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W. David Paxton

*Gentry Locke Rakes & Moor, L.L.P.*

Gregory R. Hunt

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# LABOR AND EMPLOYMENT LAW

*W. David Paxton* \*

*Gregory R. Hunt* \*\*

## I. INTRODUCTION

It was a relatively quiet year in the Virginia labor and employment law arena, with no real groundbreaking cases or legislative enactments. There were developments in case law and legislative changes, but these were more subtle this year than in years past, and for the most part, the courts confirmed, affirmed, or clarified the existing state of the law.

This article discusses cases and legislative activity of note in the Virginia labor and employment law arena during the past year.<sup>1</sup> Part II addresses recent cases considering employment agreements under Virginia law. Part III considers cases in the continually evolving area of wrongful discharge claims. Part IV concerns employer liability for the wrongful acts of employees. Part V addresses defamation in the context of the employment relationship. Part VI discusses a recent case involving a misappropriation of trade secrets claim by an employer against its former employees. Part VII outlines recent developments in unemployment compensation law. Finally, Part VIII gives an overview of legislative developments during the 2005 Session of the Virginia General Assembly.

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\* Partner, Gentry Locke Rakes & Moore, L.L.P., Roanoke, Virginia. B.A., 1976, Hampden-Sydney College; J.D., 1980, University of Virginia School of Law.

\*\* Associate, Gentry Locke Rakes & Moore, L.L.P., Roanoke, Virginia. B.A., 1997, Washington and Lee University; J.D., 2001, University of Richmond School of Law.

1. Federal labor and employment developments, as well as workers' compensation and public sector employment are beyond the scope of this article.

## II. EMPLOYMENT AGREEMENTS

### A. *At-Will Employee Issues Continue*

In Virginia, it is presumed that employment is “at-will” and may be terminated by an employer or employee for any reason and at any time.<sup>2</sup> This presumption, however, may be rebutted by evidence of an agreement setting forth a definite term of employment.<sup>3</sup>

In *Walton v. Greenbrier Ford, Inc.*,<sup>4</sup> the United States Court of Appeals for the Fourth Circuit was faced with a dispute as to whether an auto dealership employee’s employment was at-will or for a definite term pursuant to a contract.<sup>5</sup> The employee had a work-related injury at a previous job and obtained employment as a “service advisor” with the defendant dealership through the Office of Workers’ Compensation Programs (“OWCP”) following rehabilitation.<sup>6</sup> For hiring the employee, the OWCP entered into a written agreement to reimburse the dealership for a portion of the employee’s wages over a three-year period.<sup>7</sup> The dealership also entered into a written compensation agreement with the employee that did not specify a term of employment.<sup>8</sup>

After sixteen months of employment, the employee presented a doctor’s note stating that he could no longer work the hours of a service advisor.<sup>9</sup> The dealership offered the employee a “greeter position” at a reduced salary, but the employee refused and quit.<sup>10</sup> He then sued the dealership for breach of employment contract, claiming that he was entitled to three years’ compensation as a

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2. County of Giles v. Wines, 262 Va. 68, 72, 546 S.E.2d 721, 723 (2001) (citing Dray v. New Mkt. Poultry Prods., Inc., 258 Va. 187, 190, 518 S.E.2d 312, 313 (1999); Doss v. Jamco, Inc., 254 Va. 362, 366, 492 S.E.2d 441, 443 (1997); Progress Printing Co. v. Nichols, 244 Va. 337, 340, 421 S.E.2d 428, 429 (1992); Norfolk S. Ry. Co. v. Harris, 190 Va. 966, 976, 59 S.E.2d 110, 114 (1950); Hoffman Specialty Co. v. Pelouze, 158 Va. 586, 594, 164 S.E. 397, 399 (1932); Stonega Coal & Coke Co. v. Louisville & Nashville R.R., 106 Va. 223, 226, 55 S.E. 551, 552 (1906)).

3. *Id.* (citing *Progress Printing Co.*, 244 Va. at 340, 421 S.E.2d at 429).

4. 370 F.3d 446 (4th Cir. 2004).

5. *Id.* at 453–54. The employee also alleged his employer violated the federal Fair Labor Standards Act, which is beyond the scope of this article. *Id.* at 448.

6. *Id.* at 448–49.

7. *Id.* at 449.

8. *Id.*

9. *Id.*

10. *Id.*

service advisor pursuant to the agreement between the OWCP and the dealership.<sup>11</sup> The employee contended in the alternative that an employment handbook assuring employees of “steady employment” if they adhered to company policies and performed satisfactorily and oral representations made by the dealership guaranteed a term of employment.<sup>12</sup>

The United States District Court for the Eastern District of Virginia granted the dealership’s motion for summary judgment, and the Fourth Circuit affirmed.<sup>13</sup> According to the Fourth Circuit, the facts supported the dealership’s argument that “this is an employment at-will situation,” as there was no provision in the agreement between the dealership and the OWCP or the employee handbook promising the employee employment for a definite term.<sup>14</sup> Indeed, the handbook included a “clear disclaimer” that it imposed no contractual obligations, which the court held “negate[d] any other provisions or attempts to rebut the at-will presumption.”<sup>15</sup> Moreover, the statute of frauds barred any claim to the existence of an oral contract guaranteeing three years employment.<sup>16</sup>

In *Appleton v. Bondurant & Appleton, P.C.*,<sup>17</sup> an attorney sued his former law firm for compensation he alleged was owed for work performed during his employment.<sup>18</sup> The attorney had left his former firm and taken both clients and employees with him to open his own firm.<sup>19</sup> The attorney claimed the firm breached an oral employment agreement by failing to pay him a portion of the proceeds from matters concluded before his departure.<sup>20</sup> He also claimed entitlement to a portion of the proceeds from matters he worked on that were not concluded until after he left based on a quantum meruit theory, and sought a declaratory judgment that the firm was not entitled to an attorney’s lien on the cases he took with him when he left the firm.<sup>21</sup>

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11. *Id.*

12. *Id.* at 453–54.

13. *See id.* at 449, 454.

14. *Id.* at 453–54.

15. *Id.* at 454 (citing *Nguyen v. CNA Corp.*, 44 F.3d 234, 239 (4th Cir. 1995)).

16. *Id.*

17. No. 04-110606, 2005 Va. Cir. LEXIS 9 (Cir. Ct. Feb. 28, 2005) (Portsmouth City).

18. *Id.* at \*2–3.

19. *Id.* at \*4.

20. *Id.* at \*2–3.

21. *Id.* at \*3.

The law firm asserted that the attorney was a salaried, at-will employee and would only be entitled to a portion of the proceeds for matters concluded before the attorney quit as a bonus after payment of all firm debts and obligations.<sup>22</sup> The firm also counterclaimed for breach of fiduciary duty, tortious interference with business, and misappropriation of proprietary information, and asserted its own quantum meruit claim seeking repayment of all costs advanced by the firm for those clients who left with the attorney.<sup>23</sup>

The central issue before the court was the attorney's quantum meruit claim, to which the law firm filed a motion for summary judgment.<sup>24</sup> The attorney argued that the firm had induced him to perform work on contingency fee personal injury cases, which generated fees for the firm after he left.<sup>25</sup> According to the attorney, because his oral employment agreement did not contemplate a way to compensate him for contingency fees collected after he quit, the firm was unjustly enriched when it collected such fees.<sup>26</sup> The law firm argued that, regardless of the nature of the employment relationship between the attorney and the firm, the attorney was not entitled to any fees collected after he voluntarily left the firm.<sup>27</sup>

The court found that the nature of the attorney's employment with the firm was determinative of the attorney's quantum meruit claim, and denied the firm's motion for summary judgment.<sup>28</sup> According to the court, if the attorney was a salaried, at-will employee as alleged by the law firm, his salary would be his compensation for work performed during his tenure at the firm, which "undercuts any suggestion that [an attorney] could leave a firm and make an unjust enrichment claim (absent such an agreement) as to cases he worked on prior to his departure but which were concluded after his departure."<sup>29</sup> If, however, the employee had an oral employment agreement with the firm which did not

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22. *Id.* at \*5-6.

23. *Id.* at \*7-8. The court dismissed the firm's misappropriation of proprietary information claim on the attorney's demurrer. *Id.* at \*10.

24. *Id.* at \*3, 11.

25. *Id.* at \*13.

26. *Id.*

27. *Id.* at \*14, 24.

28. *See id.* at \*26-28.

29. *Id.* at \*24-25.

contemplate compensation for work performed and not collected at the time the employee left, then it was for the finder of fact to determine if the employee could recover for unjust enrichment.<sup>30</sup>

### B. Breach of Employment Agreement

Disputes over interpretation of employment agreements continue to generate litigation, especially if the disputed provisions relate to compensation or the termination of the employment relationship. As the following two cases out of the United States District Court for the Eastern District of Virginia illustrate, a clearly drafted employment agreement may not stave off a lawsuit, but it may ultimately prevent litigation of a breach of contract claim.

At issue in *Davis v. American Society of Civil Engineers*<sup>31</sup> was an employment agreement between an employer and its Executive Director and Chief Financial Officer that obligated the employer to pay severance if the employee was terminated without cause.<sup>32</sup> The agreement also included an automatic renewal provision, but either party could choose not to renew the agreement upon timely notice to the other party.<sup>33</sup> Under the agreement, non-renewal was not considered a “termination.”<sup>34</sup>

The employer’s board of directors voted not to renew the employment agreement and provided timely notice of its decision to the employee.<sup>35</sup> The employee acknowledged that he was not entitled to severance if the employer chose not to renew the agreement, but nevertheless sued to collect severance, arguing that he had actually been terminated without cause.<sup>36</sup> According to the

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30. *Id.* at \*26–27.

31. 330 F. Supp. 2d 647 (E.D. Va. 2004).

32. *See id.* at 651, 660. The employee alleged several other causes of action as well. *See id.* at 652. His allegations of a conspiracy in violation of 42 U.S.C. § 1985, tortious interference with business, and tortious interference with contract claims were dismissed pursuant to the employer’s motion to dismiss and were not addressed in the court’s opinion. *See id.* His race discrimination and harassment claims pursuant to 42 U.S.C. § 1981, which are beyond the scope of this article, were dismissed on the employer’s motion for summary judgment. *See id.* at 654–59.

33. *Id.* at 660.

34. *Id.*

35. *Id.* at 651–52.

36. *Id.* at 660.

employee, the board's decision not to renew his contract was "procured through fraudulent misrepresentations . . . , the purpose of which was to hide an illegal discriminatory motive."<sup>37</sup> Thus, the employee argued, regardless of the label applied to his separation by the employer, the result was a termination without cause which entitled him to severance.<sup>38</sup>

Despite the employee's novel argument, the district court found that the employer had complied with the clear terms of the employment agreement in choosing not to renew the agreement and engaged in no ultra vires acts.<sup>39</sup> Thus, the employee's breach of contract claim could not survive the employer's motion for summary judgment.<sup>40</sup>

In *Lettieri v. Equant, Inc.*,<sup>41</sup> an employee sued her former employer for \$50,000 in commissions that she alleged were owed under the terms of an employment agreement.<sup>42</sup> Under the agreement, the employee could achieve commissions upon meeting a certain percentage of her revenue quota.<sup>43</sup> Three months after the employee was terminated, the employer retroactively reduced the revenue quota, making it easier for employees to make commissions.<sup>44</sup> The employee asserted that she was entitled to the benefit of the reduced revenue quota because it was retroactive to the time that she was employed with the employer.<sup>45</sup> The employer countered that the employee was not entitled to have her target reduced retroactively because the quota reduction was not applied until after her termination.<sup>46</sup> The district court agreed with the employer, finding that "[n]o reasonable juror could conclude that [the employer] was obligated to pay the commissions."<sup>47</sup>

The employee also claimed that she was owed commission on a \$3.5 million order acquired by a subordinate, but not submitted to

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37. *Id.*

38. *Id.*

39. *See id.*

40. *See id.*

41. No. 1:04cv838, 2005 U.S. Dist. LEXIS 7456 (E.D. Va. Apr. 21, 2005).

42. *See id.* at \*10. The plaintiff also asserted gender discrimination and retaliation claims, which are beyond the scope of this article. *See id.* at \*11.

43. *Id.* at \*25.

44. *Id.* at \*27-28.

45. *Id.* at \*28.

46. *Id.*

47. *Id.* at \*29.

the employer before the employee was terminated.<sup>48</sup> The employment agreement language was clear, however, that the employee was only entitled to commission on monthly billed revenue through the date of termination.<sup>49</sup> Thus, the court held that the employee could identify no breach of agreement by her employer and she was not entitled to commission on the order.<sup>50</sup>

### III. WRONGFUL DISCHARGE

Virginia's strong adherence to the employment at-will doctrine has led courts to recognize a very narrow exception for wrongful discharge claims that allege a violation of public policy.<sup>51</sup> A common law cause of action for wrongful discharge under this public policy exception is only viable in three circumstances, enumerated by the Supreme Court of Virginia in *Rowan v. Tractor Supply Co.*:<sup>52</sup> (1) where "an employer violated a policy enabling the exercise of an employee's statutorily created right[;]"<sup>53</sup> (2) "when the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy[;]"<sup>54</sup> and (3) "where the discharge was based on the employee's refusal to engage in a criminal act."<sup>55</sup>

The Supreme Court of Virginia's opinion in *Rowan* considered a certified question from the United States District Court for the Western District of Virginia: whether the public policy behind Virginia's statute criminalizing obstruction of justice, Virginia Code section 18.2-460, provides a statutorily protected right to participate in the prosecution of wrongdoers free of intimidation and, thus, supports a wrongful discharge claim under the first public policy exception noted above.<sup>56</sup> The plaintiff in that case

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48. *Id.* at \*26.

49. *Id.* at \*25-26.

50. *Id.* at \*27.

51. See *City of Virginia Beach v. Harris*, 259 Va. 220, 232, 523 S.E.2d 239, 245 (2000).

52. 263 Va. 209, 559 S.E.2d 709 (2002).

53. *Id.* at 213-14, 559 S.E.2d at 711 (citing *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985)).

54. *Id.* at 214, 559 S.E.2d at 711 (citing *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997); *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 439 S.E.2d 328 (1994)).

55. *Id.* (citing *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000)).

56. See *id.* at 211, 215, 559 S.E.2d at 709, 711.



asserted that she was terminated for refusing to discontinue pursuit of criminal charges against her supervisor.<sup>57</sup> She alleged that the termination of her employment in such circumstances violated the public policy behind the obstruction of justice statute—which she claimed was to protect those who participate in criminal prosecutions from intimidation—as well as other Virginia statutes addressed separately by the district court and discussed below.<sup>58</sup> The Supreme Court of Virginia found that the obstruction of justice statute did not grant any right to those participating in a criminal prosecution, let alone a right to be free from intimidation.<sup>59</sup> Because there is no right to be free from intimidation under the statute, there could be no corresponding public policy to support an exception to the employment at-will doctrine predicated on Virginia's obstruction of justice statute.<sup>60</sup>

Based on the Supreme Court of Virginia's response to its certified question, the district court dismissed the plaintiff's wrongful discharge claim premised on Virginia's obstruction of justice statute, and the Fourth Circuit recently affirmed the district court's decision.<sup>61</sup> The Fourth Circuit also held that the district court properly dismissed the plaintiff's wrongful discharge claims based on four other Virginia statutes:<sup>62</sup> (1) Virginia Code section 18.2-465.1, making it a criminal offense for employers to take adverse action against employees for missing work for court appearances;<sup>63</sup> (2) Virginia Code section 19.2-11.01(A)(3)(a), requiring that trial witnesses be advised of their right to be absent from work for court appearances;<sup>64</sup> (3) Virginia Code section 19.2-267, making it a punishable offense to disobey a witness subpoena;<sup>65</sup> and (4) Virginia Code section 18.2-456, enabling a court to punish individuals who disobey a court order.<sup>66</sup>

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57. See *id.* at 212, 559 S.E.2d at 710.

58. See *id.* at 212–13, 559 S.E.2d at 710.

59. See *id.* at 215, 559 S.E.2d at 711–12.

60. See *id.* Moreover, the court noted that the public policy behind the obstruction of justice statute was “not to protect *individuals* from intimidation, but to protect the public from a flawed legal system due to impaired prosecution of criminals.” *Id.*

61. See *Rowan v. Tractor Supply Co.*, 108 F. App'x 110, 113 (4th Cir. 2004) (unpublished decision).

62. *Id.* at 112–13.

63. VA. CODE ANN. § 18.2-465.1 (Repl. Vol. 2004).

64. *Id.* § 19.2-11.01(A)(3)(a) (Repl. Vol. 2004 & Cum. Supp. 2005).

65. *Id.* § 19.2-267 (Repl. Vol. 2004).

66. *Id.* § 18.2-456 (Repl. Vol. 2004 & Cum. Supp. 2005).

The Fourth Circuit agreed with the district court that the public policies underlying the statutes making disobedience of a subpoena or court order an offense punishable by the court, Virginia Code sections 19.2-267 and 18.2-456, could not support a wrongful discharge claim based on the facts of the case because the plaintiff did not allege that the defendant asked her to disobey any subpoena.<sup>67</sup> Likewise, the public policies underlying Virginia Code section 18.2-465.1 and related Virginia Code section 19.2-11.01(A) could not support plaintiff's wrongful discharge claim because she did not allege that she was terminated because she planned to be absent from work.<sup>68</sup>

The United States District Court for the Western District of Virginia also considered a wrongful discharge claim based on Virginia Code section 18.2-465.1 in *Sewell v. Macado's, Inc.*<sup>69</sup> In support of her wrongful discharge cause of action, the plaintiff in this case asserted that her employer terminated her employment because she attended a child custody and visitation hearing in California pursuant to a court order.<sup>70</sup> This, the plaintiff alleged, violated the public policy behind Virginia's statute making it a punishable offense for an employer to terminate an employee for missing work for a court appearance.<sup>71</sup>

The district court expressed doubt that Virginia Code section 18.2-465.1 could support a wrongful discharge claim because it did not "expressly set out" a public policy and included no "explicit statutory right."<sup>72</sup> The district court also seemed to think it was significant to the issue that the statute was a criminal statute, noting that in *Rowan*, the Supreme Court of Virginia had found another criminal statute, Virginia Code section 18.2-460, could not support a wrongful discharge cause of action.<sup>73</sup> In the end, the district court determined that, because the Supreme Court of Virginia had not yet recognized a wrongful discharge cause of action based on Virginia Code section 18.2-465.1, the

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67. *Rowan*, 108 F. App'x at 112-13.

68. *Id.* at 112.

69. No. 7:04CV00268, 2004 U.S. Dist. LEXIS 19950, at \*1 (W.D. Va. Oct. 4, 2004). The plaintiff also alleged common law causes of action for assault and battery, and sexual harassment and retaliation claims under Title VII of the Civil Rights Act of 1964. *Id.*

70. *Id.* at \*3-4.

71. *Id.* at \*13-14.

72. *Id.* at \*14.

73. *See id.*

plaintiff's claim had to be dismissed.<sup>74</sup> According to the court, it could only "rule upon the state law as it currently exists and not . . . surmise or suggest its expansion."<sup>75</sup>

#### IV. EMPLOYER LIABILITY FOR WRONGFUL ACTS OF EMPLOYEES

##### A. *Respondeat Superior Liability*

An employer may only be held liable for the wrongful act of an employee under the doctrine of respondeat superior if the act was committed while the employee was acting within the scope of his employment.<sup>76</sup> The Supreme Court of Virginia has held that proof of the employment relationship satisfies a plaintiff's burden of persuasion that an employee was acting in the scope of employment, creating a "*prima facie* rebuttable presumption of the employer's liability."<sup>77</sup> Once the employment relationship is established, the burden shifts to the employer "to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of."<sup>78</sup> The test for determining if the employee was acting within the scope of employment is "whether the service itself, in which the tortious act was done, was within the ordinary course of the employer's business."<sup>79</sup>

Determining "whether [an] employee's wrongful act was within the scope of . . . employment" in a particular circumstance has proven to be—in the words of the Supreme Court of Virginia—"vexatious."<sup>80</sup> The United States Court of Appeals for the Fourth Circuit experienced this firsthand in *Blair v. Defender Services, Inc.*<sup>81</sup> Defender Services ("Defender") provided janitorial services

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74. See *id.* at \*14–15.

75. *Id.* (quoting *Swain v. Adventa Hospice, Inc.*, No. 7:03CV00505, 2003 U.S. Dist. LEXIS 22753, \*7 (W.D. Va. Dec. 12, 2003)).

76. See *Gina Chin & Assocs. v. First Union Bank*, 260 Va. 533, 540, 537 S.E.2d 573, 576 (2000) (quoting *Davis v. Merrill*, 133 Va. 69, 74, 112 S.E. 628, 629–30 (1922)).

77. *Id.* at 542, 537 S.E.2d at 577 (citing *McNeill v. Spindler*, 191 Va. 685, 694, 695, 62 S.E.2d 13, 17, 18 (1950)).

78. *Id.*, 537 S.E.2d at 578 (alteration in original) (quoting *Kensington Assocs. v. West*, 234 Va. 430, 432–33, 362 S.E.2d 900, 901 (1987)).

79. *Id.* at 544, 537 S.E.2d at 579 (internal quotations omitted).

80. *Id.* at 540–41, 537 S.E.2d at 576–77.

81. See *Blair v. Defender Servs., Inc.*, 386 F.3d 623, 624 (4th Cir. 2004).

to Virginia Tech.<sup>82</sup> The plaintiff, a female Virginia Tech student, alleged that she was assaulted by a janitor employed by Defender in the unisex bathroom of a campus building.<sup>83</sup> According to the student, she saw the janitor standing in the hallway with a large bucket before she entered the bathroom.<sup>84</sup> When she tried to exit the bathroom, the janitor grabbed her by the neck and pushed her to the bathroom floor.<sup>85</sup> The student lost consciousness and awoke later with broken facial bones and neck injuries that required surgery.<sup>86</sup> The student sued Defender for respondeat superior liability, as well as negligent hiring, retention, and supervision.<sup>87</sup>

The district court found that the facts were not sufficient to impose respondeat superior liability on Defender and dismissed the plaintiff's claim on summary judgment, and the Fourth Circuit affirmed.<sup>88</sup> According to the Fourth Circuit, the janitor's assault on the student "was so great a deviation from Defender's business" as to be a departure from the scope of his employment.<sup>89</sup> The court noted that the janitor was on the job at the time of the assault and the assault occurred at a place where the janitor performed his duties, but held that these facts were insufficient to impose respondeat superior liability on Defender.<sup>90</sup>

*Microstrategy, Inc. v. Business Objects, S.A.*<sup>91</sup> is a trade secret case with a respondeat superior component.<sup>92</sup> In that case, a company accused of misappropriating the trade secrets of a competitor argued that it could not be held liable for any misappropriation by its employees under a respondeat superior theory because it had its employees sign an employment agreement expressly prohibiting such conduct.<sup>93</sup> The district court found this argument "unavailing," as an employee may act in the scope of employment

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82. *Id.* at 626.

83. *See id.* at 625–26.

84. *Id.* at 625.

85. *Id.*

86. *Id.* at 625–26, 626 n.2.

87. *Id.* at 624. The district court dismissed plaintiff's negligent supervision claim on defendant's motion to dismiss, and this determination was not appealed. *Id.* at 624 n.1. Plaintiff's negligent hiring and negligent retention claims are discussed in a later section. *See infra* Part IV.B.

88. *See Blair*, 386 F.3d at 624.

89. *Id.* at 628.

90. *Id.* at 627 (citing *Cary v. Hotel Rueger, Inc.*, 195 Va. 980, 986–87, 81 S.E.2d 421, 424 (1954)).

91. 331 F. Supp. 2d 396 (E.D. Va. 2004).

92. *See id.* at 418.

93. *See id.*

by engaging in acts specifically forbidden by the employer as long as the act is intended to "further the employer's interests."<sup>94</sup> The district court also noted that the employer does not have to know of the employee's actions for respondeat superior to be applicable.<sup>95</sup>

### B. *Negligent Hiring and Retention*

In *Blair v. Defender Services, Inc.*,<sup>96</sup> which is perhaps the most disconcerting case of this past year for employers, the Fourth Circuit may have made federal court the preferred venue in the Commonwealth for negligent hiring and negligent retention claims.

The plaintiff asserted that Defender was negligent in hiring and retaining the janitor who assaulted her because it knew or should have known of the janitor's propensity for violence.<sup>97</sup> A protective order had been issued against the janitor for assaulting a woman in a restaurant eleven months before he assaulted the plaintiff in a Virginia Tech bathroom.<sup>98</sup> The restaurant assault allegedly occurred in a neighboring county in which the janitor lived.<sup>99</sup> Pursuant to its contract with Virginia Tech, Defender was required to perform criminal background checks on all employees assigned to the campus.<sup>100</sup> The janitor had three separate periods of employment with Defender, but the company never performed a criminal background check.<sup>101</sup> The plaintiff also offered expert testimony by affidavit that Defender would have discovered the protective order if it had performed an investigation before the start of the janitor's second period of employment with the company.<sup>102</sup> Moreover, Virginia Tech's Director of Housekeeping testified that the janitor would not have been permitted to work on the campus had Virginia Tech known of the protective order.<sup>103</sup>

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94. *Id.*

95. *See id.*

96. 386 F.3d 623 (4th Cir. 2004); *see supra* Part IV.A.

97. 386 F.3d at 624, 629.

98. *See id.* at 626.

99. *Id.* at 626-27.

100. *Id.* at 626.

101. *Id.*

102. *See id.* at 627.

103. *Id.* at 630.

Defender had checked the janitor's references.<sup>104</sup> Defender had also asked the janitor about his criminal history in its job application, and the janitor did not disclose the protective order.<sup>105</sup> The protective order expired six months before the commencement of the janitor's third period of employment with Defender during which he assaulted the plaintiff.<sup>106</sup> Moreover, a background check conducted by an investigating officer immediately after the alleged assault did not reveal the protective order.<sup>107</sup>

The district court awarded summary judgment to Defender on both the negligent hiring and negligent retention claims, but a majority of a three-judge panel of the Fourth Circuit reversed.<sup>108</sup> In so holding, the Fourth Circuit noted that liability for negligent hiring in Virginia is

predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.<sup>109</sup>

Liability for negligent hiring is premised on retaining such a dangerous employee after an employer knows or should have known about the employee's propensity to harm others.<sup>110</sup> In the Fourth Circuit's opinion, there was a genuine issue of material fact in this case as to whether Defender should have known of the janitor's propensity for violence, presumably because of the duty imposed on Defender to conduct a criminal background check through its contract with Virginia Tech.<sup>111</sup> Though Defender presented evidence that a reasonable background check would not have uncovered the protective order in the janitor's county of residence, the evidence was disputed and it was the province of a jury to determine the issue.<sup>112</sup>

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104. *Id.* at 626.

105. *Id.*

106. *Id.* at 631 (Widener, J., concurring in part and dissenting in part).

107. *Id.* at 631–32 (Widener, J., concurring in part and dissenting in part).

108. *See id.* at 630.

109. *Id.* at 629 (quoting *Southeast Apartments Mgmt., Inc. v. Jackman*, 257 Va. 256, 260, 513 S.E.2d 395, 397 (1999)).

110. *Id.* (quoting *Southeast Apartments*, 257 Va. at 260–61, 513 S.E.2d at 397).

111. *See id.* at 629–30.

112. *Id.* at 629.

In a concurring in part and dissenting in part opinion, Judge Widener challenged the majority's construction of Virginia law on negligent hiring and retention.<sup>113</sup> Judge Widener noted that tort liability is only created by breach of a common law duty, not a duty imposed by contract,<sup>114</sup> and that Virginia law imposes no duty on employers to conduct a criminal background check when the employer has no reason to suspect a criminal record and the employee has told the employer that he has no criminal record.<sup>115</sup> Judge Widener also questioned whether knowledge of the protective order could be used to establish that Defender should have known the janitor had a propensity for violence, as Virginia law states that "[t]he issuance of an emergency protective order shall not be considered evidence of any wrongdoing."<sup>116</sup>

Judge Widener further opined that, even if Defender had breached a common law duty by failing to conduct a background check, the plaintiff could not, as a matter of law, meet her burden to establish that the protective order "should have been discovered by reasonable investigation."<sup>117</sup> Judge Widener noted that the protective order expired six months before the janitor applied for his third term of employment with Defender.<sup>118</sup> Additionally, as the investigation by the investigating officer illustrated, a normal criminal background check would not have uncovered the protective order.<sup>119</sup> According to Judge Widener, Defender would have had to have "taken the extra step to examine the records of the court not of record in [the janitor's] county of residence to discover the existence of an emergency protective order."<sup>120</sup> These facts, in Judge Widener's opinion, demonstrated that a "reason-

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113. See *id.* at 630.

114. See *id.* at 631 (Widener, J., concurring in part and dissenting in part) (citing *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998)).

115. See *id.* (Widener, J., concurring in part and dissenting in part) (quoting *Southeast Apartments*, 257 Va. at 261, 513 S.E.2d at 397).

116. See *id.* (Widener, J., concurring in part and dissenting in part) (alteration in original) (quoting VA. CODE ANN. § 16.1-253.4(G) (Repl. Vol. 2003)).

117. *Id.* (Widener, J., concurring in part and dissenting in part) (quoting *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 531, 539 S.E.2d 426, 431 (2000)).

118. See *id.* (Widener, J., concurring in part and dissenting in part).

119. *Id.* at 631-32 (Widener, J., concurring in part and dissenting in part).

120. *Id.* at 632 (Widener, J., concurring in part and dissenting in part).

able investigation” would not have revealed the protective order.<sup>121</sup>

Moreover, Judge Widener expressed concern that the majority’s holding places an unreasonable burden on employers to “search for even unsuccessful misdemeanor prosecutions in the records of the courts not of record of the county of residence” for every prospective employee.<sup>122</sup> Otherwise, employers open themselves up to negligent hiring and retention claims.<sup>123</sup>

The Fourth Circuit expressly limited its decision to the facts of the *Blair* case.<sup>124</sup> Whether it intended to or not, however, the Fourth Circuit has certainly raised the bar as to what is expected as far as inquiries into an employee’s past. In light of the *Blair* case, employers would be well served to expand the scope of such inquiries beyond criminal convictions. Moreover, employers required to conduct background checks, or those that employ persons in situations where background checks are deemed necessary or reasonable, would be well served to make sure that the scope of any such investigation includes a search for protective orders and locales where the employee has maintained a residence.

## V. DEFAMATION

In *Union of Needletrades, Industrial & Textile Employees v. Jones*,<sup>125</sup> the Supreme Court of Virginia addressed a defamation claim in the context of an employment relationship.<sup>126</sup> At issue was a resolution adopted by the board of the defendant employer, a union, stating that “information has been made available to the [board] indicating that financial malpractice has occurred with respect to the assets of [a local union].”<sup>127</sup> The union employee responsible for managing the assets of the local union took offense and sued the union, claiming that this statement was false and

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121. See *id.* (Widener, J., concurring in part and dissenting in part) (quoting *Majorana*, 260 Va. at 531, 539 S.E.2d at 431).

122. See *id.* (Widener, J., concurring in part and dissenting in part).

123. See *id.* (Widener, J., concurring in part and dissenting in part).

124. *Id.* at 630.

125. 268 Va. 512, 603 S.E.2d 920 (2004).

126. See *id.* at 517–18, 603 S.E.2d at 923.

127. *Id.* at 517, 603 S.E.2d at 923.



defamatory per se.<sup>128</sup> On this cause of action, a jury awarded the employee \$150,000 in compensatory damages and \$350,000 in punitive damages.<sup>129</sup>

The employer appealed, asserting that the statement was true and that the employee had failed to meet his burden to prove that the statement was false.<sup>130</sup> The Supreme Court of Virginia agreed, noting that the employer's statement did not say that the employee had engaged in financial malpractice, but that the employer "had received information indicating that possibility."<sup>131</sup> It was undisputed that the employer had received a letter from the employee's supervisor expressing concern regarding "questionable expenditures" by the employee.<sup>132</sup> This letter, according to the court, proved the truth of the employer's statement; not that the employee had done something wrong, but that the union had received information suggesting that the employee had done something wrong.<sup>133</sup> Because the employee had failed to satisfy his burden to establish the falsity of the alleged defamatory statement, the court reversed the judgment of the trial court and entered judgment for the employer.<sup>134</sup>

In so holding, the court noted that defamatory statements made in the employment context are typically "afforded a qualified privilege" and, in such instances, an employee plaintiff "must establish both that the statement was false and that the defendant acted with actual malice."<sup>135</sup> In this case, because the court found that the employee failed to establish the falsity of the statement, it never reached the actual malice issue.<sup>136</sup>

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128. *Id.* at 517-18, 603 S.E.2d at 923.

129. *Id.* at 519, 603 S.E.2d at 924. The trial court reduced the punitive amount to \$150,000. *Id.*

130. *Id.* at 520, 603 S.E.2d at 925.

131. *Id.* at 521, 603 S.E.2d at 925.

132. *Id.* at 516-17, 603 S.E.2d at 922. The plaintiff initially sued his supervisor for defamation as well based on this letter, but the trial court dismissed this claim on a motion to strike. *Id.* at 517-18, 603 S.E.2d at 923-24. The Supreme Court of Virginia presumed this claim was dismissed because the letter stated opinion, or the statement was subject to a qualified privilege since it was made in an employment setting and the employee could not prove actual malice. *See id.* at 518, 603 S.E.2d at 924.

133. *See id.* at 521, 603 S.E.2d at 925.

134. *See id.* at 522, 603 S.E.2d at 926.

135. *Id.* at 519-20, 603 S.E.2d at 924.

136. *See id.* at 520-22, 603 S.E.2d at 924-26.

## VI. MISAPPROPRIATION OF TRADE SECRETS

Not all lawsuits resulting from the termination of an employment relationship are filed by dissatisfied employees. Occasionally, it is the employer who seeks redress for an employment relationship that ended unexpectedly, as in *MicroStrategy Inc. v. Li*.<sup>137</sup> In this case, the Supreme Court of Virginia considered an employer's misappropriation of trade secrets claims against two former employees and their new employer.<sup>138</sup> The plaintiff, a computer software company, objected to the fact that two engineers who helped develop its "flagship" product decided to quit and help an "indirect competitor" enhance one of its products.<sup>139</sup> The plaintiff believed the engineers used its confidential information to enhance the new employer's product and brought causes of action for violation of the Virginia Uniform Trade Secrets Act ("VUTSA"), breach of contract, tortious interference with business, breach of fiduciary duty, and conspiracy to injure business.<sup>140</sup> A chancellor found in favor of the defendants, and the plaintiff only appealed a portion of its VUTSA claim to the Supreme Court of Virginia.<sup>141</sup>

Damages are recoverable under the VUTSA if a plaintiff establishes both the existence of a "trade secret" and "misappropriation" of that trade secret.<sup>142</sup> The VUTSA defines a "trade secret" as something which has "independent economic value" from not being known to others who could obtain economic value from it, and which is subject to reasonable efforts to maintain its secrecy.<sup>143</sup> "Misappropriation" is defined by the VUTSA as disclosing or using the trade secret of another without consent by a person with a duty to maintain its secrecy, or by a person who acquired the trade secret from someone with a duty to maintain its secrecy.<sup>144</sup>

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137. 268 Va. 249, 601 S.E.2d 580 (2004).

138. See *id.* at 252–55, 601 S.E.2d at 582–84.

139. *Id.*

140. *Id.* at 252, 255 & n.1, 601 S.E.2d at 582, 584 & n.1.

141. *Id.* at 252, 255, 261, 601 S.E.2d at 582, 584, 587.

142. VA. CODE ANN. § 59.1-338(A) (Repl. Vol. 2001 & Cum. Supp. 2005).

143. *Id.* § 59.1-336 (Repl. Vol. 2001 & Cum. Supp. 2005).

144. *Id.*

The chancellor found that the plaintiff failed to meet its burden under the VUTSA to establish that a "trade secret" existed and was "misappropriated" by the defendants.<sup>145</sup> On appeal, the plaintiff asserted that it had satisfied its burden under the VUTSA by merely establishing that its product and the product of its competitors "shared 'unique' features."<sup>146</sup> This, the plaintiff argued, shifted the burden to the defendants to establish that the product they developed was independently invented.<sup>147</sup> The Supreme Court of Virginia rejected this argument, holding that nothing in the VUTSA imposes a burden shifting scheme.<sup>148</sup> Defendants had no burden to prove that the product they developed was "independently derived."<sup>149</sup>

The plaintiff also challenged the chancellor's conclusion that the shared features of the two products did not satisfy the plaintiff's burden to prove that the defendants had "misappropriated" trade secrets.<sup>150</sup> Specifically, the plaintiff argued that similarities in the products' "pointers" and "metadata schema" proved misappropriation.<sup>151</sup> The court, however, found that there was ample evidence to support the proposition that the defendants had not misappropriated any technology.<sup>152</sup> The chancellor had determined that one of the employee defendants understood and had experience with pointers before he worked for the plaintiff, and that the pointers he designed for the defendant company had a fundamentally different design from the plaintiff's product.<sup>153</sup> The chancellor also found that the metadata schema of the product produced by the defendants was derived from a version of the product that predated the plaintiff's product and was far simpler to create than that of the plaintiff's product.<sup>154</sup> Though the plaintiff challenged the chancellor's conclusions, the plaintiff did not challenge these findings of fact.<sup>155</sup> Having found support for the chancellor's conclusion that the employees and their new em-

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145. *MicroStrategy*, 268 Va. at 261, 601 S.E.2d at 587.

146. *Id.* at 261, 601 S.E.2d at 587-88.

147. *Id.* at 261-62, 601 S.E.2d at 588.

148. *Id.* at 265, 601 S.E.2d at 590.

149. *Id.*

150. *Id.* at 261, 601 S.E.2d at 587.

151. *Id.* at 258, 601 S.E.2d at 586-88.

152. *See id.* at 266-67, 601 S.E.2d at 598.

153. *Id.* at 266, 601 S.E.2d at 590.

154. *Id.* at 267 n.3, 601 S.E.2d at 591 n.3.

155. *Id.* at 265, 601 S.E.2d at 590.

ployer had not misappropriated any information or technology, the court did not address whether a trade secret existed.<sup>156</sup>

## VII. UNEMPLOYMENT COMPENSATION

### A. *Employee Misconduct*

Absent mitigating circumstances, the Virginia Unemployment Compensation Act disqualifies a claimant from receiving unemployment benefits if terminated for “misconduct connected with his work.”<sup>157</sup> It is the employer’s burden to prove “misconduct.”<sup>158</sup> If misconduct is established, the burden shifts to the claimant to demonstrate mitigating circumstances.<sup>159</sup>

Whether a claimant was barred from receiving unemployment compensation for “misconduct in connection with his work” was at issue in *Denisar v. Barrett Hauling*.<sup>160</sup> In *Denisar*, a truck driver refused to make a 4:15 p.m. delivery requested by the employer’s store manager.<sup>161</sup> At the time he was approached to make the delivery, the truck driver had already clocked out and gotten into his car.<sup>162</sup> His explanation to the Virginia Employment Commission (the “Commission”) and the court for refusing the delivery was that his vacation started at 5:00 p.m. that day and he had plans to meet his father to celebrate his birthday.<sup>163</sup> When the truck driver returned to work after his vacation, he was terminated.<sup>164</sup> The store manager testified to the Commission that the truck driver should have been able to complete the delivery before 5:00 p.m.<sup>165</sup>

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156. *Id.* at 267, 601 S.E.2d at 591.

157. VA. CODE ANN. § 60.2-618(2)(a)(ii) (Cum. Supp. 2005).

158. *Bell Atl. Network Servs. v. Va. Employment Comm’n*, 16 Va. App. 741, 745, 433 S.E.2d 30, 32 (Ct. App. 1993).

159. *Kennedy’s Piggly Wiggly Stores, Inc. v. Cooper*, 14 Va. App. 701, 705, 419 S.E.2d 278, 280–81 (Ct. App. 1992) (citing *Branch v. Va. Employment Comm’n*, 219 Va. 609, 611–12, 249 S.E.2d 180, 182 (1978)).

160. No. 2861-03-4, 2004 Va. App. LEXIS 393, at \*1 (Ct. App. Aug. 17, 2004) (unpublished decision).

161. *See id.* at \*4.

162. *Id.* at \*4, 7.

163. *Id.* at \*4, 7–8.

164. *See id.* at \*4–5.

165. *Id.* at \*7.

The Commission found that the truck driver's refusal to comply with his employer's request was insubordination and "misconduct connected with work."<sup>166</sup> Moreover, the truck driver's personal plans did not qualify as mitigating circumstances.<sup>167</sup> Thus, he was disqualified from receiving unemployment benefits.<sup>168</sup> On appeal, the Warren County Circuit Court and the Court of Appeals of Virginia found no error in the Commission's determination.<sup>169</sup>

### B. "Good Cause" to Voluntarily Quit

An otherwise eligible claimant is disqualified from receiving unemployment benefits under the Virginia Unemployment Compensation Act if that person voluntarily left work without "good cause."<sup>170</sup> The act, however, provides very little guidance as to just what factors may constitute good cause to justify voluntarily leaving employment.<sup>171</sup> Consequently, whether a claimant had good cause to justify quitting employment is frequently a disputed issue before the Commission, and such disputes often continue beyond the Commission level and into Virginia courts.

The Richmond City Circuit Court was faced with one such dispute this past year in *Tulloh v. Virginia Employment Commission*.<sup>172</sup> The claimant in that case was previously employed as a sales representative.<sup>173</sup> Upon learning that his employer wanted him to work on a Saturday, the claimant told his branch manager that he had a prior commitment and would quit if required to work that day.<sup>174</sup> After a "heated conversation" during which the branch manager allegedly used "bad language," the branch man-

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166. *Id.* at \*6-7.

167. *Id.* at \*7-8.

168. *Id.* at \*2-3.

169. *Id.* at \*1, 8.

170. VA. CODE ANN. § 60.2-618(1) (Cum. Supp. 2005).

171. Virginia Code section 60.2-618 merely identifies two situations that are not "good cause" to quit work: (1) leaving work for self-employment or (2) leaving work to join a spouse in a new location. *See id.* § 60.2-618(1) (Cum. Supp. 2005).

172. 64 Va. Cir. 469 (Cir. Ct. 2004) (Richmond City).

173. *Id.* at 469.

174. *Id.* The claimant argued before the Commission and the court that he did not quit. *Id.* at 469-70. However, the Commission credited the testimony of the company's witnesses and evidence that the employee explicitly stated that he quit, and the Commission's findings of fact are conclusive. *Id.* at 470.

ager accepted the claimant's resignation.<sup>175</sup> The claimant asserted that he had good cause to quit because the branch manager used foul language during their conversation.<sup>176</sup>

The Commission found that the claimant voluntarily quit without good cause and denied unemployment benefits.<sup>177</sup> The circuit court affirmed, finding that the instance of foul language alleged by the claimant was not "so substantial, compelling, and necessitous as would leave the claimant no other reasonable alternative other than quitting his job."<sup>178</sup> Moreover, the circuit court found it compelling that the claimant took no steps to resolve the dispute he had with his branch manager other than to call his employer's corporate headquarters after he quit.<sup>179</sup> This, the court concluded, was not "the way a reasonable person who desired to keep his job would have acted."<sup>180</sup> Thus, the court found that the claimant failed to meet his burden to establish he had good cause to quit.<sup>181</sup>

### C. *Timeliness of Appeals*

In *Tindall v. Virginia Employment Commission*,<sup>182</sup> the Richmond City Circuit Court found a claimant qualified to receive unemployment benefits because her employer was not diligent in pursuing an appeal.<sup>183</sup> The claimant, a public school guidance counselor with a variety of health problems, voluntarily quit her job and filed for unemployment compensation.<sup>184</sup> A Commission deputy found her qualified to receive unemployment compensation on October 25, 2002, but the deputy's determination never reached the school system.<sup>185</sup> In mid-January 2003, a school system employee noticed that the claimant was receiving unemployment benefits.<sup>186</sup> More than two weeks later, the school sys-

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175. *Id.* at 469, 471.

176. *Id.* at 470–71.

177. *Id.* at 469–71.

178. *Id.* at 470.

179. *Id.* at 471.

180. *Id.*

181. *Id.*

182. 66 Va. Cir. 125 (Cir. Ct. 2004) (Richmond City).

183. *See id.* at 130–31.

184. *Id.* at 125–26.

185. *See id.* at 126–28.

186. *Id.* at 126.

tem wrote a letter to the Commission inquiring as to why the claimant was receiving benefits.<sup>187</sup> After more than a month had passed, the school system received a copy of the deputy's determination in response to its letter.<sup>188</sup> Twenty-four days later, the school system sent a letter to the Commission requesting that the matter be reopened so it could appeal the deputy's determination.<sup>189</sup> The school system's request to reopen the case came seventy-one days after the school system first learned that the claimant was receiving unemployment compensation.<sup>190</sup>

A Commission hearing examiner found that the school system was prevented from filing a timely appeal because of circumstances beyond its control—it never received the deputy's determination—and extended the appeal period, but still found the claimant qualified to receive unemployment compensation.<sup>191</sup> The Commission held that there was good cause to extend the appeal deadline for the school system because it never received the deputy's determination, but reversed the hearing examiner's determination that the claimant was entitled to unemployment benefits.<sup>192</sup>

On further appeal, the circuit court agreed with the Commission that the school system had demonstrated that "uncontrollable, necessitous, and compelling circumstances" prevented it from filing a timely appeal.<sup>193</sup> The circuit court, however, disagreed that this was all that was required to establish good cause to extend the appeal deadline.<sup>194</sup> In the court's opinion, good cause should also require that the appellant act "with diligence in noting the appeal under whatever circumstances existed."<sup>195</sup>

Applying this new test to the case at issue, the court ruled that the school system had not been diligent in pursuing its appeal.<sup>196</sup> The court found that the school had no good excuse for waiting seventy-one days to file its appeal after learning that the claim-

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 128–29.

191. *Id.* at 127.

192. *Id.*

193. *Id.* at 129.

194. *Id.*

195. *Id.*

196. *See id.* at 130.

ant was receiving unemployment compensation.<sup>197</sup> According to the court, the school system was familiar with the Commission's appeal process, knew that an appeal was in order upon learning that the claimant was receiving unemployment compensation, and knew how to go about filing such an appeal.<sup>198</sup> Moreover, the court found that the school system did not act diligently by trying to resolve the issue via written correspondence with the Commission instead of communicating by telephone, facsimile, or walking the five blocks to the Commission.<sup>199</sup> For these reasons, the school system failed to establish good cause to extend the appeal period, its appeal was not timely, and the claimant was qualified for unemployment compensation.<sup>200</sup>

*Jones v. Virginia Employment Commission*<sup>201</sup> involved a pro se claimant who filed an appeal to a hearing examiner's determination more than one month late.<sup>202</sup> The Commission dismissed the appeal, finding that the claimant provided "no information . . . that would establish uncontrollable circumstances of a compelling and necessitous nature [that] prevented the appeal from being filed on time."<sup>203</sup> For the same reason, the Alexandria City Circuit Court and the Court of Appeals of Virginia affirmed.<sup>204</sup>

The claimant raised thirteen additional grounds for appeal, with subparts, before the Court of Appeals of Virginia, but the court had no record that these issues had been preserved for appeal.<sup>205</sup> Indeed, the claimant did not submit a transcript of prior proceedings, a signed statement of facts, or an appendix as required by the Rules of the Supreme Court of Virginia.<sup>206</sup> Without a record that these issues had been properly preserved, they were procedurally barred, and the court did not address them.<sup>207</sup>

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197. *See id.* at 128–29.

198. *See id.*

199. *See id.* at 128, 131.

200. *Id.* at 128–29.

201. No. 0362-04-4, 2004 Va. App. LEXIS 571 (Ct. App. Nov. 23, 2004) (unpublished decision).

202. *See id.* at \*1, 3–4.

203. *Id.* at \*4 (alteration in original).

204. *Id.* at \*1, 5, 10.

205. *Id.* at \*9.

206. *Id.* at \*8.

207. *See id.* at \*10.



## VIII. SIGNIFICANT LEGISLATIVE DEVELOPMENTS

A. *Virginia Unemployment Compensation Act*

The General Assembly expanded Virginia Code section 60.2-618(2)(b)'s definition of "misconduct" disqualifying a claimant from receiving unemployment benefits to include "[c]hronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence."<sup>208</sup> The Virginia Employment Commission may consider mitigating circumstances when determining whether absenteeism or tardiness amount to "misconduct."<sup>209</sup> These changes to Virginia Code section 60.2-618 simply codify prior case law.<sup>210</sup>

The General Assembly made several additions and amendments to the Virginia Code designed to prevent an employer from avoiding unemployment compensation tax by transferring a business.<sup>211</sup> Virginia Code section 60.2-536.1 provides that when an employer transfers a business to another employer with "substantially common ownership, management, or control," the "unemployment experience" of the business, which affects the unemployment tax rate, transfers with the business.<sup>212</sup> Moreover, if the primary purpose of the business transfer is to lower the unemployment tax rate attributable to the business, the employer and anyone who knowingly advised the transfer is subject to civil penalties<sup>213</sup> and may be found criminally liable.<sup>214</sup>

Also, Virginia Code section 60.2-212, which essentially defines who qualifies as an employee under the Virginia Unemployment Compensation Act, was amended by the General Assembly to in-

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208. Act of Mar. 21, 2005, ch. 464, 2005 Va. Acts 631 (codified as amended at VA. CODE ANN. § 60.2-618(2)(b)(4) (Cum. Supp. 2005)).

209. VA. CODE ANN. § 60.2-618(2)(b)(4) (Cum. Supp. 2005).

210. See, e.g., *Davis v. Va. Employment Comm'n*, No. 1192-94-4, 1995 Va. App. LEXIS 115 (Ct. App. Feb. 14, 1995) (unpublished decision).

211. See Act of Mar. 20, 2005, chs. 47, 91, 2005 Va. Acts 118, 169 (codified as amended at VA. CODE ANN. §§ 18.2-204.3, 60.2-500, -536.1 to -536.5, -622 (Cum. Supp. 2005)).

212. VA. CODE ANN. § 60.2-536.1(A) (Cum. Supp. 2005).

213. *Id.* §§ 60.2-536.1(A), (C), -536.3 (Cum. Supp. 2005).

214. *Id.* § 18.2-204.3(A), (B) (Cum. Supp. 2005).

corporate the factors set forth in Internal Revenue Service Ruling 87-41 as indicative of an employer-employee relationship.<sup>215</sup>

### B. *Restrictive Covenants*

An effort to pass legislation governing the enforceability of restrictive covenants between employers and employees, Senate Bill 1172, was left in committee at the close of the 2005 Session of the General Assembly.<sup>216</sup> It is likely, however, that a version of this bill will surface in the near future, possibly as early as the 2006 Session. The bill, proposed by Republican Senator Kenneth W. Stolle, would have established that a covenant restraining competition is enforceable if it satisfies a legitimate business interest of the employer, is "reasonable in duration, geographic area, and scope," is signed by the employee, and the employee receives adequate consideration.<sup>217</sup>

### C. *Virginia Human Rights Act*

The General Assembly extended the limitations period for filing a civil action for a violation of the Virginia Human Rights Act, which prohibits discharge based on "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, or of age,"<sup>218</sup> from 180 days to 300 days from the date of discharge.<sup>219</sup> If, however, an employee wishes to pursue administrative remedies before resorting to legal action, the employee has just 180 days from the date of discharge to file a complaint with the Virginia Human Rights Council or a local human rights agency or commission.<sup>220</sup> An employee who files an administrative complaint within 180 days of discharge has ninety days from the date that the administrative agency renders its determination to file a civil action.<sup>221</sup>

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215. Act of Mar. 28, 2005, ch. 892, 2005 Va. Acts 1577 (codified as amended at VA. CODE ANN. § 60.2-212 (Cum. Supp. 2005)).

216. See S.B. 1172, Va. Gen. Assembly (Reg. Sess. 2005).

217. *Id.*

218. VA. CODE ANN. § 2.2-2639(B) (Repl. Vol. 2005).

219. See Act of Mar. 26, 2005, chs. 770, 857, 2005 Va. Acts 1290, 1451 (codified as amended at VA. CODE ANN. § 2.2-2639(C) (Repl. Vol. 2005)).

220. VA. CODE ANN. § 2.2-2639(C) (Repl. Vol. 2005).

221. *Id.*

### D. *Payment of Wages*

Persons who issue bad checks of \$200 or more to pay employee wages may face stiffer criminal penalties. Previously, it was a misdemeanor for a person to knowingly issue a bad check in payment of wages on behalf of a business.<sup>222</sup> It is now a Class Six felony if the check has a face value of \$200 or more.<sup>223</sup>

The General Assembly also increased the penalty for employers who intentionally fail or refuse to pay wages of \$10,000 or more, and employers who have intentionally failed to pay wages more than once. Previously, it was a misdemeanor to withhold or refuse to pay wages of any amount "willfully and with intent to defraud."<sup>224</sup> Now an employer is guilty of a Class Six felony "if the value of the wages earned and not paid is \$10,000 or more," or if the employer was previously found guilty of intentionally withholding wages regardless of the amount.<sup>225</sup> Moreover, the General Assembly clarified that it is appropriate to aggregate the total wages withheld by the employer for all employees to determine the "value of the wages earned."<sup>226</sup>

### E. *Jury Service by Employees*

During the 2004 Session, the General Assembly amended Virginia Code section 18.2-465.1 to prohibit employers from requiring any employee summoned to serve on jury duty to work on the day of jury service.<sup>227</sup> Before this amendment took effect, the General Assembly changed Virginia Code section 18.2-465.1 again, this time prohibiting employers from requiring any employee who serves on jury duty for four hours or more to work any shift that starts between 5:00 p.m. on the day of jury service and 3:00 a.m. on the following day.<sup>228</sup>

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222. *Id.* § 18.2-182 (Repl. Vol. 2004).

223. *Id.* (Cum. Supp. 2005).

224. *Id.* § 40.1-29 (Cum. Supp. 2004).

225. *Id.* § 40.1-29(E) (Cum. Supp. 2005).

226. Act of Mar. 22, 2005, ch. 595, 2005 Va. Acts 791 (codified as amended at VA. CODE ANN. § 40.1-29(E) (Cum. Supp. 2005)).

227. See Act of Apr. 14, 2004, ch. 800, 2005 Va. Acts 1337 (codified as amended at VA. CODE ANN. § 18.2-465.1 (Repl. Vol. 2004)).

228. See Act of Apr. 6, 2005, ch. 931, 2005 Va. Acts 1758 (codified as amended at VA.

## IX. CONCLUSION

Virginia labor and employment law was not without developments of note. The *Blair* case—probably the most significant case of the past year—has certainly raised the bar for employer inquiries into the pasts of future and current employees, and is likely to change the hiring practices of many employers in the Commonwealth.<sup>229</sup> But for the most part, the courts maintained the status quo, as illustrated in *Rowan* and *Sewell*, where the courts declined opportunities to expand the public policy exception to the at-will doctrine.<sup>230</sup>

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CODE ANN. § 18.2-465.1 (Cum. Supp. 2005)).

229. See *supra* Part IV.

230. See *supra* Part III.

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