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Annual Survey of Virginia Law: Employment Law

M. Christina Floyd

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EMPLOYMENT LAW

*M. Christina Floyd**

I. INTRODUCTION

There have been a variety of developments in employment law since the *Annual Survey of Virginia Law* last included an article on this topic. This article focuses primarily upon two significant areas: (1) wrongful discharge and (2) employment contract claims which have been litigated since September 1996. Public sector employment,¹ unemployment compensation, and workers' compensation² are not addressed in this article.

* Staff Attorney, Metro Information Services, Virginia Beach, Virginia. B.S., 1982, M.S., 1988, Virginia Commonwealth University; J.D., 1992, University of Richmond School of Law.

1. Although public sector employment actions are not addressed by this article, it should be noted that several decisions in the area of grievance procedures were handed down in 1997. *See, e.g.*, Hagan v. Fairfax County, 43 Va. Cir. 555 (Fairfax County 1997) (holding that a public employee not in compliance with grievance procedures is entitled to notification of non-compliance and allowed time to correct procedural errors); Blue Ridge Community Servs. v. Beck, 43 Va. Cir. 377 (Roanoke City 1997) (holding that a list of grievable issues found in Virginia Code section 2.1-116.07(A) is not an exclusive list); Creecy v. City of Richmond, 42 Va. Cir. 499 (Richmond City 1997) (holding that grievance hearings were wrongfully denied on failure to promote claims); Jones v. City of Richmond, 42 Va. Cir. 342 (Richmond City 1997) (holding that grievance hearings are not required where there was no legal right to relief).

2. In 1997, the Supreme Court of Virginia issued several opinions in the workers' compensation context which bear noting. *See, e.g.*, Falls Church Constr. Co. v. Laidler, 254 Va. 474, 478, 493 S.E.2d 521, 523 (1997) (holding that "concealment of a material fact on an employment application constitutes the same misrepresentation as if the existence of the fact were expressly denied" and noting that its earlier decisions eliminated the requirement that the employer also establish a causal relationship between the misrepresentation and the work injury); Augusta County Sheriff's Dep't v. Overbey, 254 Va. 522, 492 S.E.2d 631 (1997) (holding that in cases under the Heart-Lung presumption of Virginia Code section 65.2-402, an employer does not have to exclude the mere possibility of a work-related cause); Moore v. Virginia Int'l Terminals, Inc., 254 Va. 46, 486 S.E.2d 528 (1997) (holding that an employee covered by both the federal Longshoremen's and Harbor Workers' Compensation Act and the Virginia Workers' Compensation Act may claim benefits under either statute, but is only entitled to a single recovery for injuries; as such, the employer is entitled to a

II. WRONGFUL DISCHARGE

The most significant development in Virginia employment law in recent years was the decision of the Supreme Court of Virginia in *Doss v. Jamco, Inc.*³ The supreme court in *Doss* held that the Virginia Human Rights Act ("VHRA") prohibits a common law cause of action based upon public policies reflected in the VHRA.⁴ The defense bar has heralded the decision as the end of *Lockhart*⁵ wrongful discharge claims while plaintiffs' attorneys contend claims based on other public policy sources remain viable.

In *Doss*, Jamco hired an employee who was scheduled to report for work on March 11, 1996. During her interview, the employee was told that individuals hired would not be allowed to take leave during the company's busy season. Prior to beginning work, Doss learned that she was pregnant, a fact she reported to her supervisors when she arrived for work. The next day her supervisors informed Doss that her employment was being terminated because she would be out on maternity leave during Jamco's busy period.⁶

Doss sued Jamco in federal court for alleged pregnancy discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and Virginia public policy as embodied in the VHRA.⁷ The United States District Court for the Western District of Virginia entered a stipulated order of certification which certified the following question to the Supreme Court of Virginia: "Does Va. Code § 2.1-725(D) prohibit a common law cause of action based upon the public policies reflected in the Virginia

dollar-for-dollar credit for benefits it paid under the Longshoremen's Act against benefits awarded to the employee under the Virginia Act).

3. 254 Va. 362, 492 S.E.2d 441 (1997).

4. See *id.* at 372, 492 S.E.2d at 447.

5. *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 439 S.E.2d 328 (1994). *Lockhart* involved companion claims of two employees who alleged they were wrongfully discharged from employment because of race and gender. Relying on the narrow exception to the employment-at-will doctrine recognized in *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985), the Supreme Court of Virginia reversed dismissal of the employees' claims, finding that they had stated a common law claim for wrongful discharge in violation of public policy. See *id.* at 106, 439 S.E.2d at 332.

6. See *Doss*, 254 Va. at 365, 492 S.E.2d at 443.

7. See *id.*

Human Rights Act, Va. Code § 2.1-714 et. seq?⁸ In a unanimous decision, the Supreme Court of Virginia answered the certified question in the affirmative.⁹ The supreme court found that the General Assembly clearly intended to alter the common law rule with respect to “causes of action based upon the public policies reflected in the Act,” when it amended the VHRA in 1995 by adding subsection D to section 2.1-725 of the Virginia Code.¹⁰

Rejecting Doss’s contention that the 1995 amendments to the VHRA effected no change, the supreme court opined that the amendments manifest the General Assembly’s intent to alter common law claims “by providing that such causes of action ‘shall be *exclusively limited* to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances.’”¹¹ The supreme court stated:

This is what the Act as amended says, and this is the meaning that must be given to the Act to carry out the clear intent of the General Assembly. To say, as Doss would have us say, that the 1995 amendments changed nothing would render meaningless the General Assembly’s use of the words “*exclusively limited*” and reduce to an absurdity its creation of a statutory cause of action against employers of more than five but less than fifteen persons.¹²

The supreme court noted that Doss based her claim for wrongful discharge on the public policy of Virginia as expressed in the VHRA and Title VII.¹³ Her claim, however, was limited to consideration of the public policies reflected in the VHRA by virtue of the certification order. Thus, the supreme court expressed no opinion concerning Virginia public policy as it may be expressed in sources other than the VHRA.¹⁴ With this simple pronouncement, the supreme court left open the door for

8. *Id.* at 365, 492 S.E.2d at 443.

9. *See id.* at 372, 492 S.E.2d at 447.

10. *Id.* at 371, 492 S.E.2d at 447.

11. *Id.* at 371, 492 S.E.2d at 446 (quoting VA. CODE ANN. § 2.1-725(D) (Cum. Supp. 1998)).

12. *Id.*

13. 42 U.S.C. § 2000e (1994).

14. *See Doss*, 254 Va. at 366, 492 S.E.2d at 443.

common law wrongful discharge claims based upon avenues other than the VHRA. For example, *Bowman* claims based on other articulations of public policy besides the VHRA will most likely be pursued.

In *Bowman v. State Bank of Keysville*,¹⁵ bank employees were discharged after they failed to vote their stock according to corporate management's wishes. The Supreme Court of Virginia held that such action violated the public policy articulated in Virginia Code section 13.1-662, which allows shareholders to vote free of duress and intimidation by corporate management.¹⁶ In addition, the supreme court acknowledged other public policy exceptions to employment-at-will.¹⁷ Because *Bowman* did not rely on the public policy articulated in the VHRA, discharged employees may continue to assert wrongful discharge claims based on other sources of public policy.

Prior to the Supreme Court of Virginia's ruling in *Doss*, Virginia courts came to differing conclusions as to whether *Lockhart* had been abrogated by the 1995 amendments to the VHRA and whether a *Bowman* claim may be based on other sources of public policy.¹⁸ For example, in *Janacek v. Mobil Corp.*,¹⁹ the United States District Court for the Eastern District of Virginia ruled that the 1995 amendments to the VHRA

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

16. See *id.* at 540, 331 S.E.2d at 801.

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

18. See, e.g., *Janacek v. Mobil Corp.*, No. 96-1832-A, 1997 U.S. Dist. LEXIS 5327 (E.D. Va. Apr. 3, 1997) (holding that the 1995 VHRA amendments did not nullify *Lockhart*); *Ecklund v. Fuisz Tech. Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995) (same as *Janacek*); *Parker v. Family Servs. of Tidewater, Inc.*, 41 Va. Cir. 433 (Norfolk City 1997) (holding that the 1995 VHRA amendments nullified *Lockhart*); *Tingle v. Chasen's Bus. Interiors, Inc.*, 41 Va. Cir. 451 (Norfolk City 1997) (same as *Parker*); *Lundy v. Cole Vision Corp.*, 39 Va. Cir. 254 (Richmond City 1996) (same as *Janacek*); *Molina v. Summer Consultants, Inc.*, Law No. 152715 (Fairfax County 1996) (same as *Janacek*); *Holmes v. Tiedeken*, 36 Va. Cir. 491 (Richmond City 1995) (same as *Janacek*).

19. No. 96-1832-A, 1997 U.S. Dist. LEXIS 5327, at *1 (E.D. Va. Apr. 3, 1997).

did not preclude a common law cause of action for wrongful discharge.²⁰ The court relied on the Supreme Court of Virginia's decision in *Bailey v. Scott-Gallaher, Inc.*,²¹ in which the supreme court held that a wrongful discharge claim based on public policy could proceed.²² The district court found significant the Supreme Court of Virginia's pronouncement in *Bailey* that, "we perceive of no reason why we should overrule or retreat from our holding in *Bowman* and *Lockhart*, and we decline [defendant's] invitation that we do so."²³

On the other hand, the majority of courts considering the issue prior to *Doss* concluded that the 1995 amendments to the VHRA abrogated common law wrongful discharge claims.²⁴ In addition, most courts have refused to look beyond the VHRA for a source of public policy to support a wrongful discharge claim.²⁵

Because the Supreme Court of Virginia did not address the issue of alternate sources of public policy in *Doss*, the most litigated issue in Virginia employment law will continue to be whether a common law claim for wrongful discharge may be

20. See *id.* at *7.

21. 253 Va. 121, 480 S.E.2d 502 (1997).

22. See *id.* at 126, 480 S.E.2d at 505.

23. *Janacek*, 1997 U.S. Dist. LEXIS 5327, at *5 (quoting *Bailey*, 253 Va. at 126, 480 S.E.2d at 505); see also *Fobian v. Storage Tech. Corp.*, 959 F. Supp. 742 (E.D. Va. 1997) (allowing a common law wrongful discharge claim to proceed based on the Supreme Court of Virginia's lack of consideration of the effect of VHRA amendments); *Glaser v. Titan Corp.*, 12 VA. LAW. WKLY. 203 (July 22, 1997) (allowing common law wrongful discharge claim based on the VHRA and the Fairfax County Human Rights Ordinance).

24. See, e.g., *Wilt v. Water & Waste Water Equip. Mfg. Ass'n*, 43 Va. Cir. 118 (Loudoun County 1997) (holding that the exclusive remedy for wrongful discharge is that provided by the VHRA or federal statutes prohibiting discrimination); *Parker v. Family Servs. of Tidewater, Inc.*, 41 Va. Cir. 433, 436 (Norfolk City 1997) (holding that VHRA provides an exclusive state remedy for racially motivated discharge from employment).

25. See, e.g., *Valentine v. Roanoke Podiatry & Foot Surgery, P.C.*, No. 96-883-K, 1997 U.S. Dist. LEXIS 8064, at *1 (W.D. Va. May 15, 1997) (holding that a wrongful discharge claim cannot be based on the public policy expressed in Virginia Code section 65.2-308, prohibiting discharge based on a workers' compensation claim); *Perry v. American Home Prods. Corp.*, No. 3:96CV595, 1997 U.S. Dist. LEXIS 2521, at *1 (E.D. Va. Mar. 4, 1997) (holding that a common law claim may not be based on FDA regulations or on failure to provide "reasonable notice"); *Andrews v. Bon Secours-St. Mary's Hosp.*, 43 Va. Cir. 486 (Richmond City 1997) (refusing to find a public policy basis for a common law claim in Virginia Code sections 18.2-460, 32.1-2, 32.1-27, 54.1-2906, or 54.1-3007 or in the Virginia Board of Nursing regulations).

asserted based on public policy as articulated in sources outside the VHRA. Courts considering this issue thus far have uniformly held that *Doss* abrogated all common law wrongful discharge claims. For example, the United States Court of Appeals for the Fourth Circuit acknowledged the General Assembly's intent to prohibit a common law cause of action in *Early v. Aerospace Corp.*²⁶ The circuit court held that the 1995 amendments to the Virginia Human Rights Act abrogated common law causes of action for wrongful discharge in violation of the public policies articulated in the VHRA.²⁷

In one of the first district court cases to consider an alternate source of public policy for a wrongful discharge claim, the United States District Court for the Eastern District of Virginia found in *Leverton v. AlliedSignal Inc.*²⁸ that the Virginia Consumer Protection Act of 1977 ("Consumer Protection Act")²⁹ did not provide a public policy basis for a *Bowman* claim.³⁰ In *Leverton*, the plaintiff alleged that he was targeted for termination as a part of a reduction in force due to concerns he expressed about the company's failure to disclose weaknesses in polyester tire yarn that the company produced. Leverton contended that his termination was in violation of Virginia public policy as reflected in the Consumer Protection Act.³¹ In support of a motion to dismiss, AlliedSignal argued that the Supreme Court of Virginia had rejected the Consumer Protection Act as a basis for Virginia public policy in *Lawrence Chrysler Plymouth Corp. v. Brooks*.³² The district court rejected this argument, noting that the Supreme Court of Virginia did not express any opinion as to whether the Consumer Protection Act articulated public policy.³³ The court stated:

26. No. 96-2830, 1998 U.S. App. LEXIS 3089, at *1 (4th Cir. Feb. 26, 1998) (unpublished decision).

27. See also *Williamson v. Virginia First Sav. Bank*, No. 3:98CV38, 1998 U.S. Dist. LEXIS 6709, at *15 (E.D. Va. Apr. 27, 1998) ("all common-law wrongful discharge claims have been abrogated to the extent they are based on public policies reflected in the VHRA").

28. 991 F. Supp. 486 (E.D. Va. 1998).

29. VA. CODE ANN. §§ 59.1-196 to -207 (Repl. Vol. 1998).

30. See *Leverton*, 991 F. Supp. at 493.

31. See *id.* at 490.

32. 251 Va. 94, 465 S.E.2d 806 (1996).

33. See *Leverton*, 991 F. Supp. at 493.

The statute does not, in express terms, articulate a public policy. That, however, does not end the inquiry because the Supreme Court of Virginia has not held that the policy predicate of a *Bowman* claim can exist only if the statute uses the term "public policy." Moreover, . . . it appears that, in *Bowman* the statute did not explicitly use that term. Nor has the Supreme Court of Virginia articulated a test by which to determine whether one of the Commonwealth's many statutes express a public policy which is sufficient to support a wrongful discharge claim under the *Bowman* exception.³⁴

In addition, the court also referred to *Miller v. Sevamp, Inc.*,³⁵ for the proposition that public policy supporting a wrongful discharge claim "can be found in statutes that 'protect property rights, personal freedoms, health, safety, or welfare of the people in general,' even if the statute does not enunciate public policy per se."³⁶ With this rationale in mind, the district court found that the Consumer Protection Act could not provide the basis for a public policy claim because it does not implicate an interest identified by *Bowman* and *Miller* as adequate for public policy.³⁷

Likewise, the United States District Court for the Eastern District of Virginia ruled in *McCarthy v. Texas Instruments Inc.*³⁸ that no common law wrongful discharge claim is available for termination in violation of the Virginia public policy against discrimination.³⁹ In *McCarthy*, the plaintiff brought a wrongful discharge cause of action alleging that she had been discriminated against on the basis of her gender in violation of the public policy found in Title VII, the Fourteenth Amendment to the United States Constitution, the Virginia Constitution, and the Fairfax County Human Rights Act.⁴⁰ The employer

34. *Id.* at 491.

35. 234 Va. 462, 362 S.E.2d 915 (1987).

36. *Leverton*, 991 F. Supp. at 492 (quoting *Miller*, 234 Va. at 468, 362 S.E.2d at 918).

37. *See id.* at 493. It is interesting to note that the court in *Leverton* did not even address the decision in *Doss*, although the plaintiff's cause of action arose in May 1997, well after the effective dates of the VHRA amendments.

38. 999 F. Supp. 823 (E.D. Va. 1998).

39. *See id.*

40. *See id.* at 824.

sought dismissal on the grounds that *Doss* precludes a common law employment discrimination claim.⁴¹ The district court agreed, stating that "[t]he . . . reasoning in *Doss* leads inexorably to the conclusion that a plaintiff who brings a *Bowman* claim cannot rely on non-VHRA sources for the stated public policy of Virginia if that policy is articulated in the VHRA, even though it may be articulated elsewhere as well."⁴²

The district court noted that the decision of the Supreme Court of Virginia in *Doss* either implicitly overruled or made uncertain the precedential value of its earlier decision in *Bradick v. Grumman Data System Corp.*⁴³ in which the supreme court held that common law wrongful discharge claims could be based on the disability discrimination policy articulated by the VHRA or the Virginia Rights of Persons with Disabilities Act.⁴⁴ The court acknowledged that the *Bradick* decision was not required to consider the effect of the legislature's 1995 amendments to the VHRA. Moreover, the court found that to the extent *Bradick* was inconsistent with *Doss*, *Bradick* had been overruled.⁴⁵

Concluding that the General Assembly manifested its intent to alter the common law with respect to wrongful discharge claims by amending the VHRA, the district court stated:

If plaintiffs were permitted to base *Bowman* claims on policies found in the VHRA merely because the same policies are also found in other statutes, then the *Lockhart* amendments would have little effect. Plaintiffs would still be able to bring such common law claims in direct contravention of the General Assembly's efforts, in enacting the amendments, to curb common law claims based on those policies.⁴⁶

41. *See id.*

42. *Id.* at 830.

43. 254 Va. 156, 486 S.E.2d 545 (1997).

44. VA. CODE ANN. §§ 51.5-40 to -46 (Repl. Vol. 1994 & Cum. Supp. 1997); *see Bradick*, 254 Va. at 160, 486 S.E.2d at 547.

45. *See McCarthy*, 999 F. Supp. at 831; *Bradick*, 254 Va. at 160, 486 S.E.2d at 547 (the cause of action arose prior to the effective date of the amendments).

46. *McCarthy*, 999 F. Supp. at 830.

The court acknowledged that its holding would have the effect of severely curtailing employment discrimination claims brought under Virginia common law; however, it concluded that such a result is mandated by *Doss*.⁴⁷

In a similar vein, the United States District Court for the Eastern District of Virginia held in *Williamson v. Virginia First Savings Bank*⁴⁸ that the Virginia Fair Employment Contracting Act⁴⁹ cannot provide the basis for a common law wrongful discharge claim based on Virginia's public policy against gender discrimination.⁵⁰ In *Williamson*, a bank vice-president alleged that she was fired after she took time off to care for her sick children. In dismissing her wrongful discharge claim, the court stated:

Based on the reasoning in *Doss* and the clear mandate of section 2.1-725(D), this Court must conclude that *all* common-law wrongful discharge claims have been abrogated to the extent they are based on public policies reflected in the VHRA. This conclusion means that wrongful discharge claims based on public policies expressed in other state statutes that just happen to also be expressed in the VHRA are not cognizable.⁵¹

The court reasoned that to interpret the word "reflected" in the *Doss* decision as applying only when a claim is based solely on the VHRA would circumvent the mandate of Virginia Code section 2.1-725(D) and the Supreme Court of Virginia's holding in *Doss*.⁵² The court found it dispositive that the plaintiff's "wrongful discharge claim [did] not rest on a statutory public policy that [was] not expressed in the VHRA."⁵³ Therefore, it felt compelled to dismiss her common law claim.⁵⁴

Thus, even after *Doss*, Virginia lawyers will continue to see wrongful discharge claims based on the supreme court's holding

47. *See id.* at 831.

48. No. 3:98CV38, 1998 U.S. Dist. LEXIS 6709, at *1 (E.D. Va. Apr. 27, 1998).

49. VA. CODE ANN. §§ 2.1-374 to -376.1 (Repl. Vol. 1994).

50. *See Williamson*, 1998 U.S. Dist. LEXIS 6709, at *15.

51. *Id.* (emphasis in original).

52. *See id.* at *15-16.

53. *Id.* at *17.

54. *See id.*

in *Bowman*. While the supreme court made clear that, as a result of the 1995 amendments, the VHRA cannot be used as the statutory expression of Virginia's public policy against discrimination in a common law wrongful discharge action, the supreme court left the door open for consideration of claims based on alternate sources of public policy.

Other than the VHRA, there are a number of Virginia statutes that express a public policy against discrimination.⁵⁵ In addition, the Virginia Constitution, particularly article I, section 11,⁵⁶ may provide a public policy basis for a wrongful discharge claim alleging racial and/or sexual discrimination. Article I, section 11 of the Virginia Constitution guarantees the "right to be free from any governmental discrimination on the basis of religious conviction, race, color, sex, or national origin."⁵⁷ The Supreme Court of Virginia has stated that this provision "prohibits invidious, arbitrary discrimination upon the basis of sex."⁵⁸

55. See, e.g., VA. CODE ANN. § 2.1-374 (Repl. Vol. 1994) (declaring it the public policy of the Commonwealth 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"); *id.* § 8.01-42.1 (Repl. Vol. 1992) (creating a statutory cause of action for intimidation, harassment, or violence based on "racial, religious, or ethnic animosity"); *id.* § 11-44 (Repl. Vol. 1993) (prohibiting discrimination in the soliciting or awarding of contracts by public bodies on the basis of "race, religion, color, sex or national origin"); *id.* § 11-51 (Repl. Vol. 1993) (prohibiting employment discrimination by any contractor on the basis of "race, religion, color, sex or national origin"); *id.* § 15.2-965 (Repl. Vol. 1997) (permitting counties, towns and cities to enact ordinances prohibiting discrimination "on the basis of race, color, religion, sex . . . national origin, age, marital status, or disability"); *id.* § 15.2-1604 (Repl. Vol. 1997) (making it unlawful to discriminate in employment by constitutional officers on the basis of "race, color, religion, sex or national origin"); *id.* § 36-96.1 (Repl. Vol. 1996) (declaring it the public policy of the Commonwealth to prohibit discrimination in housing on the basis of "race, color, religion, national origin, sex, elderliness, familial status, or handicap"); *id.* § 38.2-2212(C) (Cum. Supp. 1998) (prohibiting an insurer from refusing to renew motor vehicle insurance on the basis of "age, sex, residence, race, color, creed, national origin, ancestry, or marital status"); *id.* § 38.2-2213 (Repl. Vol. 1994) (prohibiting an insurer from issuing motor vehicle insurance on the basis of "age, sex, residence, race, color, creed, national origin, ancestry, [or] marital status"); *id.* § 38.2-4312(E) (Cum. Supp. 1998) (prohibiting a health maintenance organization from discriminating on the basis of "race, creed, color, sex or religion"); *id.* § 59.1-21.21:1 (Repl. Vol. 1998) (prohibiting discrimination with respect to any credit transaction on the basis of "race, color, religion, national origin, sex, or marital status, or age").

56. VA. CONST. art. I, § 11.

57. *Id.*

58. *Archer v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

In addition to the Virginia Constitution and other state statutes expressing a public policy against unlawful discrimination, there are a number of local ordinances that also express public policy against unlawful discrimination which might support a *Bowman* claim.⁵⁹ In *Glaser v. Titan Corp.*,⁶⁰ the Fairfax County Circuit Court held that the Fairfax County Human Rights Ordinance constituted a "specific Virginia statute" sufficient to support a *Bowman* claim.⁶¹

Finally, federal public policy as articulated in federal statutes may be asserted as a basis for a common law wrongful discharge claim, although it is doubtful that such claims will succeed. In *Lawrence Chrysler Plymouth Corp. v. Brooks*,⁶² the Supreme Court of Virginia suggested that a *Bowman* claim has to be supported by a Virginia statute as the expression of public policy.⁶³ This conclusion also has been reached by courts considering the issue after *Doss*.⁶⁴

III. EMPLOYMENT CONTRACTS

During the period under review, Virginia courts decided a number of significant cases concerning issues surrounding contracts of employment, both express and implied. The majority of notable decisions arose in the context of covenants against competition and claims for an implied contract based on employee handbooks.

59. See, e.g., Fairfax County Human Rights Ordinance, FAIRFAX COUNTY, VA. CODE §§ 11-1-1 to -1-22 (1976).

60. 12 VA. LAW. WKLY. 203 (July 21, 1997).

61. See *id.*

62. 251 Va. 94, 465 S.E.2d 806 (1996).

63. See *id.* at 96, 465 S.E.2d at 808.

64. See, e.g., *McCarthy v. Texas Instruments Inc.*, 999 F. Supp. 823, 829 (E.D. Va. 1998) (rejecting Title VII as a public policy basis for a common law wrongful discharge claim); *but see* *Marshall v. Obstetrics & Gynecology Ltd. of Radford*, No. 97-08-35R (W.D. Va. July 2, 1998) (unpublished in print or electronic media) (overruling a motion to dismiss a wrongful discharge claim based in part on Title VII as a public policy basis).

A. *Non-Competition Agreements*

Both employers and employees achieved favorable results in litigation surrounding covenants not to compete contained in employment contracts. One of the more significant opinions addressed the issue of whether a covenant not to compete is assignable. In *Reynolds & Reynolds Co. v. Hardee*,⁶⁵ the United States Court of Appeals for the Fourth Circuit affirmed the dismissal of a breach of contract claim on the basis that non-competition agreements are not assignable to a successor employer without the employee's consent.⁶⁶ The Reynolds & Reynolds Company ("Reynolds") purchased the assets of the plaintiff's employer, Jordan Graphics Inc. ("Jordan"). Hardee's employment agreement with Jordan was included in the sale. On the day of the sale, Hardee was terminated by Jordan and Reynolds offered to re-hire him under a new employment agreement with a more restrictive non-competition provision. Hardee refused to sign the new agreement, but offered to work for Reynolds under the same terms as his prior agreement with Jordan. Reynolds refused and thereafter filed suit to enforce the restrictive covenant alleging breach of contract and misappropriation of trade secrets.⁶⁷

The United States District Court for the Eastern District of Virginia granted Hardee's motion to dismiss the company's breach of contract claim, finding that Reynolds lacked standing to enforce the restrictive covenant.⁶⁸ Reynolds appealed. In affirming dismissal of the claim, the Fourth Circuit adopted the reasoning of the district court, which found that, because personal services agreements are not assignable under Virginia law without consent of the employee, non-competition covenants also may not be assigned.⁶⁹

65. No. 96-2077, 1997 U.S. App. LEXIS 36368, at *1 (4th Cir. Dec. 30, 1997) (unpublished decision), *aff'g* 932 F. Supp. 149 (E.D. Va. 1996).

66. *See id.* at *6.

67. *See id.* at *2-3.

68. *See Reynolds & Reynolds Co. v. Hardee*, 932 F. Supp. 149, 155 (E.D. Va. 1996).

69. *See Reynolds & Reynolds*, 1997 U.S. App. LEXIS 36368, at *3.

Circuit courts in Virginia also had the opportunity in 1997 to address claims arising out of covenants not to compete. In *Doctors Blum, Newman, Blackstock & Associates, Optometrists, P.C. v. Jesse*,⁷⁰ the Circuit Court for the City of Salem upheld a non-competition provision in an employment agreement which restricted the defendant from practicing optometry within a twenty-five-mile radius of his former employer's nine offices for a period of three years.⁷¹ The defendant optometrist, who had resigned after nine years of employment with the plaintiff, argued that the agreement was "overbroad, ambiguous, punitive, and unenforceable."⁷² Finding that the employer had a legitimate business interest in preventing the defendant from using confidential information gained during his employment, the circuit court found that the restraint of trade contained in the non-competition provision was not unduly harsh or oppressive in curtailing the optometrist's efforts to earn a living.⁷³ On the other hand, the circuit court found that a liquidated damages provision in the contract was unenforceable as it constituted a penalty clause.⁷⁴

In a similar fashion, the Fairfax County Circuit Court upheld a non-competition agreement in *Allen J. Zuccari, Inc. v. Adams*.⁷⁵ The restrictive covenant in *Allen J. Zuccari* forbade the defendant from doing business with or disclosing information about the plaintiff's clients for a period of five years following the termination of employment.⁷⁶ When the defendant resigned to form his own risk management company, the plaintiff sued, claiming that the defendant was diverting business and had not returned company property.⁷⁷

The circuit court found that the restrictive covenant in Adams' agreement was reasonable for protection of the plaintiff's legitimate business interests.⁷⁸ The circuit court also

70. 42 Va. Cir. 187 (Salem City 1997).

71. *See id.* at 187.

72. *Id.*

73. *See id.* at 188.

74. *See id.* at 189 (citing 301 Dahlgren Ltd. Partnership v. Board of Supervisors, 240 Va. 200, 396 S.E.2d 651 (1990)).

75. 42 Va. Cir. 132 (Fairfax County 1997).

76. *See id.* at 133.

77. *See id.* at 133-34.

78. *See id.* at 134.

found that the non-compete clause was reasonable as it did not preclude the defendant from earning a livelihood.⁷⁹ Finally, the restrictive covenant was found reasonable from a public policy perspective, as employers are entitled to protect their client base from ex-employees.⁸⁰ The circuit court specifically rejected the defendant's arguments that the agreement was unreasonable as to time and geographic scope. The circuit court found that there is no requirement that a non-compete clause contain a geographic limitation and that a five-year period limitation served to protect the plaintiff from employees who try to compete with their former employer after gaining experience and contacts from the employer.⁸¹ Finally, the circuit court disagreed with the defendant's contention that the non-competition agreement was invalid because it was an at-will contract that was not supported by consideration.⁸² Relying on *Paramount Termite Control Co. v. Rector*,⁸³ the circuit court held that the defendant's continued employment after he had signed the employment contract was sufficient consideration to support the validity of the non-competition provision.⁸⁴

A conflicting conclusion was reached by the Loudoun County Circuit Court in *Statkus v. Loudoun Anesthesia Associates, LLC*,⁸⁵ where the circuit court considered a non-competition provision contained in an operating agreement. In *Statkus*, five physicians joined to form a limited liability company. The doctors executed an operating agreement which included a provision whereby the doctors agreed that for a period of one year following withdrawal from the company, the withdrawing partner would not engage in a competitive business in Loudoun County.⁸⁶ The agreement further provided that the doctors expressly agreed that the terms, duration, and geographic scope of the restrictive covenant were reasonable.⁸⁷ The plaintiff was later expelled from the company and filed a declaratory judg-

79. *See id.*

80. *See id.*

81. *See id.* at 134-35.

82. *See id.* at 135.

83. 238 Va. 171, 380 S.E.2d 922 (1989).

84. *See Allen J. Zuccari*, 42 Va. Cir. at 135.

85. 42 Va. Cir. 35 (Loudoun County 1996).

86. *See id.* at 35-36.

87. *See id.*

ment proceeding asking the circuit court to determine the rights of the parties under the restrictive covenant. The circuit court found that the restrictive covenant was invalid and unenforceable because it represented an unreasonable restraint on the plaintiff's ability to practice anesthesiology and pain management in Loudoun County.⁸⁸ Notably, the circuit court placed no significance on the recitation in the agreement whereby the parties agreed that the terms, duration and geographic scope of the restrictive covenant were reasonable, finding that "questions of reasonableness or legal efficacy are ones for the court, and not for the parties, to decide."⁸⁹

B. *Employee Handbooks as Contracts*

Federal and state courts in Virginia generally have refused to allow breach of contract claims based on employee handbooks to proceed during the period of review. In *Rhymer v. Yokohama Tire Corp.*,⁹⁰ the United States Court of Appeals for the Fourth Circuit considered a claim by a former employee alleging that an employee handbook constituted an implied contract that he would be terminated only "for cause."⁹¹ The employee testified that when he was given the handbook he was told that "it guaranteed his employment if he did an acceptable job."⁹² When he was later terminated for poor performance, he filed suit in federal court alleging age discrimination and breach of an implied contract of employment. The United States District Court for the Western District of Virginia granted summary judgment to the former employer, and the employee appealed. Reviewing the claim de novo, the Fourth Circuit found that a "common sense reading of the employee handbook" defeated the employee's claim.⁹³ In affirming the grant of summary judgment to the employer, the court noted that nowhere in the handbook did it provide that an employee could only be dis-

88. *See id.* at 38.

89. *Id.* at 38-39.

90. No. 96-1191, 1997 U.S. App. LEXIS 675, at *1 (4th Cir. Jan. 16, 1997) (unpublished decision).

91. *See id.* at *12.

92. *Id.* at *2.

93. *Id.* at *7.

charged for cause; therefore, the employer was not limited in its ability to terminate employees.⁹⁴

Similarly, in *Carter v. Times-World Corp.*,⁹⁵ the United States District Court for the Western District of Virginia granted summary judgment in favor of the defendant as to a wrongful discharge claim based on breach of an employment contract allegedly created by an employee handbook.⁹⁶ The plaintiff focused her claim on the use of the word "compensation" in the handbook as well as certain language regarding the employer's long-term disability plan.⁹⁷ The district court rejected both arguments, finding that "the mere use of the word 'compensation' in an employee handbook does not create an employment contract under Virginia law."⁹⁸ The court also found that the long-term disability plan documents specifically stated that it did not create a contract; therefore, the plaintiff's claim was meritless.⁹⁹

Finally, in *Bryarly v. Shenandoah University*,¹⁰⁰ the Winchester Circuit Court held that provisions in a policy manual could not be inferred to contravene employment at-will.¹⁰¹ The plaintiff was employed by the Shenandoah University ("University") as a publications manager at a private non-profit institute which was part of the University. Following a performance review, the plaintiff was informed that her primary responsibilities were being eliminated; therefore, her employment was terminated effective immediately. The plaintiff sued, alleging breach of employment contract based on a policy manual provided to her by the University.¹⁰²

Sustaining the University's demurrer, the circuit court found it significant that the introduction to the policy manual stated that: "the right of the employee or the University to terminate

94. *See id.* at *13-14.

95. No. 96-0709-R, 1997 U.S. Dist. LEXIS 10743, at *1 (W.D. Va. May 23, 1997) (unpublished decision).

96. *See id.* at *12.

97. *See id.*

98. *Id.* (citing *Nguyen v. CNA Corp.*, 44 F.3d 234, 240 (4th Cir. 1995)).

99. *See id.*

100. 41 Va. Cir. 238 (Winchester City 1996).

101. *See id.* at 238.

102. *See id.* at 240-41.

the employment relationship 'at-will' is recognized herein and affirmed as a condition of employment. These policies are not to be construed as a contract, guarantee, or condition of employment.¹⁰³ The circuit court found this statement to be a clear declaration of at-will employment and that other provisions of the policy manual "were simply some of the conditions of her continued at-will employment."¹⁰⁴

IV. CONCLUSION

Common law wrongful discharge claims based on Virginia public policy continue to be the primary source of employment law litigation since amendments to the VHRA were enacted. Although the Supreme Court of Virginia's decision in *Doss v. Jamco, Inc.*¹⁰⁵ closed the door on common law claims based upon the public policy articulated in the VHRA, the supreme court's unwillingness to address whether alternate sources may provide the basis for such claims leaves the door wide open for continued litigation on this issue. Relying on *Doss*, employers have thus far successfully argued that *all* common law wrongful discharge claims have been abrogated. Nonetheless, until the Supreme Court of Virginia issues an opinion squarely addressing this question, plaintiffs will continue to pursue common law wrongful discharge claims based on other Virginia and federal statutes, the Virginia Constitution, and local ordinances.

In the employment contracts arena, both employees and employers noted victories in litigation concerning the effectiveness of covenants not to compete. As a result, claims arising from such provisions in employment contracts will likely continue as employers aggressively pursue enforcement of non-competition provisions and employees seek to evade the restrictions of a covenant not to compete.

Finally, although employees continue to assert handbook provisions as indicia of an employment contract, Virginia courts are quick to conclude that statements included in handbooks

103. *Id.* at 240.

104. *Id.* at 243 (quoting *Graham v. Central Fidelity Bank*, 245 Va. 395, 399, 428 S.E.2d 916, 918 (1993)).

105. 254 Va. 362, 492 S.E.2d 441 (1997).

expressing that employment is at-will clearly rebut such claims. Thus, astute employers will continue to draft their policy manuals to include such disclaimers.