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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\**

## I. INTRODUCTION

This article discusses six areas of labor and employment law in which there was significant activity in Virginia's courts over the past year: (1) covenants not to compete and employee's fiduciary duties to employers; (2) the doctrine of respondeat superior; (3) negligent hiring, retention, and supervision; (4) wrongful discharge in violation of public policy; (5) workers' compensation exclusivity; and (6) employment agreements. Beyond the scope of this article are decisions rendered in other areas of law that affect the employment relationship, including defamation,<sup>1</sup> claims under Virginia's Occupational Safety and Health Act,<sup>2</sup> public employment claims,<sup>3</sup> and unemployment compensation claims.<sup>4</sup>

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1. See, e.g., *Larimore v. Blaylock*, 259 Va. 568, 528 S.E.2d 119 (2000) (holding that allegedly defamatory communications between members of Radford University's academic department, concerning a professor, were subject to "qualified" immunity rather than "absolute" immunity).

2. VA. CODE ANN. §§ 40.1-1 to -51.4:4 (Repl. Vol. 1999 & Cum. Supp. 2001). See, e.g., *Halterman v. Radisson Hotel Corp.*, 259 Va. 171, 523 S.E.2d 823 (2000) (holding that an employer at a multi-employer worksite was responsible for providing information about its Hazardous Communications Program to the employer(s) of other employees working at the same work site, but that the employer was under no duty to provide such information to his employees).

3. See, e.g., *Arlington County v. White*, 259 Va. 708, 528 S.E.2d 706 (2000) (affirming summary judgment for Arlington County taxpayers who claimed that the county lacked authority to extend insurance coverage to same-sex domestic partners under its self-funded health benefits plan for county employees and that the Virginia legislature did not contemplate a definition of "dependent" that did not require some manner of financial dependence, as opposed to "interdependence"); *Russell County Dept. of Soc. Servs. v. O'Quinn*, 259 Va. 139, 523 S.E.2d 492 (2000) (holding, in an employee's declaratory judgment action seeking reinstatement of employment, that Virginia's Declaratory Judgment Act does not authorize an award of attorney's fees).

4. *Bistawros v. Virginia Employment Comm'n*, No. 2207-00-4, 2001 Va. App. LEXIS

## II. COVENANTS NOT TO COMPETE AND THE FIDUCIARY DUTY OF LOYALTY

Perhaps the most significant labor and employment decisions of the past year arose in the field of covenants not to compete. For the last fifty years, the Supreme Court of Virginia has shepherded the law of noncompetition agreements into a well-defined, unambiguous framework from which an employer's counsel could protect their client's businesses and their investment in employees. Pursuant to the court's decision in *Roanoke Engineering Sales v. Rosenbaum*,<sup>5</sup> employers must consider whether "restraint, from the standpoint of the employer, [is] reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest[.]"<sup>6</sup> Subsequent decisions clarified that such reasonableness is achieved by limiting noncompetition agreements to "businesses similar" to that in which employers engage.<sup>7</sup>

Virginia businesses and attorneys using these prior decisions as a road map to aid in drafting and enforcing noncompetition agreements, however, will find themselves repeatedly asking for direction in light of the court's two recent decisions in *Simmons v. Miller*<sup>8</sup> and *Motion Control Systems, Inc. v. East*.<sup>9</sup>

In *Simmons*, without citation to any of the above-referenced decisions regarding the "business similar" language approved therein, the Supreme Court of Virginia struck down the very same "business similar" language for being too general.<sup>10</sup> At issue in *Simmons* was a noncompetition agreement that provided:

For a period of three (3) years after this termination or expiration of

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77 (Ct. App. Feb. 20, 2001) (unpublished decision) (denying benefits to a former day care worker who was discharged for making threats related to his suspicions about other staff practicing witchcraft against him); *Duncan v. Data Servs. Am.*, No. 0431-00-2, 2000 Va. App. LEXIS 646 (Ct. App. Sept. 5, 2000) (unpublished decision) (denying benefits to an employee who was fired for sending a defamatory letter accusing the employer of fraud and for threatening disruptive legal action).

5. 223 Va. 548, 290 S.E.2d 882 (1982).

6. *Id.* at 552, 290 S.E.2d at 884.

7. *See, e.g.*, *Rash v. Hilb, Rogal & Hamilton Co.*, 251 Va. 281, 467 S.E.2d 791 (1996); *New River Media Group, Inc. v. Knighton*, 245 Va. 367, 429 S.E.2d 25 (1993); *Blue Ridge Anesthesia and Critical Care, Inc. v. Gidick*, 239 Va. 369, 389 S.E.2d 467 (1990).

8. 261 Va. 561, 544 S.E.2d 666 (2001).

9. 262 Va. 33, 546 S.E.2d 424 (2001).

10. *Simmons*, 261 Va. at 581, 544 S.E.2d at 678.

the Agreement, Employee shall not directly or indirectly, own, manage, control, be employed by, participate in, or be connected in any manner with ownership, management, operation, or control of any business similar to the type of business conducted by Employer at the time this Agreement terminates.<sup>11</sup>

The *Simmons* court began its analysis of the covenant by reciting the now-familiar tri-partite standard recently echoed in *Advanced Marine Enterprises v. PRC, Inc.*<sup>12</sup> In *Simmons*, the court held that in order to determine whether a noncompetition agreement may be enforced, a chancellor must consider the following criteria:

(1) Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than necessary to protect the employer in some legitimate business interest?

(2) From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?

(3) Is the restraint reasonable from the standpoint of a sound public policy?<sup>13</sup>

The court then noted that such clauses are strictly construed against the employer because they restrain trade.<sup>14</sup> Furthermore, the court explained that the employer bears the burden of proving that the restraint is reasonable under the specific facts of the case.<sup>15</sup> Finally, the court noted that enforceability of such clauses is a question of law to be determined by the court.<sup>16</sup>

Turning to the facts, the court pointed out that while the employer was engaged in the import of one particular brand of cigars grown and manufactured in the Canary Islands, the noncompetition clause restricted “any business similar to the type of business conducted by [the employer]” that is “considerably broader” than

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11. *Id.* at 580, 544 S.E.2d at 678.

12. 256 Va. 106, 501 S.E.2d 148 (1998).

13. *Simmons*, 261 Va. at 580–81, 544 S.E.2d at 678 (quoting *Advanced Marine Enter.*, 256 Va. at 118, 501 S.E.2d at 155).

14. *Id.* at 581, 544 S.E.2d at 678 (citing *Grant v. Carotek, Inc.*, 737 F.2d 410, 412 (4th Cir. 1984)).

15. *Id.* (citing *Blue Ridge Anesthesia and Critical Care, Inc. v. Gidick*, 239 Va. 369, 374, 389 S.E.2d 467, 470 (1990)).

16. *Id.* (citing *Orkin Exterminating Co. v. Walker*, 251 Ga. 536, 537, 307 S.E.2d 914, 916 (1983)).

the employer's business.<sup>17</sup> It is noteworthy that the court did not address this issue with any explicit citation or even veiled reference to its prior line of cases approving "business similar" language.<sup>18</sup> Regardless, the noncompetition clause at issue was doomed because the clause was without any geographical limitation, despite the defined geographical parameters of the employer's business.<sup>19</sup> In the final analysis, the court held:

[U]pon consideration of the lengthy duration of the restriction,<sup>20</sup> the expansion of restricted functions, and the lack of any geographical limitation, . . . the restrictive covenant was greater than necessary to protect the legitimate business interests of [the employer], and unduly harsh and oppressive in curtailing [the employee's] legitimate efforts to pursue her livelihood. As an unnecessary and unreasonable restraint of trade, the non-competition clause is offensive to the public policy of the Commonwealth and is not enforceable.<sup>21</sup>

In *Motion Control Systems, Inc. v. East*,<sup>22</sup> decided just two months after *Simmons*, the Supreme Court of Virginia suggested that an attempt to make "similar business" language more specific may render a noncompetition agreement overbroad in some circumstances.<sup>23</sup> At issue in that case was a clause that provided:

[T]he Employee agrees that for a period of two years after termination of their employment with the Company in any manner whether with or without cause, the Employee will not within a one hundred (100) mile radius of the Company's principal office in Dublin, Virginia, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be associated in any manner with the ownership, management, operation or control of any business similar to the type of business conducted by the Company at the time of the termination of this Agreement. The term "business similar to the type of business conducted by the Company" includes, but is not limited to any business that designs, manufactures, sells or distributes motors, motor drives or motor controls.<sup>24</sup>

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17. *Id.*

18. *See id.*

19. *Id.*

20. The court acknowledged prior decisions in which it found restrictive covenants lasting as long as three years reasonable under the circumstances of the particular case. *Id.* (citing *Blue Ridge Anesthesia*, 239 Va. at 374, 389 S.E.2d at 470; *Roanoke Eng'g Sales v. Rosenbaum*, 223 Va. 548, 556, 290 S.E.2d 882, 887 (1982)).

21. *Id.* at 581, 544 S.E.2d at 678-79.

22. 262 Va. 33, 546 S.E.2d 424 (2001).

23. *See id.* at 37-38, 546 S.E.2d at 425-26.

24. *Id.* at 36, 546 S.E.2d at 425.

As in *Simmons*, the court emphasized the barriers that face employers seeking to enforce such clauses:

Covenants not to compete are restraints on trade and accordingly are not favored. The validity of a covenant not to compete is determined by applying not only the general principles of contract construction, but also legal principles specifically applicable to such covenants. The employer bears the burden to show that the restraint is reasonable and no greater than necessary to protect the employer's legitimate business interests. The restraint may not be unduly harsh or oppressive in curtailing the employee's legitimate efforts to earn a livelihood and must be reasonable in light of sound public policy. As a restraint of trade, the covenant must be strictly construed and, if ambiguous, it must be construed in favor of the employee.<sup>25</sup>

The two-year restriction and the geographic scope of the covenant were not issues considered on appeal.<sup>26</sup> Addressing only the scope of restricted activities, the court declined to enforce the noncompetition clause because it "prohibits employment in any business, for example, that sells motors, regardless of whether the motors are the specialized types of brushless motors sold by [the employer]."<sup>27</sup> The court held that the restrictive language defining "business similar" was inserted into the agreement upon the suggestion of the employee, and thus, was of no importance.<sup>28</sup> Because the court found that the covenant imposed restraints that exceeded those necessary to protect the legitimate business interests of the employer, it held the covenant unenforceable.<sup>29</sup>

In another case of interest, *Carilion Healthcare Corp. v. Ball*,<sup>30</sup> a health care corporation system ("CHC") sought to enjoin one of its former physicians ("Ball") from competing against it pursuant to a noncompetition covenant incorporated into the physician employment agreement ("PEA").<sup>31</sup> The noncompetition covenant provided that Ball would not provide primary care medical services within twenty-five miles of the primary office for a two-year period following any termination of employment.<sup>32</sup> The restrictive

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25. *Id.* at 37, 546 S.E.2d at 425–26 (citing *Richardson v. Paxton*, 203 Va. 790, 794–95, 127 S.E.2d 113, 117 (1962)).

26. *See id.* at 38, 546 S.E.2d at 426.

27. *Id.*

28. *See id.*

29. *See id.*

30. No. CH00-732, 2001 Va. Cir. LEXIS 22 (Cir. Ct. Feb. 26, 2001) (Roanoke County).

31. *Id.* at \*1.

32. *Id.* at \*3.

covenant arose from both the sale of Ball's practice to CHC and from the employment relationship.<sup>33</sup> After the sale was complete, Ball remained an employee with CHC until the PEA expired, at which time CHC made him a reasonable offer to continue his employment.<sup>34</sup> Ball declined the offer and began practicing medicine independent of CHC.<sup>35</sup>

Ball contended that the covenant was triggered only by termination of his employment before the end of the term required by the PEA.<sup>36</sup> Ball further argued that since he worked until his term expired, the covenant was not triggered and he could not have possibly violated its terms.<sup>37</sup> Based on a full reading of the agreement, the court held that the parties intended the noncompetition covenant to survive the expiration of the PEA and that the covenant is triggered when a reasonable offer to continue employment is made, rather than when employment is terminated prematurely.<sup>38</sup>

With regard to an employee's fiduciary duty of loyalty in *Radon Control Professionals, Inc. v. Keely*,<sup>39</sup> the Fairfax Circuit Court granted an injunction forbidding a former employee from utilizing any of the techniques or methods that he learned from his former employer that were not already known in the public domain.<sup>40</sup> This decision underscores the principle clarified by the Supreme Court of Virginia in *Feddeman & Co. v. Langan Assoc.*<sup>41</sup> In *Feddeman*, the court held that a departed employee owes a continuing fiduciary duty of loyalty, with regard to confidential information acquired during the course of employment, to a former employer even after the termination of the employment relationship.<sup>42</sup>

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33. *Id.*

34. *Id.* at \*1.

35. *Id.*

36. *Id.* at \*2.

37. *Id.*

38. *Id.* at \*13.

39. Ch. No. 168597 (Va. Cir. Ct. filed Sept. 13, 2000) (Fairfax County). This case was ultimately dismissed. (Va. Cir. Ct. June 12, 2001). *See id.*

40. *See id.* (Va. Cir. Ct. Oct. 6, 2000) (order granting *pendente lite* injunction).

41. 260 Va. 35, 530 S.E.2d 668 (2000).

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

## III. RESPONDEAT SUPERIOR

The Supreme Court of Virginia's recent decisions addressing the scope of respondeat superior likewise captured broad attention over the past year. Under the doctrine of respondeat superior,<sup>43</sup> an employer is liable for the tortious acts of its employee if the employee was acting within the scope of his employment when the tortious acts were committed.<sup>44</sup> Two years ago, the Supreme Court of Virginia issued a decision that has been touted by some as "set[ting] an outer limit on employer liability."<sup>45</sup> In *Giant of Maryland, Inc. v. Enger*,<sup>46</sup> the court reversed a jury verdict in favor of an elderly customer hit by a supermarket clerk.<sup>47</sup> The court explained that the test for employer liability is not whether the tortious act itself is a transaction within the ordinary course of the employer's business, but whether the service itself, in which the tortious act was done, is within the ordinary course of such business.<sup>48</sup> In the past year, the court decided two cases which further refine this approach.

First, in *Majorana v. Crown Central Petroleum Corp.*,<sup>49</sup> the plaintiff alleged that she stopped at the defendant's gas station, where she was a regular customer.<sup>50</sup> When she attempted to pay for her purchase with a credit card, an employee produced a small black notebook and refused to complete the transaction unless she provided him with her telephone number.<sup>51</sup> In addition, the employee told the plaintiff that he told his friends that he was going to marry her.<sup>52</sup> When the plaintiff refused to provide her telephone number, the employee became angry, refused to return her credit card, and told her to get some sodas and "take a break" while he attended to other customers.<sup>53</sup> Further, the plaintiff alleged that after the other customers departed, the employee

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43. The phrase respondeat superior is translated as "let the master answer."

44. See *Kensington Assocs. v. West*, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987).

45. Deborah Elkins, *Employer Was Not Liable for Workplace Assault: Respondeat Superior Being Reined In?*, VA. LAW. WKLY, Apr. 26, 1999, at A1.

46. 257 Va. 513, 515 S.E.2d 111 (1999).

47. *Id.* at 517, 515 S.E.2d at 113.

48. *Id.* at 516-17, 515 S.E.2d at 112-13.

49. 260 Va. 521, 539 S.E.2d 426 (2000).

50. *Id.* at 524, 539 S.E.2d at 427.

51. *Id.*

52. *Id.*

53. *Id.*

moved from behind the counter, lunged at her, attempted to kiss her, grabbed her breasts, rubbed his body against her, and made an "animal-like conquering scream."<sup>54</sup> Eventually, the employee completed the transaction, and the plaintiff departed.<sup>55</sup>

The supreme court reversed the dismissal of the plaintiff's claims of assault and battery and intentional infliction of emotional distress, which had been attributed to the defendant employer through the doctrine of respondeat superior.<sup>56</sup> The court held that a plaintiff satisfies the burden of production on the issue of respondeat superior when he establishes the employer-employee relationship at the time of the alleged tort.<sup>57</sup> A presumption of employer liability then exists, which shifts the burden of production to the employer.<sup>58</sup> The employer must prove that the employee acted beyond the scope of his employment in engaging in the alleged conduct.<sup>59</sup> Assuming the employer satisfies this burden, an issue of fact for the jury results unless the nature of the defendant's proof justifies a ruling from the court as a matter of law.<sup>60</sup>

In *Gina Chin & Associates v. First Union Bank*,<sup>61</sup> the plaintiff alleged that First Union was negligent because it accepted checks with both forged signatures of the plaintiff and forged endorsements of payees.<sup>62</sup> The plaintiff further alleged that the bank was vicariously liable for the criminal acts of its teller who participated in the forgery scheme.<sup>63</sup> The Supreme Court of Virginia held that the trial court erred by ruling as a matter of law that an employee bank teller who knowingly accepted forged checks for deposit was acting outside the scope of his employment.<sup>64</sup> The court noted that it has:

consistently held that proof of the employment relationship creates a prima facie rebuttable presumption of the employer's liability. Thus,

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54. *Id.*

55. *Id.*

56. *Id.* at 526, 539 S.E.2d at 428-29.

57. *Id.*

58. *Id.*

59. *Id.* at 526-27, 539 S.E.2d at 429.

60. *Id.* at 527, 539 S.E.2d at 429.

61. 260 Va. 533, 537 S.E.2d 573 (2000).

62. *Id.* at 538, 537 S.E.2d at 575.

63. *Id.*

64. *Id.* at 544, 537 S.E.2d at 579.

"[w]hen an employer-employee relationship has been established, the burden is on the [employer] to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of, and . . . if the evidence leaves the question in doubt it becomes an issue to be determined by the jury."

Admittedly, the trial court's task may be particularly difficult in cases in which the injury is caused by an intentional, often criminal, tortious act which clearly would not have been contemplated by the employer as being within the scope of employment, but which nonetheless was performed incident to the employment and even facilitated thereby. Such cases invoke consideration of whether the employee deviated from the scope of his employment because of an "external, independent, and personal motive . . . to do the act upon his own account." In that regard, we have distinguished between the motive of the employee and the relevant question whether the service performed was within the scope of employment. In making this distinction, we have held that the motive of the employee in committing the act complained of is not determinative of whether it took place within the scope of the employment relationship. Rather, the issue is "whether the service itself, in which the tortious act was done, was within the ordinary course of such business."<sup>65</sup>

The court acknowledged that when the employee criminally accepted known forged checks, "he was performing a normal function of a bank teller in accepting checks for deposit."<sup>66</sup> The court emphasized that the employee's improper motive is not irrelevant to the inquiry, but "[r]ather, it is merely a factor to be considered in making that determination, and, unless the deviation from the employer's business is slight on the one hand, or marked and unusual on the other, but falls instead between those two extremes, the question is for the jury."<sup>67</sup>

The court concluded that the trial court's decision to strike the plaintiff's evidence was premised not on the failure of the plaintiff to present sufficient evidence to establish a *prima facie* case of the necessary employment relationship, but on the failure of the evidence to prove that the acts complained of were committed within the scope of that employment.<sup>68</sup> "[H]aving established that the employment relationship existed, [the plaintiff] was entitled to have the case go forward with the burden on [the bank] to

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65. *Id.* at 542-43, 537 S.E.2d at 577-78 (alteration in original) (citations omitted).

66. *Id.* at 545, 537 S.E.2d at 579.

67. *Id.* at 543-44, 537 S.E.2d at 578.

68. *Id.*

prove that [its employee] acted *outside* the scope of his employment."<sup>69</sup>

#### IV. NEGLIGENCE IN HIRING, RETENTION, AND SUPERVISION

Tort actions in which the employer is allegedly responsible for the acts of its employees continue to receive increasing attention in Virginia courts. Often as an alternative to, or in addition to, pursuing federal remedies, plaintiffs seek tort remedies for alleged wrongs arising out of the employment relationship. Outgrowths of the doctrine of respondeat superior and related claims of negligence in employment are becoming more commonplace. Many of these cases were litigated in Virginia courts this past year.

The tort theory of negligent hiring has been recognized for some time in Virginia.<sup>70</sup> "[N]egligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others."<sup>71</sup> As expressed by one circuit court, a plaintiff must demonstrate:

that an employee had a propensity for the conduct that ultimately resulted in the injury to others and that knowledge of the propensity was reasonably discoverable; the employer failed to inquire; and, had the employer inquired, it would not have placed the employee in the same position that it did. . . . [U]nlike the knowledge element for negligent supervision or retention, the knowledge must occur prior to the hiring or placement.<sup>72</sup>

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69. *Id.* at 545, 537 S.E.2d at 579.

70. *See, e.g.,* Southeastern Apartments Mgmt., Inc. v. Jackman, 257 Va. 256, 513 S.E.2d 395 (1999); Courtney v. Ross Stores, Inc., 45 Va. Cir. 429 (Cir. Ct. 1998) (Fairfax County) (noting that the tort of negligent hiring has a long history in the state, dating back at least to 1903).

71. *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 211, 372 S.E.2d 391, 394 (1988) (quoting Cindy M. Haerle, Note, *Minnesota Developments—Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Invests.*, 68 MINN. L. REV. 1303, 1306–07 (1984)).

72. *Courtney*, 45 Va. Cir. at 430 (citing *Davis v. Merrill*, 133 Va. 69, 78–81, 112 S.E. 628, 630–32 (1922)); *see also* *Berry v. Scott & Stringfellow*, 45 Va. Cir. 240, 248 (Cir. Ct. 1998) (Norfolk City) (summarizing the test for negligent hiring within the scope of sexual harassment and assault claims).

By comparison, negligent supervision claims allege that the employer negligently monitored the offender's activities.<sup>73</sup> The Supreme Court of Virginia has declined to recognize the tort of negligent supervision and does not impose a duty of reasonable care upon an employer in the supervision of its employees.<sup>74</sup>

A negligent retention claim is distinct from a negligent hiring or negligent supervision claim. In the negligent retention context, the employee argues that the employer knew of the offender's prior bad acts but kept the offender in his position, thereby unreasonably exposing others to harm.<sup>75</sup> In opining on the tort of negligent retention, the courts have noted that for liability to be imposed, the employer must "negligently retain or fail to fire or remove an employee after learning of the employee's incompetence, negligence, or unfitness for a position."<sup>76</sup>

In *Sutphin v. United American Insurance Co.*,<sup>77</sup> an insurance agent, who was an independent contractor for the defendant insurance company, sued the company for the negligent retention of a branch manager who allegedly sexually harassed her.<sup>78</sup> The district court rejected the plaintiff's claims on the ground that the manager's alleged conduct was not actionable in its own right.<sup>79</sup> In this regard, the court noted that while Virginia courts have never directly addressed whether the tort of negligent retention requires physical harm or injury, case precedent requires, at the very least, that the alleged conduct give rise to an underlying

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73. See Paul Fletcher, *Negligent Retention: Your Success May Depend on Whether You Sue in State or Federal Court*, VA. LAW. WKLY., Sept. 29, 1997, at B1.

74. See, e.g., *C&P Tel. v. Dowdy*, 235 Va. 55, 365 S.E.2d 751 (1988); see also *Courtney*, 45 Va. Cir. at 432 ("In 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." (quoting *Dowdy*, 235 Va. at 61, 365 S.E.2d at 754)).

75. See, e.g., Fletcher, *supra* note 73, at B1. Prior to the Supreme Court of Virginia's decision in *Southeastern Apartments Management Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999), courts in Virginia were split on the issue of the viability of the tort of negligent retention. See, e.g., *Tremel v. Reid*, 45 Va. Cir. 364, 383 (Cir. Ct. 1998) (Albemarle County) (arguing that because the state recognized negligent hiring as an actionable claim, logic would dictate that the Commonwealth also recognizes negligent retention). Some courts were persuaded by this argument, but up to that point there had been little guidance on the subject from the state's highest court.

76. *Courtney*, 45 Va. Cir. at 431.

77. No. 7:00CV00669, 2000 U.S. Dist. LEXIS 21063 (W.D. Va. Dec. 13, 2000).

78. *Id.* at \*1.

79. *Id.* at \*5.

wrong that is actionable in its own right.<sup>80</sup> In *Sutphin*, the plaintiff admitted that the branch manager never physically touched or assaulted her.<sup>81</sup> Instead, she merely alleged that the branch manager's verbal conduct constituted sexual harassment.<sup>82</sup> The court noted that sexual harassment is not actionable in and of itself in Virginia and that a claim of sexual harassment under Title VII of the Civil Rights Act is not available to workers who are not "employees."<sup>83</sup> As a consequence, the alleged conduct, no matter how offensive, was not actionable in its own right under Virginia or federal law.<sup>84</sup> Accordingly, the court held that the plaintiff failed to state a claim of negligent retention.<sup>85</sup>

#### V. CLAIMS OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY<sup>86</sup>

Virginia, like many states, has traditionally adhered to the principle of employment-at-will.<sup>87</sup> The Supreme Court of Virginia has explained that:

Virginia strongly adheres to the common law employment-at-will doctrine. We have repeatedly stated: "Virginia adheres to the common law rule that when the intended duration of a contract for the rendition of services cannot be determined by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will."<sup>88</sup>

Thus, in Virginia, where no specific time period is fixed for the duration of employment, there is a presumption that employment

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80. *Id.*

81. *Id.* at \*4.

82. *Id.*

83. *Id.* at \*5.

84. *Id.*

85. *Id.* at \*6.

86. For a comprehensive overview of the evolution of wrongful discharge in violation of public policy claims, see generally Thomas M. Winn, III, *Annual Survey of Virginia Law: Employment Law*, 33 U. RICH. L. REV. 965 (1999); 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 (1999); Thomas M. Winn, III, *The Supreme Court Opens the Back Door for Public Policy Discriminatory Discharge Claims*, 12 J. CIV. LITIG. 1 (2000).

87. See *Hoffman Specialty Co. v. Pelouze*, 158 Va. 586, 594, 164 S.E. 397, 399 (1932).

88. *Lawrence Chrysler Plymouth v. Brooks*, 251 Va. 94, 96-97, 465 S.E.2d 806, 808 (1996) (quoting *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 102, 439 S.E.2d 328, 330 (1994)).

is at-will, terminable at any time by either party for any reason, with or without cause.<sup>89</sup> The employment-at-will doctrine ordinarily precludes terminated at-will employees from asserting common law causes of action for wrongful discharge or wrongful termination of employment.<sup>90</sup>

In the seminal case of *Bowman v. State Bank of Keysville*,<sup>91</sup> the Supreme Court of Virginia for the first time recognized a “narrow exception” to the employment-at-will doctrine.<sup>92</sup> The exception allows at-will employees to state a claim for wrongful discharge if they can identify a public policy that was violated by the termination of their employment.<sup>93</sup> In the fifteen years since this important decision, plaintiffs have continued their assault on the at-will doctrine through creative pleading and extensive scouring of the Virginia Code for statutes expressive of Virginia’s “public policy.” While last year lacked the judicial fireworks of the past several years, several notable opinions were issued.

In *Brown v. Wal-Mart Stores, Inc.*,<sup>94</sup> the court held that the employee could not rely upon Virginia Code section 18.2-59<sup>95</sup> because the employee did not allege sufficient facts to establish that the actions of the defendants satisfied the statutory prerequisites of the cited code section.<sup>96</sup>

In *Fisher v. A.W. Temple, Inc.*,<sup>97</sup> instead of filing a claim that might have been barred by the exclusivity provision of the Virginia Human Rights Act,<sup>98</sup> the plaintiff sufficiently alleged a claim of racial harassment by alleging the torts of assault and battery and intentional infliction of emotional distress.<sup>99</sup>

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89. *See id.*

90. *Id.*

91. 229 Va. 534, 331 S.E.2d 797 (1985).

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

93. *Id.* at 539, 331 S.E.2d at 801.

94. 52 Va. Cir. 480 (Cir. Ct. 2000) (Spotsylvania County).

95. VA. CODE ANN. § 18.2-59 (Repl. Vol. 1996 & Cum. Supp. 2001) (prohibiting extortion).

96. *Brown*, 52 Va. Cir. at 483.

97. No. LL-870, 2000 Va. Cir. LEXIS 193 (Cir. Ct. Aug. 4, 2000) (Richmond City).

98. VA. CODE ANN. §§ 2.2-3900A to -3902 (Repl. Vol. 2001).

99. *Fisher*, 2000 Va. Cir. LEXIS 193, at \*12.

## VI. WORKERS' COMPENSATION EXCLUSIVITY

Under the Virginia Workers' Compensation Act,<sup>100</sup> an employee is limited to remedies for all "injuries" arising out of and in the course of the employment as defined under the Act.<sup>101</sup> The Act provides that "the rights and remedies herein granted to an employee . . . shall exclude all other rights and remedies of such employee . . . at common law or otherwise."<sup>102</sup> The Act is highly remedial and must be liberally construed in favor of coverage.<sup>103</sup> Thus, when the plaintiff incurs an injury in the course of his employment, he ordinarily has no right to pursue a common law action.<sup>104</sup> The test is not whether plaintiff actually received Workers' Compensation benefits,<sup>105</sup> but rather whether the plaintiff's claim falls within the Act.<sup>106</sup>

In *Combs v. Virginia Electric and Power Co.*,<sup>107</sup> an employee developed a severe headache while participating in an aerobics class at her employer's health center and thereafter was left unattended in the facility's "quiet room."<sup>108</sup> She later fell into a coma and subsequently was diagnosed as having suffered a hemorrhage as a result of an aneurysm.<sup>109</sup> The employee sued her employer alleging negligence.<sup>110</sup> The employer responded with a special plea claiming the employee's exclusive remedies for such harm fell under the Workers' Compensation Act.<sup>111</sup> The court granted the plea and dismissed the claim.<sup>112</sup> The Supreme Court of Virginia affirmed the dismissal, holding that the employee had suffered an "injury by accident arising out of and in the course of

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100. VA. CODE ANN. §§ 65.2-100 to -1310 (Repl. Vol. 1995 & Cum. Supp. 2001).

101. *Id.* § 65.2-101 (Repl. Vol. 1995 & Cum. Supp. 2001).

102. *Id.* § 65.2-307 (Cum. Supp. 2001).

103. See *Henderson v. Cent. Tel. Co.*, 233 Va. 377, 382, 355 S.E.2d 596, 599 (1987).

104. *Kimmell v. Seven Up Bottling Co.*, 993 F.2d 410, 412-13 (4th Cir. 1993); see also *Plummer v. Landmark Communications, Inc.*, 235 Va. 78, 84, 366 S.E.2d 73, 75 (1988); *Permison v. Vastera*, 51 Va. Cir. 409 (Cir. Ct. 2000) (Loudoun County).

105. *Kimmel*, 993 F.2d at 412-13.

106. *Plummer*, 235 Va. at 84, 366 S.E.2d at 75; *Braxton v. City of Richmond*, 4 Va. Cir. 369, 370 (Cir. Ct. 1986) (Richmond City).

107. 259 Va. 503, 525 S.E.2d 278 (2000).

108. *Id.* at 506, 525 S.E.2d at 280.

109. *Id.*

110. *Id.*

111. *Id.* at 507, 525 S.E.2d at 281.

112. *Id.*

employment.”<sup>113</sup> The court noted that the employee’s injury was not the aneurysm per se, but rather the “aggravation, exacerbation, and/or acceleration of the aneurysm,” which resulted “from the alleged negligent emergency medical care or lack thereof that she received from [her employer] and its [Employee Health Services] employees after she suffered a severe headache during the aerobics class.”<sup>114</sup>

## VII. EMPLOYMENT AGREEMENTS

In *Judson v. America Online, Inc.*,<sup>115</sup> former employees sought a declaration of whether they were entitled to a pro rata share of stock options under Non-Qualified Stock Option Agreements, which had not vested as of the date of termination of employment.<sup>116</sup> The court held that the plain terms of the agreements precluded any argument that the employees had a right to purchase options that were not vested as of the date of termination and, accordingly, granted the employer’s Motion to Strike and dismissed the case with prejudice.<sup>117</sup>

## VIII. CONCLUSION

Clearly, employment and labor law in Virginia was affected by several important decisions over the past year. While the past year lacked sensational decisions involving the public policy exception to the employment-at-will doctrine, a steady stream of such claims in the lower courts likely will fuel further decisions by the Supreme Court of Virginia. On the other hand, evolving case law regarding the enforcement of noncompetition agreements underscores the necessity of drafting covenants not to compete that are not overly broad in geographic scope and/or duration, are not unduly burdensome to the employee and their ability to earn a livelihood, and are rationally related to the em-

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113. *Id.* at 512, 525 S.E.2d at 283 (citing VA. CODE ANN. § 65.2-101 (Repl. Vol. 1995 & Cum. Supp. 2001)).

114. *Id.* at 508, 525 S.E.2d at 281.

115. No. 19242, 2000 WL 710298 (Va. Cir. Ct. May 22, 2000) (Loudoun County).

116. *Id.* at \*1.

117. *Id.*

ployer's interests. Even in the absence of enforceable noncompetition agreements, employees must walk the fine line between merely preparing to compete with an employer and breaching the fiduciary duty of loyalty owed to the employer.

Moreover, plaintiffs continue to follow a national trend in pursuing claims against employers under common law negligence theories. The past year's decisions provide fodder for future litigation against employers both vicariously through the doctrine of respondeat superior and directly through negligent hiring and retention claims. These decisions have further fleshed out the standards for such claims and provide guidance for practitioners involved in litigating these theories.