).

5. 254 Va. 362, 492 S.E.2d 441 (1997).

6. 258 Va. 187, 518 S.E.2d 312 (1999).

7. 257 Va. 286, 513 S.E.2d 398 (1999).

8. For a more comprehensive overview of the evolution of public policy discriminatory discharge claims, see Bagby & Winn, *supra* note 4.

9. 247 Va. 98, 439 S.E.2d 328 (1994).

10. *Id.* at 106, 439 S.E.2d at 332. At that time, the VHRA provided, in pertinent part: "It is the policy of the Commonwealth of Virginia: 1. To safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status or disability . . . in employment . . ." VA. CODE ANN. § 2.1-715 (Cum. Supp. 1994).

11. *Lockhart*, 247 Va. at 106, 439 S.E.2d at 332 (citing *Bowman v. State Bank of Keyville*, 229 Va. 534, 331 S.E.2d 797 (1985)).

VHRA supported a public policy discriminatory discharge claim, despite what appeared to be clear language foreclosing causes of action based on the policies expressed in the Act.¹²

In response to *Lockhart*, the Virginia General Assembly promptly amended the VHRA to provide:

A. Nothing in this chapter creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions, except as specifically provided in subsection B and C of this section.

B. No employer employing more than five but less than fifteen persons shall discharge any such employee on the basis of race, color, religion, national origin or sex, or of age if the employee is forty years or older.

C. The employee may bring an action in a general district or circuit court having jurisdiction over the employer who allegedly discharged the employee in violation of this section. Any such action shall be brought within 180 days from the date of the discharge. The court may award up to twelve months' back pay with interest at the judgment rate as provided in 6.1-330-54. However, if the court finds that either party engaged in tactics to delay resolution of the complaint, it may (i) diminish the award or (ii) award back pay to the date of judgment without regard to the twelve-month limitation.

In any case where the employee prevails, the court shall award attorney's fees from the amount recovered, not to exceed twenty-five percent of the back pay awarded. The court shall not award other damages, compensatory or punitive, nor shall it order reinstatement of the employee.

D. Causes 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. Nothing in this section or 2.1-715 shall be deemed to alter, supersede, or otherwise modify the authority of the Council on Human Rights or of any local human rights or human relations commissions¹³

12. *Id.* At that time, the VHRA provided, in pertinent part, that:

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.

VA. CODE ANN. § 2.1-725 (Cum. Supp. 1994).

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

While there is little or no legislative history in Virginia, the legislature's intent in enacting the "Lockhart-Amendments" appeared to be plain: to reverse *Lockhart*.¹⁴

In *Doss v. Jamco Inc.*,¹⁵ the Supreme Court of Virginia confirmed that the "Lockhart-Amendments" manifested the General Assembly's intent to alter the common law and to limit actions based on violations of the policies reflected in the VHRA to applicable statutory causes of action and remedies.¹⁶ The court concluded that permitting the plaintiff to maintain a public policy claim based on alleged violations of the policy stated in the VHRA would circumvent and render meaningless the mandate of the amendments that actions for violations of such policies be "exclusively limited" to statutory causes of action.¹⁷ Thus, the court held that the 1995 amendments preclude plaintiffs from relying on the policies reflected in the VHRA as the basis for a common law claim for wrongful discharge.¹⁸

In 1999, the Supreme Court of Virginia, in *Conner v. National Pest Control Ass'n., Inc.*,¹⁹ held that the 1995 Amendments to the VHRA preclude actions based on violations of public policies enunciated in both the VHRA and other provisions of state, federal, or local statutes or ordinances.²⁰ In *Connor*, the plaintiff alleged that "her termination constituted discrimination . . . based on her gender, and that it violated the public policy against retaliation for complaints of discrimination in employment as articulated in the VHRA and other provisions of Virginia and federal law."²¹ In reaching its decision in *Connor*, the court concluded, as it had in *Doss*, that the VHRA's "exclusivity requirement would be circumvented and rendered meaningless if [the plaintiff] could maintain her common law action based upon an alleged violation of a policy enunciated in the VHRA by simply citing a different Code section or other source of public policy

14. In three cases that arose before the enactment of the "Lockhart-Amendments," the Supreme Court of Virginia held as actionable discharges based on: (1) disability discrimination, *Bradick v. Grumman Data Sys. Corp.*, 254 Va. 156, 486 S.E.2d 545 (1997); (2) sex discrimination, *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997); and (3) age discrimination, *Clark v. Manheim Servs. Corp.*, 38 Va. Cir. 479 (1996).

15. 254 Va. 362, 492 S.E.2d 441 (1997).

16. *Id.* at 371, 492 S.E.2d at 446.

17. *Id.*

18. *Id.*

19. 257 Va. 286, 513 S.E.2d 398 (1999).

20. *Id.* at 290, 513 S.E.2d at 400.

21. *Id.* at 288, 513 S.E.2d at 399.

which enunciated the same policy."²² Moreover, the court noted that the General Assembly made "statutory causes of action the exclusive avenues for pursuing a remedy for an alleged violation of any public policy 'reflected in' the VHRA . . . regardless of whether the policy is articulated elsewhere."²³ Accordingly, the supreme court affirmed the dismissal of plaintiff's claim.²⁴

After the *Doss* and *Connor* decisions, it appeared to some commentators that public policy discriminatory discharge claims were no longer available under Virginia common law.²⁵ Management-side labor and employment attorneys assumed that the long-term effects of *Doss* and *Connor* would be to channel employment discrimination claims against employers with fifteen or more employees back through the administrative procedures contemplated by the federal anti-discrimination statutes and that employees of certain small employers could be required to resort to the limited claims of employment discrimination specifically afforded by the VHRA. In short, management-side labor and employment attorneys assumed that the result of *Doss* and *Connor* would be to return the state of the law to its position prior to *Lockhart*,²⁶ with the addition of a limited statutory claim applicable only to certain small employers.²⁷ After the Supreme Court of Virginia's recent decision in *Mitchem v. Counts*,²⁸ however, it would appear that each of those assumptions is incorrect and, instead, uncertainty once again reigns supreme in this area of the law.

1. A New Breed of Public Policy Discrimination Claims

On January 14, 2000, the Supreme Court of Virginia rendered its decision in *Mitchem v. Counts*.²⁹ The supreme court addressed two issues: (1) whether the VHRA bars a common law action for wrongful discharge based on a violation of public policy not reflected in the

22. *Id.* at 289, 513 S.E.2d at 400.

23. *Id.* at 289-90, 513 S.E.2d at 400.

24. *Id.* at 290, 513 S.E.2d at 400.

25. *E.g.*, Bagby & Winn, *supra* note 4; Winn, *The Supreme Court Opens the Back Door for Public Policy Discriminatory Discharge Claims*, *supra* note 4; Winn, *Annual Survey of Virginia Law: Employment Law*, *supra* note 4.

26. *See, e.g.*, Winn, *Annual Survey of Virginia Law: Employment Law*, *supra* note 4, at 977.

27. *Id.*

28. 259 Va. 179, 523 S.E.2d 246 (2000).

29. *Id.* at 179, 523 S.E.2d at 246.

VHRA, when the conduct alleged also violates a public policy reflected in the VHRA and (2) whether a violation of the public policies embodied in two criminal statutes may support such a common law action.³⁰ In *Mitchem*, the plaintiff alleged that her former employer had discharged her after she refused to engage in a sexual relationship with him.³¹ She also alleged that on many occasions the defendant "massaged her shoulders, patted her buttocks, touched her leg, rubbed her knee, and hugged her against her will."³²

Count I of the plaintiff's motion for judgment was a claim "that her discharge violated the Commonwealth's public policy 'that all persons . . . are entitled to pursue and maintain employment free of discrimination based upon gender'" and that the "public policy is violated when a female employee 'must either consent to the commission of a crime against her person, or engage in a conspiracy to commit a crime, or both, to maintain her employment.'"³³ In support of her claim, the plaintiff cited several sources of public policy including the VHRA and several Virginia Code provisions relating to battery,³⁴ fornication,³⁵ and lewd and lascivious cohabitation.³⁶ The trial court sustained the defendant's demurrer to Count I, concluding that the 1995 amendments to the VHRA eliminated the VHRA as a source of public policy to support a common law wrongful discharge action and the criminal code sections cited by the plaintiff did not articulate public policies that supported the claim.³⁷

On appeal, the plaintiff contended that she was discharged from employment because she rejected her employer's alleged demands that she perform sexual acts in violation of the aforementioned criminal code provisions and because she would not consent to the commission of a battery upon her person.³⁸ The defendant contended that the plaintiff's allegations, if proven, would violate the public policies reflected in the VHRA and, therefore, could not support a wrongful discharge claim and that, in any event, criminal statutes

30. *Id.* at 183, 523 S.E.2d at 248.

31. *Id.*

32. *Id.*

33. *Id.*

34. VA. CODE ANN. § 18.2-57 (Repl. Vol. 1996).

35. *Id.* § 18.2-344 (Repl. Vol. 1996).

36. *Id.* § 18.2-345 (Repl. Vol. 1996).

37. *Mitchem*, 259 Va. at 183-84, 523 S.E.2d at 248.

38. *Id.* at 184, 523 S.E.2d at 249. At oral argument, the plaintiff withdrew her reliance on the VHRA as a source of public policy. *Id.*

do not “announce public policies in their texts,” and thus, cannot support a wrongful discharge claim.³⁹

a. The Majority Opinion

Justice Keenan, writing for the majority, began her analysis with the VHRA, noting that its preclusive provision in “Code § 2.1-725(D) is the controlling statute in this appeal.”⁴⁰ As noted above, Virginia Code section 2.1-725(D) provides in pertinent part: “Causes 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.”⁴¹ While the majority acknowledged its prior holdings in *Doss* and *Connor*, it distinguished these holdings from Virginia Code section 2.1-725(D), explaining:

In those cases, unlike the present case, the plaintiffs did not identify any public policy different from those reflected in the VHRA as the basis for their common law claims. Thus, in those cases, we did not address the central issue in the present appeal, whether Code § 2.1-725(D) bars a common law action for wrongful termination based on public policies not reflected in the VHRA, when the conduct alleged in the motion for judgment also violates a public policy reflected in the VHRA.⁴²

In evaluating whether the preclusive language of Virginia Code section 2.1-725(D) barred the plaintiff’s claim, the majority first noted that Virginia Code section 2.1-725(D) was “enacted . . . in derogation of the common law” and “must be strictly construed.”⁴³ The majority observed in this regard that “[a] statutory change in the common law is limited to that which is expressly stated in the statute or necessarily implied by its language because there is a presumption that no change was intended.”⁴⁴ Thus, the majority concluded that Virginia Code section 2.1-725(D) abrogated the common law wrongful discharge claim only to the extent such claims are

39. *Id.* at 185, 523 S.E.2d at 249.

40. *Id.*

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

42. *Mitchem*, 259 Va. at 186, 523 S.E.2d at 250.

43. *Id.* (citing *Chesapeake & Ohio Ry. Co. v. Kinzer*, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965)).

44. *Id.* (citing *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988); *Strother v. Lynchburg Trust & Sav. Bank*, 155 Va. 826, 833, 156 S.E. 426, 428 (1931)).

based on public policies (i.e., sex) reflected in the VHRA.⁴⁵ In doing so, the majority rejected the defendant's contention that the claim was precluded because the alleged conduct also violated the public policy in the VHRA against gender discrimination.⁴⁶

The majority next rejected the defendant's contention that the public policies embodied in Virginia Code sections 18.1-344 and 18.1-345 cannot support a common law action for wrongful termination because those statutes do not expressly state such public policies.⁴⁷ The majority explained:

We find no merit in this contention. Laws that do not expressly state a public policy, but were enacted to protect the property rights, personal freedoms, health, safety, or welfare of the general public, may support a wrongful discharge claim if they further an underlying, established public policy that is violated by the discharge from employment.⁴⁸

The majority limited this sweeping statement by citing *Dray v. New Market Poultry Products, Inc.*⁴⁹ and emphasizing that to rely upon such a statute a plaintiff must be a member of the class of persons the specific policy was designed to protect.⁵⁰ The majority noted in this regard that the cited criminal statutes were enacted for the protection of the general public and that the plaintiff thus was a member of that class of persons whom the statutes were designed to protect.⁵¹ Accordingly, the court held that plaintiff's wrongful discharge claim was actionable to the extent it relied on Virginia Code sections 18.1-344 and 18.1-345.⁵²

Finally, the majority agreed with the defendant that the plaintiff could not rely on Virginia Code section 18.1-57 (assault and battery) as a source of public policy upon which to base her wrongful dis-

45. *Id.* at 187, 523 S.E.2d at 250.

46. *Id.* The majority rejected the defendant's argument on three bases: (1) the plain language of the statute does not provide for such preclusion; (2) the same conduct can support more than one theory of recovery; and (3) when extended to its logical conclusion, an employer would be permitted to discharge any employee who refuses to commit a crime (e.g., cross burning or painting a swastika on a synagogue) at the employer's direction, as long as the employer's conduct also violates a public policy reflected in the VHRA (discrimination based on race or religion). *Id.* at 187-88, 523 S.E.2d at 250-51.

47. *Id.* at 189, 523 S.E.2d at 251.

48. *Id.*

49. 258 Va. 187, 518 S.E.2d 312 (1999).

50. *Mitchem*, 259 Va. at 189, 523 S.E.2d at 251-52.

51. *Id.* at 189, 523 S.E.2d at 252.

52. *Id.* at 190, 523 S.E.2d at 252.

charge claim.⁵³ The plaintiff alleged that she was fired for refusing to “consent to commission of a battery upon her person.”⁵⁴ The majority implicitly distinguished Virginia Code section 18.1-57 from Virginia Code sections 18.1-344 and 18.1-345 insofar as the crime of assault and battery presumes a lack of consent, whereas consent is irrelevant to the crimes of fornication and lewd and lascivious cohabitation.⁵⁵

b. The Dissenting Opinion

Justice Kinser, with whom Chief Justice Carrico and Justice Compton joined, authored the dissenting opinion. Justice Kinser began by noting the similarity of the plaintiff’s claim to the claim alleged by the plaintiff in *Lockhart*.⁵⁶ Justice Kinser further pointed out that after *Lockhart*, the court consistently has characterized the conduct to which the plaintiff in *Lockhart* was subjected as “gender discrimination.”⁵⁷ This point was critical to the dissent because

even though *Mitchem* disavows any reliance on the VHRA, the sexual harassment that she allegedly endured prior to discharge, as well as Counts’ termination of her employment because she refused to have a sexual relationship with him, if proven true, would violate

53. *Id.* at 190-91, 523 S.E.2d at 252-53.

54. *Id.* at 191, 523 S.E.2d at 252-53. The court appeared to draw a meaningful distinction between an allegation that an employee was discharged for refusing to commit the crime and an allegation that she was fired for refusing to consent to the commission of a crime. *See id.* at 190-91, 523 S.E.2d at 252-53. The implication being that a discharge for refusing to commit the crime of assault and battery may state a claim. Other decisions have blurred or outright ignored this subtle but dispositive distinction. *See Peyton v. United S. Aluminum Prods., Inc.*, 49 Va. Cir. 187 (Cir. Ct. 1999) (Richmond City) (recognizing VA. CODE ANN. § 18.2-57 (Repl. Vol. 1996) (assault and battery) and VA. CODE ANN. § 18.2-67.4 (Repl. Vol. 1996) (sexual battery) as viable sources of public policy, but failing to address explicitly whether the discharge was for refusing to consent, as opposed to refusing to commit, the crimes).

55. *See Mitchem*, 259 Va. at 191, 523 S.E.2d at 252-53.

56. *Id.* at 192, 523 S.E.2d at 253 (Kinser, J., dissenting). Justice Kinser noted that Wright alleged that her employer “approached her from behind, kissed her cheek and” “physically seized her, grabbed her and hugged her without her consent.” She also alleged that her employer repeatedly made abusive, inappropriate, and harassing remarks to her, and ultimately told her “get out” after she advised her employer that she did not intend to be subjected to that kind of treatment at work.

Id. at 192, 523 S.E.2d at 253-54 (Kinser, J., dissenting)(quoting *Lockhart*, 247 Va. at 101-02, 439 S.E.2d at 329-30).

57. *Id.* at 193, 523 S.E.2d at 254 (Kinser, J., dissenting) (citing *Bailey v. Scott-Gallagher, Inc.*, 253 Va. 121, 126, 480 S.E.2d 502, 505 (1997); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 98, 465 S.E.2d 806, 809 (1996)).

a public policy reflected in the VHRA. The distinction that Mitchem attempts to make and which the majority accepts, that she was fired, not because of "sex," but because she refused to engage in conduct that would have violated certain criminal statutes, merely places a different label on "sex" discrimination and thus exalts form over substance. The re-labeling of her claim does nothing to alter the facts alleged by Mitchem or the law governing those allegations.⁵⁸

Relying on the court's decision in *Connor*, Justice Kinser opined that

an at-will employee in Virginia cannot maintain a cause of action based on the public policy exception to the at-will employment doctrine if the public policy is one that is "reflected" in the VHRA, even when the employee does not rely on or cite the VHRA because the policy is found in other statutes.⁵⁹

Because the defendant's alleged conduct, if proven, would violate policies "reflected" in the VHRA, Justice Kinser concluded that the plaintiff's "[c]ause[] of action [is one] based upon the public policies reflected in [the VHRA]," despite her attempt to place a different label on her cause of action.⁶⁰

More fundamentally, and practically for employers in Virginia, Justice Kinser expressed concern that the majority's decision would

create[] an avenue through which all employees asserting allegations similar to Mitchem's can bypass the General Assembly's clear intent, as expressed in Code § 2.1-725(D), to "abrogate the common law with respect to causes of action for unlawful termination of employment based upon the public polices reflected in the [VHRA]."⁶¹

2. Future Implications of *Mitchem*

After *Connor*, it appeared that public policy discriminatory dis-

58. *Id.* at 193-94, 523 S.E.2d at 254 (Kinser, J., dissenting).

59. *Id.* at 194-95, 523 S.E.2d at 255 (Kinser, J., dissenting).

60. *Id.* at 195, 523 S.E.2d at 255 (Kinser, J., dissenting) (quoting VA. CODE ANN. § 2.1-725(D) (Repl. Vol. 1995)).

61. *Id.* (Kinser, J., dissenting) (quoting *Doss*, 254 Va. at 372, 492 S.E.2d at 447). Justice Kinser also took issue with the majority's hypothetical examples concerning the discharge of an employee for refusing to engage in cross-burning or painting a swastika on a synagogue. *See id.* at 195-96, 523 S.E.2d at 255-56 (Kinser, J., dissenting). Justice Kinser pointed out that the discharges would not be in violation of the policies reflected in the VHRA (and thus would be actionable) because the employer's act of discrimination based on race or religion would not be directed toward the employee, but instead would be directed toward a third party. *Id.* at 196, 523 S.E.2d at 255-56 (Kinser, J., dissenting).

charge claims no longer should have been available under Virginia common law. *Mitchem*, however, creates a new avenue for creative plaintiffs' counsel to assert common law discriminatory discharge claims involving allegations of sexual harassment. *Mitchem*-type claims, like *Lockhart*-type claims previously, undoubtedly will emerge as the claim *du jour* for plaintiffs' counsel seeking to avoid the restrictions inherent in claims asserted under federal anti-discrimination laws.

Mitchem-type discriminatory discharge actions differ from federal actions in a number of critical ways. For example, while Title VII applies to employers with at least fifteen employees,⁶² *Mitchem*-type wrongful discharge actions contain no such restriction. Title VII also provides caps on compensatory and punitive damages,⁶³ but a *Mitchem*-type action is not bound by such caps. Indeed, after *Mitchem*, employers in Virginia face potential liability for certain claims of sexual harassment greatly exceeding potential exposure under the federal acts. For example, under the Civil Rights Act of 1991, compensatory and punitive damages are capped from \$50,000 to \$300,000 depending on the size of the employer.⁶⁴ Although Virginia Code section 8.01-38.1 caps punitive damages at \$350,000,⁶⁵ there is no compensatory damage ceiling. Thus, after *Mitchem*, the smallest Virginia employer is exposed to potentially unlimited damages while the largest non-Virginia employer has compensatory and punitive damages capped under Title VII at \$300,000.

Moreover, Title VII claims require the filing of an administrative charge, an agency investigation, and attempts at voluntary conciliation before a lawsuit may be filed,⁶⁶ but *Mitchem*-type actions present no such prerequisites to suit. Finally, although federal administrative charges must be filed within 300 days,⁶⁷ a longer statute of limitations applies to wrongful discharge cases.⁶⁸ Finally, and perhaps most significantly, the virtual unavailability of summary judgment in state court, as opposed to the well-established body of sum-

62. 42 U.S.C. § 2000e(b) (1994).

63. *Id.* § 1981a(a)-(b) (1994).

64. *Id.* § 1981a(b)(3) (1994).

65. VA. CODE ANN. § 8.01-38.1 (Repl. Vol. 2000).

66. 42 U.S.C. § 2000e-5 (1994).

67. *Id.*

68. VA. CODE ANN. § 8.01-248 (Repl. Vol. 2000) (applying a two-year statute of limitations to wrongful discharge claims arising on or after July 1, 1995); *Purcell v. Tidewater Constr. Corp.*, 250 Va. 93, 95, 458 S.E.2d 291, 293 (1995).

mary judgment precedent in federal court, looms as a significant hazard for employers after *Mitchem*.

While *Mitchem* involved allegations of sexual harassment and discrimination, plaintiffs certainly will attempt to identify additional state criminal or other statutes that express policies on which claims of other types of harassment and discrimination may be based.⁶⁹ It remains to be seen whether the General Assembly will respond swiftly to *Mitchem* with the decisiveness that led to the 1995 Amendments to the VHRA. Until such order is restored, employers potentially face significantly enhanced risks in the defense of discriminatory discharge claims, particularly those involving allegations of sexual harassment.

B. *Public Policy Wrongful Discharge Claims Based on Other Civil and Criminal Statutes*

Aside from claims seeking to redress alleged discriminatory discharges, plaintiffs over the past year have had mixed results in their attempts to rely on various other civil and criminal statutes as expressions of "public policy" on which to ground public policy wrongful discharge claims.

1. Cases Rejecting Such Claims

In *Dray v. New Market Poultry*,⁷⁰ the Supreme Court of Virginia rejected the plaintiff's attempted reliance on the Virginia Meat and Poultry Products Inspection Act⁷¹ in support of a wrongful termination claim because the Act "does not confer any rights or duties upon her or any other similarly situated employee of the defendant."⁷² The court later reaffirmed *Dray* in *City of Virginia Beach v. Harris*,⁷³ a case decided on the same day as *Mitchem*.

In *Harris*, the supreme court rejected a discharged police officer's attempted reliance on Virginia Code section 18.2-460 (obstruction of

69. See, e.g., Winn, *Annual Survey of Virginia Law: Employment Law*, *supra* note 4, at 977-85.

70. 258 Va. 187, 518 S.E.2d 312 (1999).

71. VA. CODE ANN. §§ 3.1-884.17 to -884.35 (Repl. Vol. 1994 & Cum. Supp. 2000).

72. *Dray*, 258 Va. at 191, 518 S.E.2d at 314.

73. 259 Va. 220, 523 S.E.2d 239 (2000).

justice) and Virginia Code section 15.1-138 (enumerating duties of police officers).⁷⁴ The court began its analysis by stating that it had “found a public policy sufficient to allow a common law wrongful discharge claim to go forward as an exception to the employment-at-will doctrine in only two instances.”⁷⁵ The court then proceeded to define the parameters for a cognizable statutory source of public policy:

The first instance involves laws containing explicit statements of public policy (e.g. “It is the public policy of the Commonwealth of Virginia [that] . . .”). The second one involves laws that do not explicitly state a public policy, but instead are designed to protect the “property rights, personal freedoms, health, safety or welfare of the people in general.” Such laws must be in furtherance of “an [underlying] established public policy” that the discharge from employment violates.⁷⁶

Once a plaintiff has satisfied the court that a statute is a viable source of public policy, the plaintiff then must demonstrate that he or she is “a member of the class of individuals that the specific public policy is intended to benefit in order to state a claim.”⁷⁷

The court explained that Virginia Code section 18.2-460 “does not explicitly state any public policy, but like all criminal statutes, it has as an underlying policy the protection of the public’s safety and welfare.”⁷⁸ On the other hand, the court explained, Virginia Code section 15.1-138 merely describes the powers and duties of a police force and was not designed to protect any public rights pertaining to “property . . . , personal freedoms, health, safety, or welfare.”⁷⁹ Accordingly, the court reversed the judgment of the circuit court and entered final judgment in favor of the defendants on the grounds that the statutes relied upon by the plaintiff “do not fit within either of the instances where we have found public policies that support a *Bowman*-type cause of action.”⁸⁰

In *Francis v. Computer Learning Centers, Inc.*,⁸¹ the Fourth Circuit, citing *Dray*, also affirmed the dismissal of a public policy

74. *Id.* at 233-34, 523 S.E.2d at 245-46.

75. *Id.* at 232, 523 S.E.2d at 245.

76. *Id.* at 233, 523 S.E.2d at 245 (alteration in original) (citations omitted).

77. *Id.*

78. *Id.* at 233, 523 S.E.2d at 246.

79. *Id.* at 234, 523 S.E.2d at 246 (quoting *Miller v. SEVAMP, Inc.*, 234 Va. 462, 468, 362 S.E.2d 915, 918 (1987)).

80. *Id.* at 233, 523 S.E.2d at 245-46.

81. No. 98-2801, 1999 U.S. App. LEXIS 26998 (4th Cir. Oct. 27, 1999) (per curiam).

wrongful discharge claim.⁸² In *Francis*, the plaintiff alleged he was terminated for refusing to participate in his employer's allegedly illegal and fraudulent activities.⁸³ Specifically, the plaintiff contended that he was discharged after being asked to contribute \$1,000 to the re-election campaign of a politician and then submit to the company a bogus reimbursement of that amount.⁸⁴ The plaintiff contended that his discharge violated Virginia public policy as embodied in the Virginia Consumer Protection Act⁸⁵ and certain regulations of the State Council of Higher Education for Virginia enacted pursuant to Virginia statute.⁸⁶ In affirming the dismissal of plaintiff's claim, the court did not reach the issue of whether the statutes in question were cognizable sources of policy, instead holding that the plaintiff did not fall within the "zone of interests that the relevant [statute and regulations] set out to protect," even assuming they were otherwise valid sources of public policy.⁸⁷

2. Cases Recognizing Such Claims

In *King v. Donnkenny, Inc.*,⁸⁸ the plaintiff alleged that she was terminated after she reported first to her supervisor, and ultimately to the company's president, that certain corporate officers were engaged in an illegal accounting scheme designed to fraudulently inflate the company's stock prices.⁸⁹ The plaintiff alleged that the officers' conduct violated Virginia Code section 13.1-502 (fraudulent offer or sale of securities) and that she had been terminated for "refus[ing] to participate in violating the law."⁹⁰ In allowing the claim to go forward, the United States District Court for the Western District of Virginia noted, "Virginia courts are becoming increasingly sympathetic toward plaintiffs who are fired for bringing an employer's criminal transgressions to light where the underlying public policy in outlawing the conduct dictates that citizens are entitled to live

82. *Id.* at *1.

83. *Id.* at *1-2.

84. *Id.* at *2.

85. VA. CODE ANN. §§ 59.1-196 to -207 (Repl. Vol. 1998 & Cum. Supp. 2000).

86. *Francis*, 1999 U.S. App. LEXIS 26998, at *2.

87. *Id.* at *3.

88. 84 F. Supp. 2d 736 (W.D. Va. 2000).

89. *Id.* at 738.

90. *Id.* at 740.

free from such activity."⁹¹

In *McGee v. Williamsburg Townhouses*,⁹² the Norfolk Circuit Court overruled the defendant's demurrer to a wrongful discharge in violation of public policy claim that was grounded upon Virginia Code section 36-96.5, which prohibits threatening, coercing, intimidating or interfering with any person's exercise or enjoyment of any right granted or protected by Virginia's Fair Housing Act.⁹³ Holding *sub silentio* that the statute in question was a viable source of public policy, the court held that the facts as alleged in the lawsuit indicated that the plaintiff's discharge may have been the result of her "aid[ing] or encourag[ing] any other person in the exercise or enjoyment of, any rights granted or protected" by the Virginia Fair Housing Act.⁹⁴

In *Anderson v. ITT Industries Corp.*,⁹⁵ the United States District Court for the Eastern District of Virginia traced the development of the tort, analytically distilled the extant caselaw to its essence and allowed a plaintiff to proceed in reliance on alleged violations of two criminal statutes.⁹⁶ The plaintiff contended that he had been discharged for refusing to falsify resumes to be submitted pursuant to bids on government contracts.⁹⁷ The court began its analysis by setting forth the parameters of the claim, consistent with the Supreme Court of Virginia's holding in *Harris*, as follows:

[S]tatutes embodying a public policy sufficient to form the basis of a wrongful discharge claim fall into two categories. The first is a statute stating explicitly that it expresses a public policy of the Commonwealth. The second, far more common category consists of statutes that do not explicitly state a public policy, but rather "are designed to protect the property rights, personal freedoms, health, safety or welfare of the people in general," and thereby further an underlying established public policy that is violated by the discharge

91. *Id.*; see also *Dye v. Matewan Bancshares, Inc.*, No. CL 98-261, slip op. at 2 (Va. Cir. Ct. May 10, 2000) (Tazewell County) (denying demurrer and stating that "[i]t is inconceivable that an employer requiring an employee to commit criminal acts in order to keep her job is not against the public policy of the Commonwealth of Virginia" in cases involving alleged termination in retaliation for refusal to perform securities sales work in violation of Virginia Code sections 13.1-501 through 13.1-527.3); VA. LAW. WKLY., June 12, 2000, A-12 (discussing *Dye*).

92. No. L99-2574, slip op. at 1-2 (Va. Cir. Ct. Feb. 25, 2000) (Norfolk City).

93. *Id.*

94. *Id.* at 2.

95. 92 F. Supp. 2d 516 (E.D. Va. 2000).

96. See *id.* at 520-23.

97. *Id.* at 517.

at issue. Yet, even if a statute falls within one of these categories, it may not serve as the basis of a *Bowman* claim, unless the aggrieved employee also shows that he or she is a member of the class of individuals the public policy is intended to benefit. In other words, to state a *Bowman* claim, the discharged employee must show that he or she "fell within the protective reach of the statute which supplied the public policy component of his or her claim."⁹⁸

The court observed that Virginia Code sections 18.2-172 (forgery) and 18.2-178 (obtaining money by false pretenses), the criminal statutes upon which the plaintiff based her claim, were "clearly designed to protect the welfare and property rights of the general public."⁹⁹

The defendant contended that the plaintiff was not within the statutes' protective reach because the statutes were designed to protect the victims of the crimes in question, and the plaintiff would not have been the victim of the crimes had he consummated them.¹⁰⁰ The court, citing *Mitchem*, dispensed with this argument, observing:

Like the plaintiff in *Mitchem*, plaintiff here was discharged for allegedly refusing to engage in conduct prohibited by a Virginia criminal statute. And, like the plaintiff in *Mitchem*, plaintiff here falls within the class of individuals the statutes relied on were designed to protect, because the statutes imposed upon plaintiff a legal duty not to engage in the prohibited conduct. *Mitchem* and *Dray* make clear that an employee does not have to be the victim of the crime he or she is asked to commit to fall within the statute's protective reach. Rather, it is sufficient that the statute imposes upon the employee a duty not to engage in the conduct ordered by the employer. The statutes plaintiff cites plainly imposed a duty on him not to commit the crimes of forgery or obtaining money under false pretenses. As a result, plaintiff is within those statutes' protective reach and he states a valid *Bowman* wrongful discharge claim where, as here, he alleges that his employer fired him for refusing to engage in statutorily prohibited conduct.¹⁰¹

Anderson would appear to be an accurate analysis of the current state of the law of wrongful discharge after *Dray*, *Harris*, and *Mitchem* and provides a helpful roadmap for assessing the validity of such claims in Virginia.

98. *Id.* at 520-21 (quoting *City of Virginia Beach v. Harris*, 259 Va. 220, 232, 523 S.E.2d 239, 245 (2000) and *Leverton v. Allied Signal, Inc.*, 991 F. Supp. 486, 493 (E.D. Va. 1998)).

99. *Id.* at 521.

100. *Id.*

101. *Id.* at 523.

II. NEGLIGENCE IN HIRING, RETENTION, AND SUPERVISION

Tort actions in which the employer is alleged to be responsible for the acts of its employees continue to receive increasing attention in the Virginia courts as plaintiffs seek tort remedies for alleged wrongs arising out of the employment relationship as an alternative to, or in addition to, pursuing federal remedies. Outgrowths of the doctrine of respondeat superior, claims of negligent hiring, negligent retention, and negligent supervision are becoming more commonplace and were actively litigated in Virginia courts this year.

In *Goforth v. Office Max*,¹⁰² the Norfolk Circuit Court addressed two alleged instances of tortious conduct against the plaintiff by an employee of Office Max.¹⁰³ When the first allegedly tortious act occurred, the plaintiff was a customer/invitee at Big Lots, a store adjoining the Office Max where the employee worked.¹⁰⁴ While the defendant was on a break from his job at Office Max, he went to Big Lots and allegedly committed a battery against the plaintiff on Big Lots's premises.¹⁰⁵

The second tortious act purportedly occurred when the plaintiff later entered Office Max as an invitee and encountered the defendant, who was still employed by Office Max.¹⁰⁶ While the plaintiff and a friend shopped, the defendant allegedly followed them and from time to time made facial and body gestures toward the plaintiff.¹⁰⁷ On the issues of negligent hiring and retention, the jury returned a verdict for the plaintiff.¹⁰⁸ Thereafter, Office Max moved for a new trial or summary judgment.¹⁰⁹

Office Max cited three grounds for its motion pertaining to the battery at Big Lots: (1) it did not owe a duty to the plaintiff for the defendant's criminal act committed at Big Lots; (2) it was not negligent in hiring the defendant; and (3) even if it were negligent in hiring the defendant, its negligence was not the proximate cause of the plaintiff's injury.¹¹⁰ The court did not examine the latter two issues, as they were fact questions properly left to the jury, but it did

102. 48 Va. Cir. 463 (Cir. Ct. 1999) (Norfolk City).

103. *Id.* at 468.

104. *Id.* at 464.

105. *Id.*

106. *Id.* at 468.

107. *Id.*

108. *Id.* at 464.

109. *Id.*

110. *Id.*

determine that Office Max owed the plaintiff no legal duty when she was battered at Big Lots.¹¹¹

In so deciding, the court stated that an employer was not "the insurer of the employee's behavior,"¹¹² but that liability for negligent hiring occurs when it should have been foreseeable that the employee posed a threat of injury to others because of the circumstances of the employment.¹¹³ The court observed that three factors are typically present when an employer has a duty to a third party: (1) "the plaintiff and the employee were both rightfully in the place the tort occurred,"¹¹⁴ (2) "the plaintiff met the employee as a direct result of his employment,"¹¹⁵ and (3) "the employer must have received some benefit, even if only potential or indirect, from the meeting between plaintiff and employee."¹¹⁶ The court decided that because these three factors did not exist, Office Max was not liable for the incident at Big Lots.¹¹⁷

The court then turned to the encounter between the plaintiff and the defendant at Office Max. The plaintiff's claim of negligent retention against Office Max was based on the torts of intentional infliction of emotional distress, stalking, and assault.¹¹⁸ First, the court stated that damages for emotional distress could not be awarded in the absence of some physical impact unless the conduct was willful and wanton.¹¹⁹ Although the court indicated Office Max's retention of the defendant could have been negligent, it was not willful and wanton, and therefore, the store was not liable for the tort of intentional infliction of emotional distress.¹²⁰ Second, the court acknowledged that stalking is a crime in Virginia, but determined there was no private right of action for stalking.¹²¹ Since the defendant could not be civilly liable for stalking, the court refused to hold Office Max liable.¹²² Finally, the court examined the claim of assault and found that although no assault occurred when the defendant followed the

111. *Id.*

112. *Id.* at 465.

113. *Id.* (citing *Ponticas v. K.M.S. Inv.*, 331 N.W.2d 907 (Minn. 1983)).

114. *Id.* at 467.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 468-69.

119. *Id.* at 468.

120. *Id.* at 469.

121. *Id.*

122. *Id.*

plaintiff through the store, one may have occurred when he approached her with his arms raised.¹²³ Office Max may have been liable for this tort based on its negligent retention of the defendant.¹²⁴

In the final analysis, the court set aside the verdict because the jury was improperly permitted to hold Office Max liable for the incident at Big Lots.¹²⁵ It ordered a new trial to determine whether Office Max was liable for the incident at Office Max and what damages were appropriate.¹²⁶

The issues of negligent hiring and retention also were addressed in *Stansfield v. Goodyear Tire & Rubber Co.*¹²⁷ In that case, the plaintiff alleged that she was raped and sodomized by an employee of MSS, Inc., an agent of Goodyear.¹²⁸ The plaintiff met the employee when she brought her car to MSS for maintenance; the employee drove her home while her car was repaired and picked her up when it was ready.¹²⁹ She had never met the employee before then, and the two had no contact from the time of the meeting until the attack about four months later.¹³⁰ The plaintiff alleged that both MSS and Goodyear were liable for her injuries because of their negligent hiring and retention of the employee.¹³¹

The employee filled out an application before he was hired, admitting that he had been convicted of distributing a controlled dangerous substance.¹³² Had MSS completed a background check on the employee, it would have learned that the employee also had convictions for robbery with a deadly weapon (three counts) and use of a handgun in the commission of a felony (three counts).¹³³ The plaintiff argued that MSS failed to exercise reasonable care when it did not investigate the crime the employee had admitted or his background as a whole.¹³⁴

In its ruling on defendants' demurrers, the court stated that even

123. *Id.* at 469-70.

124. *Id.* at 470.

125. *Id.*

126. *Id.*

127. No. 21924, 1999 WL 1419253 (Va. Cir. Ct. Oct. 13, 1999) (Loudoun County).

128. *Id.* at *1.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

if MSS had performed a background check, it would not have had notice of the employee's propensity to commit sexual assault.¹³⁵ Furthermore, no fact pleaded by the plaintiff indicated that MSS was put on notice after hiring the employee that he might commit a sexual assault.¹³⁶ For those reasons, the court decided that claims of negligent hiring and retention against MSS and Goodyear must fail.¹³⁷ The court sustained the demurrers and entered final judgment in favor of the defendants.¹³⁸

In *Permison v. Vastera, Inc.*,¹³⁹ the plaintiff, an employee of Vastera, alleged that he was assaulted and verbally threatened by another employee while he (the plaintiff) was being fired.¹⁴⁰ He asserted claims of negligent hiring, negligent retention, and negligent supervision.¹⁴¹ In its demurrer, Vastera argued that the first two claims were insufficiently alleged in the motion for judgment.¹⁴² Vastera argued that the third claim failed because Virginia does not recognize negligent supervision as a legitimate cause of action.¹⁴³

The court agreed that Virginia law is clear in its rejection of an independent cause of action for negligent supervision, citing *Chesapeake & Potomac Telephone Co. v. Dowdy*,¹⁴⁴ and, accordingly, sustained the demurrer on the third count.¹⁴⁵ The court declined to permit the plaintiff to amend the motion for judgment because the Virginia Workers' Compensation Act provided the exclusive remedy for workers injured by an intentional tort of a co-worker.¹⁴⁶ The plaintiff was in the process of being terminated when the alleged incident occurred, and, as such, he was still an employee of Vastera

135. *Id.* at *2.

136. *Id.*

137. *Id.*

138. *Id.* at *1.

139. No. 23096, slip op. at 1 (Va. Cir. Ct. Mar. 10, 2000) (Loudoun County).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. 235 Va. 55, 365 S.E.2d 751 (1988) (declining to recognize the tort of negligent supervision or impose a duty of reasonable care upon an employer in the supervision of its employees); see also *Call v. Shaw Jewelers, Inc.*, No. 3:98CV449, 1999 U.S. Dist. LEXIS 636 (E.D. Va. Jan. 7, 1999) (unpublished decision); *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429, 432 (Cir. Ct. 1998) (Fairfax County) (explaining that "[i]n Virginia there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances and we will not create one here").

145. See *Permison*, No. 23096, slip op. at 2.

146. See *id.* (citing *Haddon v. Metro. Life Ins. Co.*, 239 Va. 397, 389 S.E.2d 712 (1990)).

who must seek a remedy pursuant to the Workers' Compensation Act. Accordingly, the motion for judgment was dismissed.¹⁴⁷

III. EMPLOYMENT REFERENCES

Prudent employers historically have been reluctant to provide prospective employers detailed and accurate assessments of the performance and conduct of their former employees. This reluctance generally is born of a fear of liability for defamation claims.¹⁴⁸ Out of concern for such claims, employers often refuse to provide any information other than name, rank and serial number in employment references. This practice inhibits a prospective employer's ability to gather important information about an applicant. To further complicate matters, employers may be held liable for negligent references resulting from their failure to disclose information relating to a former employee's violent acts, other criminal conduct or unfitness to perform a particular job.

Presumably to address these issues and to encourage greater sharing of helpful and important information among employers, the Virginia legislature recently passed, and Governor Gilmore signed, House Bill 1126 which offers employers limited immunity for communicating job-related information about an employee to a prospective or current employer.¹⁴⁹ The new law provides:

[A]ny employer who, upon request by a person's prospective or current employer, furnishes information about that person's professional conduct, reasons for separation or job performance, including... information contained in any written performance evaluations, shall be immune from civil liability... provided that the employer is not acting in bad faith... or with reckless disregard for whether [the information] is false.¹⁵⁰

Punitive damages may be awarded if the employer acts in bad faith.¹⁵¹

The immunity would apply when a prospective or current em-

147. *Id.*

148. *See, e.g.,* *Doran v. Sigmon*, No. 97-0023-D, 1998 U.S. Dist. LEXIS 6219 (W.D. Va. Mar. 23, 1998) (holding that a private healthcare agency could be liable for allegedly defamatory comments made about an ex-employee by its office manager); *Eslami v. Global One Communications, Inc.*, 48 Va. Cir. 17, 23 (Cir. Ct. 1999) (Fairfax County) (overruling the defendant's demurrer to a defamation claim; statements that employee "did not fit in" and "lost his temper" could constitute the basis of a defamation claim).

149. VA. CODE ANN. § 8.01-46.1 (Repl. Vol. 2000).

150. *Id.* § 8.01-46.1(A) (Repl. Vol. 2000).

151. *Id.* § 8.01-46.1(B) (Repl. Vol. 2000).

ployer requests information about an individual.¹⁵² The immunity would not apply to statements volunteered to others or to information communicated to someone other than a prospective or current employer.¹⁵³ The potential scope of the immunity is broad in that it would protect entities with one or more employee(s).¹⁵⁴ Additionally, it defines "employee" as any person who provided service to an employer, whether or not they ever received payment for their services.¹⁵⁵

Facts, data and opinions are all covered by this immunity.¹⁵⁶ The new law provides some measure of protection to an employer who communicates information about a person's professional conduct, reasons for separation, job performance, attendance history, disciplinary actions and productivity, as well as information contained in written performance evaluations.¹⁵⁷ All such communications should be job-related and narrowly tailored to avoid claims of bad faith.

Employers are presumed to have acted in good faith when responding to a prospective or current employer.¹⁵⁸ Therefore, a plaintiff must prove by clear and convincing evidence that an employer acted in bad faith to overcome the presumption.¹⁵⁹ A plaintiff could do this by showing that the employer disclosed the information under one of the following three circumstances: (1) with knowledge that the information was false; (2) with reckless disregard for whether it was false or not; or (3) with the intent to deliberately mislead.¹⁶⁰ Should a plaintiff meet this elevated burden and prove bad faith, the employer will lose its immunity and may be vulnerable. Plaintiffs nonetheless probably will not be deterred from bringing defamation and retaliation claims in reliance on the "bad faith" provision.

The new law applies only to claims that arise on or after July 1, 2000.¹⁶¹ Until the immunity under this new law is tested in the courts, employers would be wise to limit the information they give in employment references, as they have done in the past. Additionally,

152. *Id.* § 8.01-46.1(C) (Repl. Vol. 2000).

153. *See id.*

154. *See id.*

155. *Id.* § 8.01-46.1 (Repl. Vol. 2000).

156. *See id.*

157. *See id.*

158. *Id.* § 8.01-46.1(A) (Repl. Vol. 2000).

159. *See id.*

160. *Id.*

161. *Id.*

prospective employers should consider the use of background and criminal history checks to assist them in making wise hiring decisions and to avoid potential negligent hiring claims. To obtain such information, the Fair Credit Reporting Act requires proper disclosures and authorizations.¹⁶²

IV. COVENANTS NOT TO COMPETE AND THE FIDUCIARY DUTY OF LOYALTY

Cases involving the duties, created by both an employee's inherent fiduciary duties and contract, flowing from employee to employer continued to receive a great deal of coverage in the Virginia courts.

In *Cliff Simmons Roofing, Inc. v. Cash*,¹⁶³ the Rockingham County Circuit Court addressed the enforceability of an employee non-compete agreement that had no geographic restrictions.¹⁶⁴ A few months before leaving Cliff Simmons Roofing, the defendant signed an "Employee Non-Compete Agreement" at the request of his employer.¹⁶⁵ The agreement stated in part that the defendant agreed "not to directly or indirectly compete with the business of the company . . . for a period of one year."¹⁶⁶ "Not compete" was defined as not being involved with another company as an employee, owner, manager, operator, or consultant if the business was "substantially similar to or competitive with" the company.¹⁶⁷ The company brought a bill of complaint and an application for a temporary injunction to enjoin the defendant from working in the roofing business.¹⁶⁸ Cash filed a demurrer alleging that the Non-Compete Agreement was unreasonable and unenforceable as against public policy.¹⁶⁹

The court cited three criteria for determining the validity of a non-compete agreement: (1) whether the restraint was reasonable in that it was no greater than necessary to protect the employer's business interests; (2) whether the restraint was reasonable and not unduly oppressive in limiting the ability of the employee to earn a livelihood;

162. 15 U.S.C. § 1681a-1681t (1994 & Supp. 1998).

163. 49 Va. Cir. 156 (Cir. Ct. 1999) (Rockingham County).

164. *Id.* at 157.

165. *Id.* at 156.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 157.

and (3) whether the restraint was reasonable as sound public policy.¹⁷⁰ The defendant's Non-Compete Agreement, according to the court, was "clearly unenforceable" because it had no geographic boundaries, effectively preventing him from working for a roofing company anywhere in the United States.¹⁷¹ It also prevented the defendant from working for a competing roofing company even in a position in which he could not use confidential information or play a competing role with Cliff Simmons Roofing.¹⁷² The court further stated that it must strictly construe a non-compete agreement against an employer and that it would not grant the company's request for an injunction limited to a restriction within its market place.¹⁷³ To do so would be a selective enforcement of the agreement, and the court did not have the authority to cure a defective instrument in this way.¹⁷⁴ The court sustained the defendant's demurrer.¹⁷⁵

Similarly, in *Leddy v. Communication Consultants, Inc.*,¹⁷⁶ an employer sought to enforce a non-compete agreement, the terms of which were somewhat ambiguous.¹⁷⁷ While employed by Communication Consultants, Inc. ("CCI"), the plaintiff entered into a contract with his employer that prohibited him from soliciting any client of CCI for two years after termination of his employment.¹⁷⁸ The contract banned both direct and indirect solicitation of clients, defined as persons or business entities to which CCI sold advertising or public relations services during the two years prior to the plaintiff's termination.¹⁷⁹ The contract did not include any geographic restriction.¹⁸⁰ Based on these facts, the plaintiff asked the court to grant him a declaratory judgment.¹⁸¹

The plaintiff had four major arguments against enforcement of the agreement.¹⁸² First, he contended that the non-solicitation clause

170. *Id.* (citing *New River Media Group, Inc. v. Knighton*, 245 Va. 367, 429 S.E.2d 25 (1993)).

171. *Id.*

172. *See id.*

173. *Id.* at 157-58.

174. *See id.* at 158.

175. *Id.*

176. No. CH99-3952, slip op. at 1 (Va. Cir. Ct. Apr. 5, 2000) (Virginia Beach City).

177. *See id.* at 2.

178. *Id.* at 1-2.

179. *Id.*

180. *Id.*

181. *See id.* at 1.

182. *See id.* at 2.

was per se unreasonable because it did not include a geographic limitation.¹⁸³ Second, he contended it was overly broad to ban performance of any services currently provided by CCI to its clients.¹⁸⁴ Third, the plaintiff argued that the agreement was overreaching because the type of communications incorporated in "indirect solicitation" were not defined.¹⁸⁵ Finally, he argued that prohibiting contact with any client from the past two years, even if it was no longer associated with CCI, was overly restrictive.¹⁸⁶

The court recognized that restraints of trade are not favored under Virginia law and that the burden of proving the reasonableness of the restraint was on CCI.¹⁸⁷ It articulated the criteria (mentioned in the previous case) for determining the reasonableness of a non-solicitation covenant in an employment contract: (1) whether the restraint is greater than necessary to protect the employer's business interests; (2) whether the restraint is unduly harsh or oppressive in limiting the former employee's ability to earn a livelihood; and (3) whether the restraint is sound public policy.¹⁸⁸

The court determined that the agreement protected a legitimate business interest and that because an employer should be able to preserve its client base, the agreement was not facially violative of public policy.¹⁸⁹ As to the third factor of the reasonableness test, the court pointed out a distinction between a geographic limit in which the former employee cannot conduct business and a time limit during which the employee cannot contact the employer's clients.¹⁹⁰ While a geographic limit, or the lack thereof, may be too restrictive, the court found a time limit permissible as long as enough potential customers remained available to the former employee.¹⁹¹

At this point, a few factual questions remained unanswered: (1) whether a pool of non-restricted clients were available to the plaintiff and (2) whether the time limit in the agreement was overly broad.¹⁹² In addition, the court refused to void the contract based on

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 3.

188. *Id.* (citing *Foti v. Cook*, 220 Va. 800, 805, 263 S.E.2d 430, 433 (1980)).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 4.

the prohibition of indirect solicitation because the Supreme Court of Virginia had earlier held such a restriction reasonable.¹⁹³ Because factual issues were still in dispute, the court overruled the motion for summary judgment.¹⁹⁴

The Henrico County Circuit Court assessed the validity of a broad and ambiguous non-compete agreement in *Lawrence v. Business Communications of Virginia, Inc.*¹⁹⁵ In 1994, the plaintiff began working for Business Communications of Virginia ("BCV") as an outside salesperson, selling cell phones, pagers, and long-distance service.¹⁹⁶ She had substantial customer contact and was a top salesperson.¹⁹⁷ Eventually she was asked, under threat of termination, to sign a non-compete agreement stating in part that she would not engage in the business of selling cell phones, pagers or other products sold by BCV for the duration of the non-compete agreement.¹⁹⁸ The agreement defined the geographic area for non-competition as "a radius of fifty (50) miles from any location [in which] the Company operates during the duration of this Agreement."¹⁹⁹ The agreement's duration was two years from the date of the plaintiff's termination of employment with BCV.²⁰⁰

The court imposed the following criteria to determine the validity of non-compete agreements: (1) whether the restraint is greater than necessary to protect the employer's business interests; (2) whether the restraint is unduly harsh or oppressive on the former employee's efforts to earn a livelihood; and (3) whether the restraint is sound public policy.²⁰¹ At the outset of its opinion, the court called the covenant ambiguous, saying it was "akin to an amoebae [sic]."²⁰² When such an instrument is ambiguous, all reasonable inferences must be given to the employee.²⁰³ The court labeled the agreement "too overbroad" and, in examining the first criterion, the court found the re-

193. *Id.*

194. *Id.*

195. No. CH99-1134, slip op. at 1 (Va. Cir. Ct. May 5, 2000) (Henrico County).

196. *Id.* at 1.

197. *Id.*

198. *Id.* at 2.

199. *Id.*

200. *Id.*

201. *Id.* at 2-3 (citing *Paramount-Termite Control Co., Inc. v. Rector*, 238 Va. 171, 174, 380 S.E.2d 922, 924 (1989)).

202. *Id.* at 3.

203. *Id.* (citing *Baird v. Dodson Bros. Exterminating Co.*, 217 Va. 745, 749, 232 S.E.2d 770, 773 (1977)).

straint to be greater than necessary for BCV to protect its business interests.²⁰⁴ There were few limitations in the covenant; BCV did not even limit the non-compete agreement to the type of business conducted during the plaintiff's employment.²⁰⁵ In addition, the agreement was too broad geographically because it prohibited the plaintiff from competing with any branch of BCV, whether it existed at the time of her employment or not.²⁰⁶ By way of example, the court hypothesized that the plaintiff could open a store in an area where BCV did not operate at the time, only to be forced to close if BCV later decided to enter that market or one within fifty miles.²⁰⁷

Finally, the court found that the agreement "offend[ed] public policy because it restrain[ed] Lawrence's trade and promote[d] BCV as a monopoly."²⁰⁸ In essence, the agreement constituted an undue restriction of free trade or competition.²⁰⁹ Based on its unreasonableness under any of the three criteria, the court declined to enforce the non-compete agreement.²¹⁰ The court, therefore, overruled BCV's motion to strike.²¹¹

The Supreme Court of Virginia dealt with the issue of breach of fiduciary duty in *Feddeman & Co., C.P.A., P.C. v. Langan Associates, P.C.*²¹² Officers and directors ("buyers' group") of Feddeman & Company. ("Feddeman") sought to purchase a ninety-five percent interest in the company and effect a merger with Langan Associates ("Langan").²¹³ Eventually negotiations wore down, and the buyers' group approached Langan about resigning from Feddeman and working for it if the purchase of the interest in Feddeman did not occur.²¹⁴ The buyers' group began meeting during non-business hours away from the company premises to discuss options and sought legal counsel to determine how to leave Feddeman lawfully, informing the attorney that its members were not subject to a non-compete agreement.²¹⁵ The attorney, who admittedly was also counsel to Langan, advised

204. *Id.*

205. *See id.*

206. *See id.* at 4.

207. *Id.*

208. *Id.* at 5.

209. *See id.*

210. *Id.*

211. *Id.*

212. 260 Va. 35, 530 S.E.2d 668 (2000).

213. *Id.* at 38, 530 S.E.2d at 670.

214. *Id.* at 40, 530 S.E.2d at 671.

215. *Id.* at 38, 530 S.E.2d at 670.

the group on how to resign lawfully.²¹⁶ The buyers' group followed that advice, resigning their positions with Feddeman when it became clear that the purchase would be unsuccessful.²¹⁷ Meanwhile, Feddeman, fearful of a walkout, contacted the accounting firm Johnson & Lambert for assistance and discussed a possible merger in the future.²¹⁸

After hiring the buyers' group, Langan ultimately offered positions to other Feddeman employees.²¹⁹ These offers were made after the buyers' group submitted its resignations.²²⁰ In addition, the new Langan employees solicited clients from Feddeman.²²¹ Within one day, they had contacted all Feddeman clients, half of whom transferred their business to Langan.²²² After fifty percent of Feddeman's clients and twenty-five of its employees had left, Feddeman filed suit alleging business conspiracy, breach of fiduciary duty, tortious interference with contracts, and usurpation of business opportunities.²²³ A jury awarded Feddeman \$3,300,000 in damages.²²⁴ Langan filed and was granted a Motion to Strike and To Set Aside the Verdict.²²⁵ Feddeman appealed the trial judge's ruling.²²⁶

In reviewing the trial court's decision to set aside the jury verdict, the supreme court examined whether there was sufficient evidence to establish the claims against Langan, giving all reasonable inferences to Feddeman.²²⁷ The court first determined that although the employees had the right to make preparations to resign, that right had to be balanced with fairness to the employer.²²⁸ Where employees misused confidential information or solicited clients and other employees prior to resignation, their actions could constitute a breach of fiduciary duty.²²⁹ According to the court, that determination had to be made on a case-by-case basis, and it cited cases from

216. *Id.* at 38-39, 530 S.E.2d at 670.

217. *Id.* at 39-40, 530 S.E.2d at 671.

218. *Id.* at 39, 530 S.E.2d at 671.

219. *Id.* at 40, 530 S.E.2d at 671.

220. *Id.*

221. *Id.* at 40-41, 530 S.E.2d at 671.

222. *Id.*

223. *Id.* at 40-41, 530 S.E.2d at 671-72.

224. *Id.* at 41, 530 S.E.2d at 672.

225. *Id.*

226. *Id.*

227. *Id.* at 41-44, 530 S.E.2d at 672-73.

228. *Id.* at 42, 530 S.E.2d at 672.

229. *Id.*

other jurisdictions in which similar en masse resignations that crippled an employer's business, were actionable breaches of fiduciary duty.²³⁰ In the case at bar, the buyers' group knew that their actions would severely damage Feddeman.²³¹ Additionally, the trial court specifically instructed the jury both that employees must act in good faith toward their employer and that those resigning could not use confidential company information or solicit other employees or clients to join them.²³² The court decided that the actions of the buyers' group, when viewed as a whole, presented sufficient credible evidence for the jury to determine that a breach of fiduciary duty existed.²³³ Setting aside the jury verdict was an error.²³⁴

Feddeman also alleged that the intentional conspiracy between Langan and the buyers' group to injure Feddeman's business violated Virginia Code sections 18.2-499 and 18.2-500, which led to financial harm.²³⁵ Jury instructions required the plaintiff to prove that the parties combined to maliciously and willfully damage Feddeman's business and that the business was actually damaged.²³⁶ The supreme court, however, stated that it was not necessary to prove that the primary purpose of the buyers' group and Langan was to injure Feddeman, but only that they acted "intentionally, purposefully, and without lawful justification."²³⁷ Because all reasonable inferences had to be afforded to the plaintiff, the court determined that sufficient evidence existed to justify a finding of intentional action by the defendants.²³⁸ The buyers' group plan was based on the idea that the threat of resignations and loss of clients would force Feddeman to lower the cost of the buyout or suffer the consequences.²³⁹ With this evidence available to the jury, the trial court erred in its decision to overturn the jury verdict in favor of Feddeman.²⁴⁰ In conclu-

230. *Id.* at 42-44, 530 S.E.2d at 672-73 (citing *ABC Trans Nat'l Trans., Inc. v. Aeronautics Forwarders, Inc.*, 413 N.E.2d 1299 (Ill. App. Ct. 1980); *Duane Jones Co. v. Burke*, 117 N.E.2d 237 (Ct. App. N.Y. 1954)).

231. *Id.* at 43, 530 S.E.2d at 673.

232. *Id.*

233. *Id.* at 43-44, 530 S.E.2d at 673.

234. *Id.* at 44, 530 S.E.2d at 673.

235. *Id.* (citing VA. CODE ANN. §§ 18.2-499, -500 (Repl. Vol. 1999)).

236. *Id.* at 44, 530 S.E.2d at 673-74.

237. *Id.* at 45, 530 S.E.2d at 674 (quoting *Advance Marine Enter. v. PRC Inc.*, 256 Va. 106, 117, 501 S.E.2d 148, 154-55 (1998)).

238. *Id.*

239. *Id.*

240. *Id.* at 45-46, 530 S.E.2d at 675-76.

sion, the supreme court reversed the trial court's decision to overturn the verdicts on the counts of breach of fiduciary duty and conspiracy to injure another's business.²⁴¹

V. CONCLUSION

Clearly employment and labor law in Virginia has been affected by several important decisions over the past year. The law pertaining to wrongful discharge claims continues to evolve. Under the *Mitchem* decision, a new avenue for potential relief is available to plaintiffs under the *Bowman* doctrine. *Mitchem* appears to represent the most apparent shift in this area of the law, affording a potential claim that appeared to have been foreclosed by prior decisions of the Supreme Court of Virginia.

Plaintiffs continue to follow a national trend in pursuing claims against employers under common law negligence theories. Decisions of the past year recognize the continuing unavailability of negligent supervision claims, while confirming the viability of negligent hiring and retention claims. These decisions have further fleshed out the standards for such claims and provide guidance for practitioners involved in litigation involving these theories.

It is unclear to what extent the recent legislation involving employment references will affect the amount and types of information provided by former employers to prospective employers. Perhaps this new law will bring about a freer exchange of information among employers, thus enabling them to make more meaningful hiring decisions. Despite the well-intentioned purposes behind the act, however, prudent employers most likely will continue their restrictive practices with regard to employment references until claims involving the new qualified immunity provide additional guidance.

The *Feddeman* decision highlights the risk inherent in en masse resignations for the purpose of competing with a prior employer. Even in the absence of enforceable covenants not to compete, employees must walk the fine line between merely preparing to compete with an employer and breaching the fiduciary duty of loyalty

241. *Id.* at 47, 530 S.E.2d at 675. In a footnote, the court commented that usurpation of business opportunity is not generally a distinct cause of action, but instead, is a type of breach of fiduciary duty. *Id.* at 47 n.1, 530 S.E.2d at 675 n.1.

owed to the employer. Other cases from the past year recite the well-established standards for the evaluation of non-compete agreements and turn on the unique circumstances presented in those cases.
