University of Richmond Law Review

Volume 39
Issue 1 *Annual Survey 2004*

Article 13

11-2004

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I. INTRODUCTION

This article discusses six principal areas of state labor and employment law in which there was significant activity in Virginia's state and federal courts over the past two years: (1) employment-at-will;[1] (2) wrongful discharge;[2] (3) employment agreements;[3] (4) non-competition and non-solicitation agreements and fiduciary duty;[4] (5) respondeat superior and negligence in hiring, supervision, and retention;[5] and (6) unemployment benefits.[6] In addition, this article summarizes some of the significant legislative enactments affecting the employer/employee relationship.[7] Beyond the scope of this article are decisions rendered in other areas of law affecting the employment relationship, including, inter alia, public employment claims and workers' compensation claims.

II. EMPLOYMENT-AT-WILL

As the Supreme Court of Virginia has repeatedly held, "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

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1. *See* discussion *infra* Part II.
2. *See* discussion *infra* Part III.
3. *See* discussion *infra* Part IV.
4. *See* discussion *infra* Part V.
5. *See* discussion *infra* Part VI.
6. *See* discussion *infra* Part VII.
7. *See* discussion *infra* Part VIII.

either party is ordinarily at liberty to terminate the contract at will . . . ."[8] Under the at-will doctrine, there is a presumption that the employment relationship is terminable by either party, with or without cause, for any reason. [9]

As evinced by the Supreme Court of Virginia's opinion in *Cave Hill Corp. v. Hiers*,[10] the court has no intention of departing from the at-will presumption. In that case, the court began its analysis of a breach of employment contract claim with familiar language.

> "In Virginia, an employment relationship is presumed to be at-will, which means that the employment term extends for an indefinite period and may be terminated by the employer or employee for any reason upon reasonable notice." However, when the employment is for a definite period, the presumption of at-will employment is rebutted and an employee may be terminated only for just cause.[11]

Employing this presumption, even though there was an employment contract, the court found the employee relationship to be at-will and entered final judgment in favor of the defendant employer.[12]

In *Moore v. Historic Jackson Ward Ass'n*,[13] the plaintiff brought suit for wrongful termination in reliance upon the defendant employer's Personnel Policies and Procedures.[14] This document listed reasons an employee *may* have been discharged for cause, as opposed to listing reasons an employee *should only* have been discharged for cause.[15] The Richmond City Circuit Court determined that the plaintiffs' claims were indistinguishable from the fact pattern in *County of Giles v. Wines*.[16] In *Wines*, the Supreme Court of Virginia held that a similar personnel policy, which stated reasons an employee *may* have been discharged, was insuf-

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8. Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94, 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)).

9. Hoffman Specialty Co. v. Pelouze, 158 Va. 586, 594, 164 S.E. 397, 399 (1932); *see also* Bowman v. State Bank of Keysville, 229 Va. 534, 535, 331 S.E.2d 797, 798 (1985).

10. 264 Va. 640, 570 S.E.2d 790 (2002). For a more complete discussion of the case, see *infra* Part IV.

11. *Id.* at 645, 570 S.E.2d at 793 (quoting County of Giles v. Wines, 262 Va. 68, 72, 546 S.E.2d 721, 723 (2001)).

12. *Id.* at 646–47, 570 S.E.2d at 793–94.

13. 61 Va. Cir. 149 (Cir. Ct. 2003) (Richmond City).

14. *Id.* at 150.

15. *Id.*

16. *Id.* at 149 (citing *Wines*, 262 Va. at 63, 546 S.E.2d at 721).

ficient to rebut the strong presumption of employment-at-will.[17] Therefore, applying *Wines* as precedent, the Richmond City Circuit Court held that the plaintiff had not stated a cause of action.[18]

III. WRONGFUL DISCHARGE

At-will employees typically have no avenues for relief from the discharge decision per se.[19] A number of exceptions to this principle, however, have evolved over time.

A. *The "Public Policy" Exception*

Virginia, like a number of other states,[20] recognizes the public policy exception[21] to the employment-at-will doctrine.[22] This principle allows at-will employees to pursue a wrongful discharge claim if they can identify a public policy that was violated in connection with their discharge.[23]

In *Swain v. Adventa Hospice, Inc.*,[24] an employee brought suit in federal court for wrongful discharge, attempting to make use of

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17. *Wines*, 262 Va. at 73, 546 S.E.2d at 723; *see also* Thomas M. Winn, III, *Annual Survey of Virginia Law: Labor and Employment Law*, 37 U. RICH. L. REV. 241, 245–49 (2002) (analyzing the holding of the *Wines* case).

18. *Moore*, 61 Va. Cir. at 150.

19. *See, e.g.*, Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94, 98–99, 465 S.E.2d 806, 809 (1996); *cf.* Wright v. St. Charles Water Auth., 59 Va. Cir. 244, 245 (Cir. Ct. 2002) (Lee County) (finding "that the Virginians with Disabilities Act (VDA) is the exclusive state remedy for employment discrimination; thus, there is no common law wrongful discharge claim").

20. *See, e.g.*, Garner v. Rentenbach Constructers, Inc., 515 S.E.2d 438, 440 (N.C. 1999) (citing Coman v. Thomas Mfg. Co., 381 S.E.2d 445, 447 (N.C. 1989)); Miller v. Mass. Mut. Life Ins. Co., 455 S.E.2d 799, 802 (W. Va. 1995) (citing Harless v. First Nat'l Bank, 248 S.E.2d 270, 275 (W. Va. 1978)).

21. For a comprehensive overview of the evolution of wrongful discharge in violation of public policy claims, see 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, 150–56 (1999); Thomas M. Winn, III, *Annual Survey of Virginia Law: Employment Law*, 33 U. RICH. L. REV. 965, 966–86 (1999); Thomas M. Winn, III, *The Supreme Court of Virginia Opens the Back Door for Public Policy Discriminatory Discharge Claims*, 12 J. CIV. LITIG. 1, 1–10 (2000).

22. *See, e.g.*, Bowman v. State Bank of Keysville, 229 Va. 534, 539–40, 331 S.E.2d 797, 800–01 (1985).

23. *Id.*

24. No. 7:03CV00505, 2003 U.S. Dist. LEXIS 22753 (W.D. Va. Dec. 12, 2003) (mem.).

one of the Supreme Court of Virginia's narrow exceptions to the at-will doctrine.[25] The employee, Swain, worked as a registered nurse.[26] While overseeing a patient whose death was purportedly imminent, Swain noticed that the patient was over-medicated and reduced the dosage.[27] Upon reduction of the dosage, the patient's health improved dramatically.[28] Addressing this conduct, Swain's supervisor later explained that she should not have reduced the dosage and that in doing so she had embarrassed her employer.[29] The employer fired Swain the following day, citing receipt of adverse reports about her.[30]

Swain sought to recover for wrongful discharge under the public policy exception expressed in *Mitchem v. Counts*,[31] wherein the Supreme Court of Virginia announced an exception to the at-will doctrine for discharge based on the employee's refusal to engage in a criminal act.[32] Here, though Swain claimed manslaughter would have ensued absent her intervention, she failed to allege any refusal on her behalf of an order to perform an illegal act.[33] The federal court sitting in diversity noted that to recognize Swain's claim "would substantially erode Virginia's employment at-will doctrine,"[34] and thus declined to do so.[35] Granting the employer's motion to dismiss, the court explained, "[t]he refusal to perform an unlawful act element—an element the court finds lacking here—serves as a benchmark preventing this exception from swallowing the employment at-will doctrine, and nowhere is that fact any more apparent than when safety or health intersect decision-making."[36]

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25. *Id.* at *2.
26. *Id.* at *1.
27. *Id.* at *2.
28. *Id.*
29. *Id.* at *2–3.
30. *Id* at *3.
31. 259 Va. 179, 523 S.E.2d 246 (2000).
32. *Swain*, 2003 U.S. Dist. LEXIS 22753 at *5–8 (citing *Mitchem*, 259 Va. at 190, 523 S.E.2d at 252).
33. *Id.* at *3, 8.
34. *Id.* at *7.
35. *Id.* at *8.
36. *Id.* at *6.

B. *No Implied Covenant of Good Faith and Fair Dealing in At-Will Employment*

The Lee County Circuit Court considered a terminated employee's claim for breach of an implied covenant of good faith and fair dealing in *Wright v. St. Charles Water Authority*.[37] The plaintiff claimed that his termination resulted "solely because of his disabilities, which include[d] diabetes, high blood pressure, and a 'nervous condition.'"[38] The court dismissed the claim, affirming prior Virginia holdings that "[a] covenant of good faith and fair dealing will not be implied as a part of an at-will employment contract where the employer as well as the employee are at liberty to terminate the contract."[39]

C. *Constructive Discharge*

In *Padilla v. Silver Diner*,[40] the plaintiffs brought suit alleging, inter alia, wrongful constructive discharge.[41] "The theory of constructive discharge," the court noted, "is an extension of the tort action for wrongful discharge and is available to an employee who resigns as opposed to being fired."[42] Though the court had refused to acknowledge such a claim in the past, it chose to do so here, noting that as of late "Virginia trial courts have recognized constructive discharge as a cause of action."[43] The elements of this action are as follows: "To establish constructive discharge, a plaintiff must show that the termination was in violation of 'clear and unequivocal public policy of this Commonwealth, that no person should have to suffer such indignities,' and that the employer's actions were deliberate and created intolerable working conditions."[44] As the plaintiffs in *Silver Diner* alleged sufficient

37. 59 Va. Cir. 244 (Cir. Ct. 2002) (Lee County).

38. *Id.* at 244.

39. *Id.* at 246 (citing Schryer v. VBR, 25 Va. Cir. 464, 467 (Cir. Ct. 1991) (Fairfax County)); *see also* Derthick v. Basset-Walker, Inc., 904 F. Supp. 510, 522 (W.D. Va. 1995).

40. 63 Va. Cir. 50 (Cir. Ct. 2003) (Virginia Beach City).

41. *Id.* at 51–52.

42. *Id.* at 57 (citing Jones v. Prof. Hospitality Resources, Inc., 35 Va. Cir. 458 (Cir. Ct. 1995) (Virginia Beach City)).

43. *Id.* (citing Gochenour v. Beasley, 47 Va. Cir. 218 (Cir. Ct. 1998) (Rockingham County)).

44. *Id.*

facts to comport with these elements, the court overruled the defendants' demurrer.[45]

IV. EMPLOYMENT AGREEMENTS

A. *Breach of Contract*

In *Cave Hill Corp. v. Hiers*,[46] the Supreme Court of Virginia analyzed a breach of contract claim brought by an employee against his former employer.[47] The employment contract specified "Effective Dates [of] August 14, 1998—August 1, 2003" and provided that "[t]hirty (30) days' notice [would] be given by both the employee and the employer in the case of leave or dismissal."[48] Following discharge in May of 1999, the employee, Hiers, brought suit alleging: (1) he was improperly denied certain commissions; (2) his job performance was unjustly criticized; (3) he was guaranteed a fixed term of employment per the contract's effective date; and (4) his termination was "without just cause."[49] The employer, Cave Hill, conversely, claimed that Hiers's employment was at-will.[50] In order to resolve what the trial court deemed ambiguity in the contractual language, the jury was allowed to interpret the employment contract and ultimately returned a verdict in favor of Hiers in the amount of $260,000.[51]

Applying the above-mentioned and settled principles of the employment-at-will doctrine, the supreme court noted that "when

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45. *Id.* In overruling the defendants' demurrer, the court held,

> [T]he first element is satisfied by the Plaintiffs' allegations that their continued employment was contingent upon their involvement in acts that violate public policies set forth in Va. Code section 18.2-344, prohibiting fornication, and Va. Code section 18.2-345, prohibiting lewd and lascivious cohabitation. Additionally, the frequency and extent of Miller's alleged actions support an inference of deliberateness and intolerable working conditions, notwithstanding the defendants' assertion that the sole purpose of Miller's actions was for the Plaintiffs to succumb to their sexual advances.

Id.

46. 264 Va. 640, 570 S.E.2d 790 (2002).

47. *Id.* at 642, 570 S.E.2d at 791.

48. *Id.* at 643, 570 S.E.2d at 791–92.

49. *Id.* at 644, 570 S.E.2d at 792.

50. *See id.* at 645, 570 S.E.2d at 793.

51. *Id.* at 644, 570 S.E.2d at 792–93. Upon Cave Hill's motion to set aside the verdict, however, the court ordered remittitur to $100,000. *Id.*

there is a conflict in the evidence concerning the terms of an employment contract, the question whether the employment is at will or for a definite term becomes one of fact to be resolved by the jury."[52] Contractual language is ambiguous if it admits of more than one understanding of the same thing.[53] Ambiguity is not present "'merely because the parties or their attorneys disagree upon the meaning of the language employed to express the agreement.'"[54] Reversing the trial court and entering judgment in favor of defendant Cave Hill, the supreme court held:

> [T]he contract was clear and unambiguous. In plain terms, the contract was effective for a designated period of time. Nevertheless, the agreement specifically was subject to certain "conditions," . . . . The significant condition relevant here is that either party could terminate the contract upon 30 days notice, according to the clear terms of paragraph 5. This notice provision trumped the effect of the designated time period.
>
> Nowhere in this writing is there any reference to a "just cause" requirement for job termination by the employer. In order to find such a requirement, one would have to insert words into the writing contrary to the elementary rule that the function of the court is to construe the contract made by the parties, not to make a contract for them.[55]

In *Mills v. Virginia Polytechnic Institute & State University*,[56] Mills, an employee of Virginia Tech, brought a claim for breach of contract.[57] Tech transferred Mills, a radio station manager, from his position in Roanoke to one in Blacksburg.[58] As a result of a dispute over the relocation, Mills failed to report to his new position in Blacksburg for over a month, and Virginia Tech fired him.[59] Mills argued that his transfer, thirty-four miles by one account, but forty-eight miles by his preferred route, was controlled by a provision in the university's faculty handbook, which guar-

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52. *Cave Hill*, 264 Va. at 645, 570 S.E.2d at 793 (citing Miller v. SEVAMP, Inc., 234 Va. 462, 465–66, 362 S.E.2d 915, 917 (1987)).

53. *Id.* (citing Renner Plumbing, Heating & Air Conditioning, Inc. v. Renner, 225 Va. 508, 515, 303 S.E.2d 894, 898 (1983)).

54. *Id.* (quoting Doswell Ltd. P'ship v. Va. Elec. & Power Co., 251 Va. 215, 222–23, 468 S.E.2d 84, 88 (1996)).

55. *Id.* at 646, 570 S.E.2d at 793 (citing Wilson v. Holyfield, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984)).

56. 64 Va. Cir. 251 (Cir. Ct. 2004) (Montgomery County).

57. *Id.* at 251.

58. *Id.*

59. *Id.* at 251–52.

anteed written notice before any transfer of more than thirty-five miles; Mills contended that Virginia Tech's failure to comply with these terms constituted a material breach.[60] Virginia Tech argued that there was no breach or, alternatively, that any breach was immaterial.[61] The court explained that in order to find a breach material, it must "find that 'the breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract.'"[62] This determination is to be made on a case by case basis, and not every term within an employment contract is material.[63] Bearing these principles in mind, the court held:

> [T]he plaintiff has failed to prove that Virginia Tech violated the terms and conditions of the Faculty Handbook, and even if there is proof of such violation, the violation in this case was not a material violation of the terms and conditions of the Faculty Handbook. Mr. Mills' refusal to report to work in Blacksburg was a material breach of any term and condition of his employment with Virginia Tech and, therefore, he breached his employment agreement with Virginia Tech, thereby precluding him from any recovery in this matter.[64]

Mills's breach of contract claim therefore failed.[65]

B. *Fraud in the Inducement*

In *Godlewski v. Affiliated Computer Services, Inc.*,[66] employee Godlewski brought suit alleging breach of contract and fraud in the inducement against her employer, Affiliated Computer Services ("ACS").[67] Godlewski contended that ACS "fraudulently induced her" to leave her "extremely lucrative position as a top

60. *Id.* at 253–54.

61. *Id.* at 253.

62. *Id.* at 254 (quoting Horton v. Horton, 254 Va. 111, 115, 487 S.E.2d 200, 204 (1997)).

63. *Id.*

64. *Id.* at 255.

65. The United States District Court for the Eastern District of Virginia was similarly unsympathetic to an employee's claim for breach of an employment contract, finding that the plaintiff, who claimed hundreds of thousands of dollars in commissions, was not entitled to said commissions, and that the plaintiff's only chance of recovery was for $7,500 from a sales prize. *See* McCormick v. Level 3 Communications, L.L.C., 261 F. Supp. 2d 476, 483 (E.D. Va. 2003).

66. 210 F.R.D. 568 (E.D. Va. 2002).

67. *Id.* at 569.

sales representative" with her former employer in favor of employment with ACS.[68] She further claimed that ACS never intended to honor its promise of a salary and commission package which would have been a thirty percent plus increase from her former salary.[69] Godlewski, in the alternative, alleged breach of employment contract, for she never received said salary and commission package.[70] Defending against her allegations, ACS argued that no cause of action lies in the tort of fraudulent inducement and that any recovery must be for breach of contract.[71]

According to the Supreme Court of Virginia, in order to determine "'whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained.'"[72] Moreover, if a duty arises from the parties' relationship irrespective of, and not solely by virtue of, the contract and such duty is breached, the cause of action is one of tort.[73] The Eastern District cited the Supreme Court of Virginia's holding in *Richmond Metro. Authority v. McDevitt St. Bovis, Inc.*[74] for the proposition that "a promisor who makes a promise, intending not to perform, makes a misrepresentation of fact that is actionable as fraud."[75] The court noted further support from the Fourth Circuit in *Hitachi Credit America Corp. v. Signet Bank*,[76] which stated, "[*Richmond Metro's*] conclusion is consistent with the distinction in Virginia law between a statement that is false when made (which is fraud) and a promise that becomes false only when the promisor later fails to keep his word (which is breach of contract)."[77] Denying ACS' motion to dismiss the fraudulent inducement claim, the *Godlewski* court reasoned:

> Ms. Godlewski alleges that ACS never intended to honor the promises it made to her in luring her away from Servicesoft and to enter into the employment contract with ACS. She also alleges that she

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* (quoting Richmond Metro. Auth. v. McDevitt St. Bovis, Inc., 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998)).
73. *Id.*; *see also Richmond Metro*, 256 Va. at 558, 507 S.E.2d at 347.
74. 256 Va. 553, 507 S.E.2d 344 (1998).
75. *Godlewski*, 210 F.R.D. at 570 (citing *Richmond Metro*, 256 Va. at 560, 507 S.E.2d at 348).
76. 166 F.3d 614 (4th Cir. 1999).
77. *Id.* at 631 n.9.

> reasonably relied on ACS' false inducements in leaving her employment with Servicesoft, and that she suffered damages by relying on the false inducements. Therefore, Ms. Godlewski's Complaint affirmatively alleges all of the elements of a claim for fraud in the inducement and she can prove a set of facts that, if believed, would entitle her to relief.
>
> Ms. Godlewski's claim of fraudulent inducement survives the crucial distinction between promises which later go unfulfilled and supposed promises which the maker never intended to honor.[78]

V. NON-COMPETITION AND NON-SOLICITATION AGREEMENTS AND FIDUCIARY DUTY

A. *Non-Competition and Non-Solicitation Agreements*

An employer seeking to enforce a non-competition and non-solicitation agreement bears the burden of proving that the restraint is reasonable[79] in that (1) it is "no greater than necessary to protect the employer in some legitimate business interest;" (2) "it is not unduly harsh and oppressive in curtailing [the employee's] legitimate business efforts to earn a livelihood;" and (3) it is consistent with public policy considerations.[80]

In *Microstrategy, Inc. v. Business Objects, S.A.*,[81] the United States District Court for the Eastern District of Virginia applied the above standard and held that the contested non-solicitation clause failed each of the three prongs.[82] "At the heart" of the case was the plaintiff's allegation that "the defendants recruited employees of the plaintiff corporation . . . in order for the defendants to gain access to plaintiff's confidential information."[83] The agree-

78. *Godlewski*, 210 F.R.D. at 571.

79. Simmons v. Miller, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2002) (citing Blue Ridge Anesthesia v. Gidick, 239 Va. 369, 371–72, 389 S.E.2d 467, 468–69 (1990)).

80. Advanced Maine Enters., Inc. v. PRC, Inc., 256 Va. 106, 118, 501 S.E.2d 148, 155 (1998).

81. No. 2:01CV826, 2002 U.S. Dist. LEXIS 25866 (E.D. Va. Oct. 22, 2002). For further discussion of the *Microstrategy* case in the context of trade secrets and non-competition agreements, see Michael F. Urbanski, James R. Creekmore & Ellen S. Moore, *Annual Survey of Virginia Law: Antitrust and Trade Regulation Law*, 38 U. RICH. L. REV. 59, 69–70 (2003).

82. *See Microstrategy*, 2002 U.S. Dist. LEXIS 25866, at *17. The contract's savings clause, however, allowed the offending clause to be severed from the remaining restrictive covenants. *See id.* at *18–20.

83. *Id.* at *4. The plaintiff alleged infringement of patents. *Id.* at *3.

ment in question provided, in pertinent part, "I agree that, for the period of one (1) year after termination of my employment with MicroStrategy for any reason, I will not, directly or indirectly, seek to influence any employees, agents, contractors or customers of MicroStrategy to terminate or modify their relationship with MicroStrategy."[84] While the court sided with the plaintiff as to the reasonableness of the clause's duration, it found that the restraint was ambiguous and therefore "greater than necessary to protect the plaintiff's legitimate business interests."[85] "A former employee of the plaintiff has no real yardstick to measure what actions would" violate the clause, explained the court.[86] The clause was found to violate the second prong of the abuse test as well, for "[t]he clause will restrict the former employee from obtaining any type of job in this industry for fear that it might modify that employer's relationship with MicroStrategy."[87] Finally, since "[b]oth federal and state courts in Virginia have held that 'subjecting the [former] employee to such uncertainty offends 'sound public policy,'[88] the provision also failed the third prong.[89]

In *Professional Heating and Cooling, Inc. v. Smith*,[90] the plaintiff employer sought to enforce a "No Piracy Agreement" against its former employee, a service technician.[91] According to the contract:

> The purpose of this agreement . . . is to establish a two year, no compete period from the date of termination of employment of the named employee.
>
> During this two year no compete period, the named employee may not solicit, cause others to solicit, or do any work for any customers of Professional Heating & Cooling, Inc., from the day of termination.[92]

84. *Id.* at *12–13.

85. *Id.* at *17.

86. *Id.* at *16.

87. *Id.* at *17.

88. *Id.* at *15–16 (alteration in original) (quoting Power Distrib. Inc. v. Emergency Power Eng'g, Inc. 569 F. Supp. 54, 58 (E.D. Va. 1983)).

89. *See id.* at *17.

90. 64 Va. Cir. 313 (Cir. Ct. 2004) (Norfolk City).

91. *Id.* at 313.

92. *Id.* at 314.

The employee, Don Smith, had resigned and moved to Costa Rica, intending the relocation to be permanent.[93] Smith sought re-employment with the plaintiff, however, when the failing health of a family member necessitated his return to the United States.[94] Though Smith signed the "No Piracy" agreement during the course of his previous employment, he never signed another agreement upon his return.[95] Interpreting the terms of the contract, the court observed:

> "Termination" is unambiguous. It means the "end" or "conclusion" of something. Smith ended his employment with the plaintiff on March 2, 2001. His departure at that time was not a "leave of absence." There was no agreement between Smith and the plaintiff about the duration of his absence, nor was there any agreement, or even any expectation that Smith would return to work for the plaintiff. There is no provision in the agreement or any overriding principle of law that would toll the running of the two year period or reimpose the entire period when Smith resumed employment. To do so would re-write the parties' contract and violate the rule to strictly construe such agreements.[96]

Thus, the court sustained Smith's demurrer for the breach of contract claim.[97]

In *International Paper Co. v. Brooks*,[98] when a former employee terminated his employment with the plaintiff employer and secured a new job with its competitor, the employer brought suit for breach of an anti-solicitation clause of a non-compete agreement.[99] The employer, International Paper Company ("IPC"), claimed that the employee solicited its employees for positions with his new employer; in fact, three employees resigned from IPC to seek such employment.[100] The anti-solicitation clause in question provided: "Employee agrees, in consideration of the mutual covenants set forth herein, that he/she will agree not to so-

93. *Id.* at 313.

94. *Id.*

95. *Id.*

96. *Id.* at 315. The court found support for its position in the case of *Reagan Outdoor Adver. v. Lundgren*, 692 P.2d 776 (Utah 1984).

97. *Professional Heating*, 64 Va. Cir. at 314.

98. 63 Va. Cir. 494 (Cir. Ct. 2003) (Roanoke City).

99. *Id.* at 494–95. International Paper Company also alleged tortious interference with contract, conspiracy to injure business, and common law conspiracy, demurrers to which claims were all sustained with leave to amend. *Id.* at 495.

100. *Id.* at 494–95.

licit other employees of the Employer to join Employee (new employer) in a newly formed business, in direct competition with Employer."[101] The court held:

> When strictly construed against the employer/drafter . . . the provision's indefinite "agreement to agree" language, combined with the absence of key terms such as geography and duration, clearly indicates that later negotiations are necessary for the provision to take effect. Even if the clause were permissible under Virginia's public policy, its language would still be too vague and indefinite to be enforceable.[102]

Beyond the issue of enforceability, continued the court, IPC failed to allege facts to support its claim of breach.[103] The employee did not create his own business; rather, he joined a previously existing competitor.[104] Accordingly, the court sustained the defendant's demurrer as to breach.[105]

In *Totten v. Employee Benefits Management, Inc.*,[106] a former employee brought suit to enjoin a former employer from enforcing provisions within a contract regarding confidentiality and non-solicitation.[107] Finding that any unenforceable clauses were severable and thus any remaining clauses enforceable,[108] the court next considered the enforceability of the confidentiality and non-solicitation provisions. Because the confidentiality agreement (1) prohibited disclosure of the employer's proprietary information; (2) was not greater than necessary to protect the employer's interests; and (3) was not deemed to preclude the employee from securing a livelihood, it was found to be enforceable.[109] Conversely, the court held the non-solicitation language to be unenforceable because:

> The restrictions here are both uncertain as to time and overly broad as to scope. They suffer from the same infirmities as the non-

101. *Id.* at 494.
102. *Id.* at 497.
103. *Id.*
104. *Id.*
105. *Id.*
106. 61 Va. Cir. 77 (Cir. Ct. 2003) (Roanoke County).
107. *Id.* at 77.
108. *Id.* at 78 ("Looking at the contract as a whole, . . . the Court finds that it was the intent of the parties to preserve the balance of the agreement in the event that some portions were found to be void.").
109. *Id.*

> competition portion of the contract earlier struck down. At their best, they contain ambiguities that must be construed against the employer. At their worst, they form a part of the non-competition clause and are dependent upon its efficacy for their survival.[110]

B. *Fiduciary Duty*

The Supreme Court of Virginia confronted an employer's claims against a former employee for breach of fiduciary duty[111] in *Williams v. Dominion Technology Partners, L.L.C.*[112] The plaintiff ,Dominion Technology Partners, L.L.C. ("Dominion"), was an employment firm that recruited and temporarily placed computer consultants with businesses, either directly or through other brokers.[113] Dominion recruited Williams to install software in a manufacturing firm, Stihl.[114] Ultimately, Williams gained employment at Stihl through a third-party broker, under a previously existing contract; thus, Dominion and the third party broker each received a portion of Williams's earnings.[115] As Williams never signed an employment contract with Dominion, he eventually terminated his at-will employment with Dominion in favor of working directly for the broker, a more lucrative arrangement.[116] Dominion's allegation of breach of fiduciary duty was predicated on the following conduct: "Williams, after having learned that his services as a computer consultant were likely to be needed at Stihl for an extended period of time, and while still an employee

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110. *Id.* at 79.

111. In *Professional Heating and Cooling, Inc. v. Smith*, 64 Va. Cir. 313 (Norfolk City), where a former employee resigned in favor of employment with the plaintiff's competitor, the court overruled defendant employee's demurrer, but in doing so said,

> I do not find from the evidence at the hearing that the plaintiff is ultimately likely to prevail on this claim. There is no evidence Smith took any documents or records; if he used anything, he used only his memory of the plaintiff's labor rate and the identity of its customers, which he properly acquired during his employment. This is permissible.

Id. at 315.

112. 265 Va. 280, 576 S.E.2d 752 (2003). For additional discussion of the case see John R. Walk, *Annual Survey of Virginia Law: Civil Practice and Procedure*, 39 U. RICH. L. REV. 87, 94–96 (2004). *See also* Urbanski, et al., *supra* note 81, at 81–82.

113. *Williams*, 265 Va. at 283, 576 S.E.2d at 753.

114. *Id.* at 284, 576 S.E.2d at 753.

115. *Id.* at 284, 576 S.E.2d at 754.

116. *Id.* at 287, 576 S.E.2d at 755–56.

of Dominion, arranged with [the broker] to become its employee effective upon his resignation from Dominion."[117]

The *Williams* case confirmed a common law principle that the Supreme Court of Virginia has long recognized—that employees, including employees-at-will, owe a fiduciary duty of loyalty to their employers during employment.[118] Elaborating on this duty, the court explained:

> Subsumed within this general duty of loyalty is the more specific duty that the employee not compete with his employer during his employment. Nonetheless, in the absence of a contract restriction regarding this duty of loyalty, an employee has the right to make arrangements during his employment to compete with his employer after resigning his post. The employee's right in such circumstances is not absolute. Rather, "[t]his right, based on a policy of free competition, must be balanced with the importance of the integrity and fairness attaching to the relationship between employer and employee." Thus, "[u]nder certain circumstances, the exercise of the right may constitute a breach of fiduciary duty . . . . Whether specific conduct taken prior to resignation breaches a fiduciary duty requires a case by case analysis."[119]

In determining whether conduct amounts to breach, courts are to be mindful, however, that harm done to an employer at an employee's hands does not alone establish an actionable breach of duty.[120] The rationale behind this guidepost is that "the law will not provide relief to every 'disgruntled player in the rough-and-tumble world comprising the competitive marketplace,' especially where, through more prudent business practices, the harm complained of could easily have been avoided."[121]

Entering judgment in favor of Williams,[122] the court reasoned that:

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117. *Id.* at 290, 576 S.E.2d at 757.

118. *Id.* at 289, 576 S.E.2d at 757 (citing Horne v. Holley, 167 Va. 234, 241, 188 S.E. 169, 172 (1936)).

119. *Id.* (quoting Feddeman & Co. v. Langan Assocs., 260 Va. 35, 42, 530 S.E.2d 668, 672 (2000)).

120. *Id.* at 290, 576 S.E.2d at 758.

121. *Id.* at 290–91, 576 S.E.2d at 758 (quoting ITT Hartford Group, Inc. v. Virginia Financial Assocs., Inc., 258 Va. 193, 204, 520 S.E.2d 355, 361 (1999)).

122. *Id.* at 292, 576 S.E.2d at 759. The court reversed the trial court's judgments in favor of Dominion on its claims of tortious interference with a business relationship and business conspiracy "[b]ecause the same conduct was alleged to constitute the proof of the 'intentional misconduct' and 'legal malice' elements of the two other theories of liability

> Williams had the right to make the necessary arrangements to resign from his employment with Dominion in such a way as to take advantage of a higher level of compensation if his services at Stihl were needed beyond the month-to-month arrangement then in place, so long as those arrangements were not disloyal or unfair to Dominion.
> . . . [I]t cannot be said that Williams' conduct to safeguard his own interests was either disloyal or unfair to Dominion. Rather, we are of the opinion that Dominion's contracts provided it with nothing more than "a subjective belief or hope that the business relationship[s] would continue and merely a possibility that future economic benefit would accrue to it."[123]

In *H.E.R.C. Products, Inc. v. Turlington*,[124] the Norfolk City Circuit Court considered an employer's claim for breach of fiduciary duty.[125] H.E.R.C., which provided cleaning services for ships, hired Turlington to aid in the preparation of a renewal bid for its existing Navy contract.[126] H.E.R.C. alleged that Turlington "gathered confidential information from his employer and planned with the other named defendants to set up a business to compete with HERC."[127] Defendants' business subsequently underbid H.E.R.C., and H.E.R.C. did not receive a renewal of a military contract.[128] Extensively citing *Williams v. Dominion Technology Partners*, the court held that H.E.R.C. had stated a cause of action for breach of fiduciary duty against Turlington.[129]

VI. RESPONDEAT SUPERIOR AND NEGLIGENCE IN HIRING, SUPERVISION, AND RETENTION

A. *Respondeat Superior*

Under the doctrine of respondeat superior an employer in Virginia may be held liable for the tortious acts committed by its

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presented by Dominion." *Id.*

123. *Id.* at 291–92, 576 S.E.2d at 758 (quoting Commercial Bus. Sys., Inc. v. Halifax Corp., 253 Va. 292, 303, 484 S.E.2d 892, 898 (1997)).

124. 62 Va. Cir. 489 (Cir. Ct. 2003) (Norfolk City).

125. *Id.* at 489.

126. *Id.*

127. *Id.* at 489–90.

128. *Id.* at 490.

129. *Id.* at 490–91 (citing Williams v. Dominion Technology Partners, L.L.C., 265 Va. 280, 289–92, 576 S.E.2d 752, 757–59 (2003)). The court sustained demurrers against all defendants except Turlington, holding that only he owed any duty to H.E.R.C. *Id.* at 491.

employers while: (1) performing their employer's business and (2) acting within the scope of their employment.[130] The critical issue is whether the service in which the tortious act occurred was within the ordinary course of the employer's business.[131]

1. Independent Contractors

The Supreme Court of Virginia examined respondeat superior in the context of an independent contractor in *Southern Floors & Acoustics, Inc. v. Max-Yeboah*.[132] In *Southern Floors*, a Food Lion customer tripped over a stack of tiles left in the aisle by employees of the subcontractors, Southern Floors and Acoustics, ("Southern Floors") who had been contracted to re-tile parts of the grocery store.[133] The customer sustained a broken ankle in the fall and subsequently filed suit for negligence, naming both Food Lion and Southern Floors as defendants.[134] At trial, the jury returned a verdict in favor of the customer, holding Food Lion and Southern Floors jointly and severally liable;[135] on appeal, both parties contested their liability.[136] As a threshold issue, the supreme court declared that "Southern Floors was clearly an independent contractor."[137] "'An independent contractor,'" the court noted "'is one who undertakes to produce a given result without being in any

130. *See* Kensington Assocs. v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987); *see also* Giant of Maryland, Inc. v. Enger, 257 Va. 513, 515, 515 S.E.2d 111, 112 (1999).

131. *Enger*, 257 Va. at 516, 515 S.E.2d at 112 (quoting Davis v. Merrill, 133 Va. 69, 77–78, 112 S.E. 628, 631 (1922)).

132. 267 Va. 682, 594 S.E.2d 908 (2004). Also at issue was the plaintiff's contributory negligence; the court held that this issue was properly submitted to the jury. *Id.* at 686, 594 S.E.2d at 911.

133. *Id.* at 684–85, 594 S.E.2d at 909–10.

134. *Id.*

135. *Id.* at 685, 594 S.E.2d at 910.

136. *Id.* at 686, 594 S.E.2d at 910.

137. *Id.* at 687, 594 S.E.2d at 911. In determining whether a person is an independent contractor or agent, the following four factors must be analyzed: "'(1) selection and engagement of the servant, (2) payment of compensation, (3) power of dismissal, and (4) power of control,'" the last of which is the controlling factor. Hadeed v. Medic-24, Ltd., 237 Va. 277, 288, 377 S.E.2d 589, 594–95 (1989) (quoting Naccash v. Burger, 223 Va. 406, 418–19, 290 S.E.2d 825, 832 (1982)); *see also* Steffan v. Freemason Assocs., Inc., 60 Va. Cir. 216, 217 (Cir. Ct. 2002) (Norfolk City) (finding a realtor to be an agent of the real estate company). This inquiry is most commonly one for a jury. *Hadeed*, 237 Va. at 288, 377 S.E.2d at 594. If the evidence leads to one conclusion, or the answer is rooted in written documents, then the inquiry becomes one of law. *Steffan*, 60 Va. Cir. at 217 (finding that the determination of independent contractor status was one of law because "the question of agency rests entirely on the interpretation" of certain contracts).

way controlled as to the method by which he attains that result.'"[138] The court went on to explain that where third parties incur injury on the premises of a property owner due to conditions caused by an independent contractor, the property owner may be vicariously liable for the acts of the contractor, or may be directly liable for the owner's negligence.[139]

As to vicarious liability, the supreme court observed that the general rule states that "'an owner who employs an independent contractor is not liable for injuries to third persons caused by the contractor's negligence.'"[140] There are, however, exceptions to this general rule. For example, the doctrine of respondeat superior would apply "if the independent contractor's torts arise directly out of his use of a dangerous instrumentality, arise out of work that is inherently dangerous, are wrongful per se, are a nuisance, or are such that it would in the natural course of events produce injury unless special precautions were taken."[141] Since the trial court dismissed all vicarious liability claims, though, the only theory of liability examined on appeal was direct liability for negligence in "'failing to see that proper warnings and safety conditions existed at the scene of the work.'"[142] Holding that the trial court committed reversible error in allowing the issue of vicarious liability to go to the jury and that Food Lion was neither vicariously nor directly liable, the supreme court declared:

> It is illogical and antithetical to the definition of an independent contractor to impose a duty to supervise upon the principal when the essence of the relationship is lack of power and control to supervise. Food Lion had no duty to supervise the means and method of the work of Southern Floors and cannot be found independently negligent for failing to do so.[143]

2. Apparent Agency

The issue of whether Virginia recognizes vicarious liability under the doctrine of apparent agency in negligence actions arose in

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138. *Southern Floors*, 267 Va. at 687, 594 S.E.2d at 911 (quoting Craig v. Doyle, 179 Va. 526, 531, 19 S.E.2d 675, 677 (1942)).

139. *Id.*

140. *Id.* (quoting Kesler v. Allen, 233 Va. 130, 134, 353 S.E.2d 777, 780 (1987)).

141. *Id.*

142. *Id.* at 688, 594 S.E.2d at 911.

143. *Id.* at 689, 594 S.E.2d at 912 (citing MacCoy v. Colony House Builders, 239 Va. 64, 69, 387 S.E.2d 760, 762 (1990); *Craig*, 179 Va. at 531, 19 S.E.2d at 677).

Sanchez v. Medicorp Health System.[144] Sanchez, a truck driver, sustained injuries in a collision and was treated in a hospital emergency room by the attending physician, who was employed by the Fredericksburg Emergency Medical Associates ("FEMA").[145] Alleging deficient care, Sanchez filed suit against the physician, FEMA, and Medicorp Health System ("Medicorp") which operated the hospital, claiming that the doctor and other medical personnel were "apparent agents, ostensible agents, and/or agents by estoppel" of Medicorp.[146] In response, Medicorp filed the demurrer at issue in the instant case.[147]

The court pointed out that in contract law, one who reasonably appears to have the authority to act on behalf of another, even though he does not have such authority, is an apparent agent and binds the principal in the same manner as if he possessed such actual authority.[148] "Courts in some jurisdictions have applied this concept of apparent agency to negligence actions, at least in the context of physician-hospital relationships."[149] The *Sanchez* court considered such an application:

> [T]he doctrine of apparent agency is not merely an extension of the doctrine of respondeat superior. In fact, it is quite different. The doctrine of respondeat superior imposes liability on a master for the negligent act of its servant where such act is performed in the course of employment because the master has the right to control that performance. The doctrine of apparent agency applies to cases where admittedly there is no control; in fact, there is no real master-servant relationship.[150]

Bearing this in mind, the court ultimately declined to impinge upon the province of the legislature by extending the doctrine of apparent agency to negligence cases.[151] Sustaining Medicorp's demurrer,[152] the court held that "Virginia does not recognize the doctrine of apparent agency in this type of case."[153]

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144. 64 Va. Cir. 207 (Cir. Ct. 2004) (Fredericksburg City).
145. *Id.* at 207.
146. *Id.*
147. *Id.*
148. *Id.* at 208.
149. *Id.*
150. *Id.* at 210.
151. *Id.*
152. *Id.*
153. *Id.* at 209. The court went on to quote Professor Charles Friend, who wrote that in

B. *Negligence in Hiring, Supervision, and Retention*

Direct negligence claims against an employer differ from claims attributable to the employer vicariously by application of the respondeat superior doctrine.[154] The fundamental issue in such claims is whether the employer unreasonably exposed others to a risk of harm by hiring and/or retaining an unsuitable employee.[155]

In *Clements v. MCV Associated Physicians*,[156] the court was faced with a claim for negligent hiring. The plaintiff's decedent died of complications from heart surgery, and the plaintiff alleged that the attendant physician had failed to properly diagnose and treat the decedent's fatal condition.[157] Suit was filed against the physician, the Medical College of Virginia, which employed and extended practice privileges to the doctor, and Virginia Commonwealth University, where the doctor held a faculty appointment.[158]

Plaintiff's negligent hiring claim was predicated upon the physician's failure to pass the General Surgery Board Certification Examination and his subsequent ineligibility to take the Cardio-Thoracic Surgery Boards, which the plaintiff claimed rendered the physician incompetent as a cardio-thoracic surgeon.[159] The court explained the requisite elements of a negligent hiring claim as follows:

> For a claim of negligent hiring, Plaintiff must allege that the employee had a known propensity of being a danger to others in the past, the employer knew or should have known through reasonable discovery about these acts, and the employer hired an unfit employee and placed him in a situation where he could create an unreasonable risk of harm to others.[160]

Virginia it is "'questionable at best'" whether "'apparent authority alone is sufficient to make a master liable for personal injuries inflicted by a servant.'" *Id.* at 209–10 (quoting CHARLES FRIEND, PERSONAL INJURY LAW IN VIRGINIA 213 n.32 (3d ed. 2003)).

154. Interim Personnel of Cent. Va., Inc., v. Messer, 263 Va. 435, 440–41, 559 S.E. 2d 704, 707 (2002).

155. J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 211, 372 S.E.2d 391, 394 (1988); *see also* Southeastern Apartments Mgmt., Inc. v. Jackman, 257 Va. 256, 260, 513 S.E.2d 395, 397 (1999).

156. 61 Va. Cir. 673 (Cir. Ct. 2002) (Richmond City).

157. *Id.* at 674

158. *See id.* at 674–75.

159. *Id.* at 674.

160. *Id.* at 676 (citing Interim Personnel of Cent. Va., Inc. v. Messer, 263 Va. 435, 440, 559 S.E.2d 704, 707) (2002)).

The court dismissed all claims of negligent hiring because the plaintiff failed to allege that the doctor was a danger to others, that the defendant employers knew or should have known that the doctor would commit acts which were dangerous to others, or that the doctor's employment posed an unreasonable risk to patients. [161] The court further explained that "[f]ailure to pass the Board exams in and of itself is not an indication that a person has a known propensity for dangerous activity."[162]

In *Padilla v. Silver Diner,*[163] discussed above,[164] former employees of the Silver Diner brought a negligent retention claim against the restaurant, alleging that the Silver Diner had actual knowledge that other employees "were likely to assault, falsely imprison, and otherwise harm their female co-workers"—the plaintiffs.[165] The court began its analysis of the case by stating that recovery of damages was not barred by the Workers' Compensation Act because the alleged injury was "not the result of an accident arising out of employment."[166] Moreover, though defendants claimed that the conduct of one employee against another was not actionable under a theory of negligent retention, the court disagreed and overruled defendants' demurrer.[167]

As contrasted with negligent retention and hiring claims, the Supreme Court of Virginia does not recognize negligent supervi-

161. *Id.* at 676–77.

162. *Id.* at 677.

163. 63 Va. Cir. 50 (Cir. Ct. 2003) (Virginia Beach City).

164. *See supra* notes 40–45 and accompanying text.

165. *Padilla*, 63 Va. Cir. at 56.

166. *Id.* Under the Virginia Workers' Compensation Act, VA. CODE ANN. § 65.2-100 to -1310 (Repl Vol. 2002 & Cum. Supp. 2004), an employee is limited to her remedies under the Act for all injuries "arising out of and in the course of the employment" as defined under the Act. *Id.* § 65.2-101 (Cum. Supp. 2004). The Act provides that "[t]he rights and remedies herein granted to an employee . . . shall exclude all other rights and remedies of such employee . . . at common law or otherwise." *Id.* § 65.2-307 (Repl. Vol. 2002 & Cum. Supp. 2004). "The Act is highly remedial and should be liberally construed" in favor of coverage. Henderson v. Cent. Tel. Co., 233 Va. 377, 382, 355 S.E.2d 596, 599 (1987). Thus, when the plaintiff incurs an injury in the course of her employment, she ordinarily has no right to pursue a common law action. *See, e.g.*, Kimmell v. Seven Up Bottling Co., 993 F.2d 410, 412–13 (4th Cir. 1993); Plummer v. Landmark Communications, Inc., 235 Va. 78, 84, 366 S.E.2d 73, 75 (1988). For a further discussion of the coverage of the Virginia Workers' Compensation Act, see Lawrence W. Tarr & Salvatore Lupica, *Annual Survey of Virginia Law: Workers' Compensation*, 39 U. RICH. L. REV. 475 (2004).

167. *Padilla,* 63 Va. Cir. at 56.

sion claims.[168] Based on this distinction, one court recently held that Virginia law does not impose a duty on a partner in a law firm to supervise associates.[169] The court noted, however, that failure to do so may in some cases result in a disciplinary proceeding for violation of the Virginia Rules of Professional Conduct.[170]

VII. UNEMPLOYMENT BENEFITS

Upon termination of the employment relationship, an eligible employee must receive unemployment benefits, barring any conduct which would disqualify the employee from benefits.[171] The Virginia Employment Commission (the "Commission" or the "VEC") will disqualify a claimant from receiving unemployment benefits if it determines that the employee: (1) left work voluntarily without good cause, or (2) was discharged for misconduct connected with work.[172] The employer bears the burden of proof on these issues.[173]

With regard to judicial review of VEC determinations, Virginia Code section 60.2-625(A) provides, "[T]he findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive,[174] and the jurisdiction of the court shall be confined to questions of law."[175] Two well-established principles guide judicial review of the VEC's decisions. First, the VEC

168. C & P Tel. Co. of Va. v. Dowdy, 235 Va. 55, 61, 365 S.E.2d 751, 754 (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).

169. Lockney v. Vroom, 61 Va. Cir. 359, 368 (Cir. Ct. 2003) (Norfolk City).

170. *Id.*

171. *See, e.g.*, Actuarial Benefits & Design Corp. v. Va. Employment Comm'n, 23 Va. App. 640, 644–45, 478 S.E.2d 735, 737–38 (Ct. App. 1996); *see also* VA. CODE ANN. § 60.2-618 (Cum. Supp. 2004).

172. *Actuarial Benefits*, 23 Va. App. at 645, 478 S.E.2d at 738.

173. *Id.*; Garland v. Va. Employment Comm'n, 2000 Va. App. LEXIS 585, at *16 (Ct. App. 2000) (unpublished decision).

174. In *Mills v. Virginia Employment Commission*, 61 Va. Cir. 443 (Cir. Ct. 2003) (Spotsylvania County), the Court affirmed the VEC's finding that an employee auto mechanic voluntarily terminated the employment relationship without good cause, disqualifying him from receipt of benefits. *Id.* at 446. When the employer suggested that the employee was taking too long on a task, a dispute arose and the employer told the employee to quit "if he did not like the way he was being treated." *Id.* at 445–46.

175. VA. CODE ANN. § 60.2-625(A) (Rep. Vol. 2001 & Cum. Supp. 2004).

"is charged with the responsibility of resolving questions of credibility and of controverted facts,"[176] and therefore, in the absence of fraud, "the dispositive question is whether the Commission's findings of fact were supported by evidence."[177] Second, "the courts must consider the evidence in the light most favorable to the finding by the Commission."[178]

A. *Voluntary Departure Versus Discharge for Misconduct*

In *Peck v. Virginia Employment Commission*,[179] the Court of Appeals of Virginia considered an employer's appeal from a final order of the trial court affirming the VEC's award of unemployment benefits to his "'nanny/housekeeper.'"[180] Preceding the employee's dismissal, Mrs. Peck advised the employee that she needed boxes to prepare to "'show the house'" to buyers, as the family was "'exploring the possibility of moving.'"[181] The claimant volunteered to acquire the boxes, but at a later date.[182] Finding this unsatisfactory, Mrs. Peck "'obtained the boxes herself'" and "'discharged'" claimant the same day, effective a couple of weeks later.[183] Upon examination of the employee's claim for benefits, the VEC found that the Pecks were generally happy with the claimant, that they agreed to help her find new employment and to provide "a favorable reference," and that prior to the claimant's dismissal, the Pecks intended to "'replace . . . claimant because she seemed more interested in performing the duties of a nanny only and seemed to object to doing housework chores.'"[184]

The Pecks claimed that the claimant voluntarily resigned without good cause.[185] The Pecks' claim of voluntary resignation was

176. Va. Employment Comm'n v. Gantt, 7 Va. App. 631, 635, 376 S.E.2d 808, 811 (Ct. App. 1989), *aff'd en banc*, 9 Va. App. 225, 385 S.E.2d 247 (Ct. App. 1989).

177. Brady v. Human Res. Inst., 231 Va. 28, 29, 340 S.E.2d 797, 798 (1986).

178. Va. Employment Comm'n v. Peninsula Emergency Physicians, Inc., 4 Va. App. 621, 626, 359 S.E.2d 552, 554 (Ct. App. 1987).

179. No. 2469-01-4, 2002 Va. App. LEXIS 517 (Ct. App. Aug. 20, 2002) (unpublished decision).

180. *Id.* at *3–5.

181. *Id.* at *3.

182. *See id.*

183. *Id.* at *3–4.

184. *Id.* at *4.

185. *Id.* at *1–2. The employer also contended that his due process rights were violated by the VEC's "Appeals Examiner," who did not allow admission of certain evidence or

based upon the claimant's agreement as to her last day of work, and, under these circumstances, the court found this argument unpersuasive. [186] Thus, as to the Pecks' claim of voluntary resignation, the court held that the employer had failed to satisfy the burden of proof to show that the employee "left work voluntarily."[187]

Alternatively, the Pecks argued that the claimant was discharged for misconduct, disqualifying her from receipt of benefits.[188] The court laid out the standard for misconduct as follows:

> An employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer.[189]

As with voluntary resignation, the burden of proving misconduct lies with the employer.[190] Affirming the decision of the trial court with respect to the award of unemployment benefits to the claimant, the court said:

> The record before us suggests no violation of an employment rule, and the factual findings of the VEC, supported by the evidence, established no willful disregard of employer's interests by claimant. She was not directed to obtain the packing boxes, and the responsibility was not among her assigned duties. To the contrary, claimant volunteered for the task only as an accommodation to employer's wife. Accordingly, the VEC correctly determined claimant was not discharged for employment-related misconduct.[191]

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cross-examination of the claimant as to her resignation. *Id.* at *5. The court held, however, that the issue had not been preserved for appeal. *Id.* at *5–7.

186. *Id.* at *7–9. "'The term 'voluntary' connotes 'unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself . . . resulting from free choice.'" *Id.* at *8–9 (citing Shuler v. Va. Employment Comm'n, 9 Va. App. 147, 150–51, 384 S.E.2d 122, 124 (Ct. App. 1989)).

187. *Id.*

188. *Id.* at *9; *see* VA. CODE ANN. § 60.2-618(2) (Cum. Supp. 2004).

189. *Peck*, 2002 Va. App. LEXIS 517, at *9 (citing Branch v. Va. Employment Comm'n, 219 Va. 609, 611, 249 S.E.2d 180, 182 (1978)). Where an employee removed a previously terminated employee's computer hard drive from the employer's premises without authorization, this action amounted to misconduct and the employee was properly denied benefits. Zugg v. Va. Employment Comm'n, 63 Va. Cir. 429, 430 (Cir. Ct. 2003) (Loudoun County). Further, the benefits received before this determination were to be repaid. *Id.*

190. *Peck*, 2002 Va. App. LEXIS 517, at *9–10.

191. *Id.* at *10.

B. *Voluntary Departure and Good Cause*

In *Lindeman v. Virginia Employment Commission*,[192] the Court of Appeals of Virginia was faced with an employee's appeal from a denial of unemployment benefits.[193] The employee, Lindeman, worked as an auto mechanic and suffered an injury at work.[194] Upon learning that his employer did not carry the required workers' compensation insurance, Lindeman "became angry, cursed at [his employer], and quit his job."[195] The employer had, however, promised Lindeman that he "'would take care of his medical bills' and lost wages if 'the doctor suggested that he take a certain amount of time off.'"[196] At the time of Lindeman's injury, the employer was operating under the wrong impression that such insurance was not required based on the fact that he did not have three full-time employees.[197] Two weeks after Lindeman quit, the employer obtained the proper coverage.[198]

Upon filing a claim for unemployment benefits, Lindeman contended that, though his departure was voluntary, the failure to carry workers' compensation insurance constituted good cause for leaving his employment, thereby entitling him to benefits.[199] As Lindeman conceded, he voluntarily terminated the employment relationship; therefore, he bore the burden of showing good cause to do so.[200] Since neither the legislature nor the Supreme Court of Virginia had defined good cause,[201] the court of appeals applied its own analysis:

> [T]he commission and the reviewing courts must first apply an objective standard to the reasonableness of the employment dispute and then to the reasonableness of the employee's efforts to resolve that dispute before leaving the employment. In making this two-part analysis, the claimant's claim must be viewed from the standpoint of a reasonable employee. "Factors that . . . are peculiar to the em-

192. No. 1842-03-3, 2004 Va. App. LEXIS 88 (Ct. App. Feb. 24, 2004) (unpublished decision).
193. *Id.* at *1.
194. *Id.* at *2.
195. *Id.* at *3.
196. *Id.* at *2.
197. *Id.* at *3.
198. *Id.*
199. *Id.* at *4.
200. *Id.* at *5.
201. *Id.*

> ployee and her situation are factors which are appropriately considered as to whether good cause existed . . . ."[202]

As to the first prong, the court found that the evidence supported a finding that Lindeman had acted unreasonably.[203] Though an employee may understandably be concerned about compensation for his injuries, Lindeman's employer told him that he would receive such desired compensation.[204] Furthermore, Lindeman could have "gained actual knowledge of his legal rights as contained in the Workers' Compensation Act if he had contacted" the VEC before his voluntary departure.[205] Regarding the second prong, the court determined that, after learning of the employer's failure to carry workers' compensation insurance, Lindeman became angry and terminated his employment "without exploring the other statutory avenues through which he would be entitled to compensation for his injury or giving employer a reasonable time in which to comply with the law."[206] Therefore, the court affirmed the denial of unemployment compensation for voluntary departure without good cause.[207]

Virginia Employment Commission v. Hill[208] involved the VEC's appeal of a Wise County Circuit Court judgment awarding benefits to its former employee.[209] The employee, Hill, worked as a secretary in a medical office.[210] Hill's frequent absence from work for personal reasons prompted her employer to confront her with this issue.[211] Upon confrontation, Hill quit her job.[212] The VEC denied

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202. *Id.* at *6 (quoting Umbarger v. Va. Employment Comm'n, 12 Va. App. 431, 435–36, 404 S.E.2d 380, 383 (Ct. App. 1991)).

203. *See id.* at *8–9.

204. *Id.* at *9.

205. *Id.*

206. *Id.* at *11.

207. *Id.* In *Kosiek v. Virginia Employment Commission*, 59 Va. Cir. 277 (Cir. Ct. 2002) (Norfolk City), where claimant nurse refused to come to work in order to attend weight loss meetings, after being warned that failure to report to work would result in discharge, the VEC did not find good cause. *Id.* at 278. On appeal, the court held that a reasonable employee would have attended other available meetings, and that the employee failed to make "'every effort to eliminate or adjust . . . the difference or conditions'" which offended her. *Id.* at 281 (quoting Lee v. Va. Employment Comm'n, 1 Va. App. 82, 85, 335 S.E.2d 104, 106 (Ct. App. 1985)).

208. No. 1436-03-3, 2004 Va. App. LEXIS 210 (Ct. App. May 4, 2004) (unpublished opinion).

209. *Id.* at *1–2.

210. *Id.* at *3.

211. *See id.* at *6.

212. *Id.* at *5.

compensation, citing as grounds Hill's voluntary departure without good cause.[213] The trial court subsequently reversed the VEC, concluding that "'Hill voluntarily left work [because] the threat of discharge prompted her to resign employment to avoid being fired and to protect her work record.'"[214]

On appeal, the VEC argued that the trial court "improperly ignored" its findings and failed to apply the statutorily prescribed and highly deferential scope of review.[215] According to the Commission, Hill's "resignation was submitted in anticipation of rather than in lieu of discharge so that it can still be considered as a voluntary leaving."[216] Considering the evidence in a light most favorable to the VEC, the court of appeals held that the trial court erred in conducting its own fact-finding expedition and that the record corroborated the VEC's findings. [217] Accordingly, the court denied the benefits to Hill.[218]

VIII. LEGISLATIVE DEVELOPMENTS

The following is a summary of legislation impacting workplace law from the 2004 General Assembly Sessions.

A. *Employee Protection*

The General Assembly amended Virginia Code section 18.2-465.1 to provide that employees summoned to jury duty are not required to work the day of jury service.[219] This change goes into effect July 1, 2005.[220]

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213. *Id.* at *9–12.

214. *Id.* at *12.

215. *Id.* at *1–2.

216. *Id.* at *11.

217. *See id.* at *12–14. "'[T]he Commission's findings of fact, if supported by evidence and in the absence of fraud, are made conclusive [by Code § 60.2-625(A)], and the jurisdiction of the circuit court is confined to questions of law.'" *Id.* at *12 (quoting Va. Employment Comm'n v. City of Virginia Beach, 222 Va. 728, 734, 284 S.E.2d 595, 598 (1981)).

218. *See id.* at *16–17

219. Act of Apr. 14, 2004, ch. 800, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 18.2-465.1 (Repl. Vol. Supp. 2004)).

220. VA. CODE ANN. § 18.2-465.1.

B. *Unemployment Compensation*

Virginia Code section 60.2-513, "Failure of employing unit to file reports; assessment and amount of penalty," was amended, increasing the late filing fee from $30 to $75.[221] Employers may avoid this penalty, however, upon a showing of good cause for failure to file any such report.[222]

The General Assembly also amended and reenacted section 60.2-612(8), the "benefit eligibility conditions," to provide that where an employee has resigned, and his employer terminates him before the date specified by that employee in resigning, the employee shall be liable for no more than two weeks of benefits, where good cause for resignation or misconduct are lacking.[223]

C. *Day of Rest Statute*

When the General Assembly repealed Virginia's antiquated "blue laws" on Sunday closings during this past session (SB-659), it inadvertently eliminated exemptions to Virginia's "day of rest statute," which is set forth in Virginia Code section 40.1-28.1 et seq.[224] Thus, as of July 2, 2004, portions of the "day of rest statute" became enforceable without exemptions, igniting a furor in Virginia's business community.[225] With no exemptions in effect, every employer must allow each employee at least twenty-four consecutive hours of rest in each calendar week, except for emergencies;[226] non-managerial employees, as a matter of right, may request Sunday as the day of rest, without fear of penalty, discipline, or discharge;[227] and non-managerial employees, as a matter of right, may request Saturday—if the employee truly observes Saturday as the Sabbath—as the day of rest, without fear of pen-

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221. Act of Apr. 12, 2004, ch. 495, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 60.2-513 (Cum. Supp. 2004)).

222. VA. CODE ANN. § 60.2-513.

223. Act of Apr. 12, 2004, ch. 496, 2004 Va. Acts ___ (codified as amended at VA. CODE ANN. § 60.2-612 (Cum. Supp. 2004)).

224. Act of Apr. 12, 2004, ch. 608, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 40.1-28.5 (Repl. Vol. 2002 & Cum. Supp. 2004)).

225. *See* VA. CODE ANN. § 40.1-28.5.

226. VA. CODE ANN. § 40.1-28.1 (Repl. Vol. 2002).

227. *Id.* § 40.1-28.2 (Repl. Vol. 2002).

alty, discipline, or discharge.[228] Violations constitute misdemeanors, carry fines between $250–$500 per each offense, and entitle employees to triple pay if they are forced to work in violation of the statute.[229]

Governor Warner convened a special legislative session of the General Assembly on July 13, 2004. During this single purpose session, the General Assembly passed emergency legislation, SB-6002, which restored the previous eighteen exemptions to the day of rest statute by adding section 40.1-28.4:1.[230] Since the General Assembly designated this legislation as emergency, it took effect immediately upon Governor Warner's signature, which occurred minutes after the special session.[231]

Because of this new legislation, businesses and industries that were exempt before July 1, are also exempt again.[232] Thus, most of Virginia's private employers are not subject to the day of rest legislation, since they fit under these restored exemptions.[233] However, many businesses have discovered they were never exempt from the day of rest statute, and still are not exempt. Efforts to expand the list of exemptions must wait for the 2005 General Assembly session. In addition, challenges to the constitutionality of the Sabbath provision of the day of rest rule may still occur.

IX. CONCLUSION

Though the past two years lacked blockbuster decisions regarding the employment-at-will doctrine, it is clear from the Supreme Court of Virginia's opinion in *Cave Hill* that the doctrine remains intact. Further, plaintiffs had no luck in their effort to expand the public policy exception to the at-will doctrine, as evinced by the United States District Court for the Western District of Virginia's rejection of such an attempt in *Swain*. While recent Virginia decisions on these matters have tended to favor employers, a circuit

228. *Id.* § 40.1-28.3 (Repl. Vol. 2002).

229. *Id.* § 40.1-28.4 (Repl. Vol. 2002).

230. Act of July 13, 2004, ch. 1, 2004 Va. Acts ___ (codified at VA. CODE ANN. § 40.1-28.4:1).

231. *Id.*

232. *Id.*

233. *See id.*

court's holding in *Padilla* may give employers cause for concern; the court overruled defendants' demurrer to plaintiffs' constructive discharge claim, albeit under egregious circumstances.

Virginia courts appeared to look favorably on employees' claims in other areas of labor and employment law. In *Godlewski*, for instance, the United States District Court for the Eastern District of Virginia was sympathetic to an employee's claim of fraudulent inducement. Similarly, in *Microstrategy*, the Eastern District struck down a non-solicitation clause as unreasonable. Likewise, in *Williams*, though the Supreme Court confirmed that at-will employees owe a fiduciary duty to their employers during employment, the court refused to impose liability for breach present under the circumstances.

Plaintiffs were often unsuccessful in holding employers liable under the theories of respondeat superior and negligence in hiring, supervision, and retention over the past two years. For example, the Supreme Court of Virginia refused to hold accountable an employer for the acts of an independent contractor in *Southern Floors*. In addition, a circuit court declined to recognize the doctrine of apparent agency in a negligence action in *Sanchez*. Finally, though the *Clements* court swiftly dismissed all claims of negligent hiring, the *Padilla* Court allowed the plaintiffs' claim of negligent retention to go forward in overruling defendants' demurrers.

Lastly, in the area of unemployment compensation, Virginia decisions largely conformed with the determinations of the Virginia Employment Commission, consistent with the highly deferential standard of review such determinations are afforded. In both *Peck* and *Lindeman*, the Court of Appeals of Virginia affirmed the Commission's award and denial, respectively, of benefits. Lending further support for this contention, the court of appeals reversed the trial court's holding in *Hill*, because the trial court improperly ignored the Commission's findings of fact.