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Labor and Employment Law

David C. Burton
Williams Millen, P.C., Virginia Beach, Virginia.

Melissa L. Lykins
Williams Mullen, P.C., Virginia Beach, Virginia.

LABOR AND EMPLOYMENT LAW

David C. Burton *
Melissa L. Lykins **

I. INTRODUCTION

Indeed, it was an active year in the employment and labor law arena with the issuance of many significant decisions. The Supreme Court of the United States issued a ruling of first impression[1] concerning the numerosity requirement of Title VII of the Civil Rights Act of 1964 ("Title VII").[2] In fact, the Supreme Court, the United States Court of Appeals for the Fourth Circuit, the United States District Courts for the Eastern and Western Districts of Virginia, and the Supreme Court of Virginia issued important labor and/or employment law decisions.

The authors note that this article is an annual survey and therefore acknowledge the limitations in depth and scope of the following reading consumption. The scope of this article is restricted to legislative and case law developments specific to the Commonwealth of Virginia.[3] Furthermore, as an annual review, this article is date restricted.[4]

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* Partner, Williams Mullen, P.C., Virginia Beach, Virginia. B.A., 1988, Elon College; J.D., 1991, University of Richmond School of Law.

** Associate, Williams Mullen, P.C., Virginia Beach, Virginia. B.A., 1997, University of the South; J.D., 2004, University of Richmond School of Law.

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1. *See* Arbaugh v. Y & H Corp., 126 S. Ct. 1235 (2006).

2. 42 U.S.C. §§ 2000e–2000e-17 (2000 & Supp. III 2005).

3. Topics that are beyond the scope of this article include worker's compensation, federal administrative, and other public sector developments.

4. With the exception of a few outlying cases that are discussed due to their significance to labor and employment law in Virginia, this article is restricted by time period to include only those cases or legislative decisions issued between May 1, 2005 and April 30,

II. AGE DISCRIMINATION

Clearing confusion among the several circuits in *Smith v. City of Jackson*,[5] the Supreme Court of the United States held that the language of the Age Discrimination in Employment Act ("ADEA")[6] is wide enough to create space for disparate-impact claims.[7] Reasonableness is still a valid defense, however, to suits brought under the ADEA.[8] In fact, an employer's defense to a disparate-impact claim is based on a decision made on the basis of a reasonable factor other than age ("RFOA").[9] Thus, although the Court ruled that the disparate-impact theory of liability *is* categorically available under the ADEA, an employer is protected from disparate-impact claims under the ADEA even if the employer makes a decision that results in a disparate-impact on employees in the protected class (those over forty years of age) as long as the employer made the decision that leads to disparate-impact based on a reasonable factor other than age.[10]

The City of Jackson, Mississippi ("the City") adjusted police officers' and public safety officers' salaries in an effort to make these employees' salaries comparable to the regional average compensation of individuals serving in similar capacities.[11] The City "adopted a pay plan granting raises to all City employees," the purpose of which "was to 'attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.'"[12] More specifically, the City followed a standard adjustment resulting in police officers with less than five years of experience receiving a proportionately larger raise than police officers with more than five years of experience.[13] As a majority of police officers with more than five years of experience were over the age of forty, a group of police officers over forty formed the group of petitioners

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5. 544 U.S. 228 (2005).
6. 29 U.S.C. §§ 621–633a (2000).
7. *Smith*, 544 U.S. at 240.
8. *Id.* at 233 n.3.
9. *Id.* at 238.
10. *Id.* at 239–40.
11. *Id.* at 231.
12. *Id.*
13. *Id.*

who sued the City claiming both disparate-treatment and disparate-impact.[14] The Court addressed only the disparate-impact claim as it was an issue not yet raised under the ADEA.[15]

In *Smith*, the Supreme Court also addressed whether the theory of disparate-impact applied to the ADEA as it relates to Title VII.[16] The Court compared the ADEA's and Title VII's language prohibiting discrimination on each statute's respective bases.[17] Recognizing both parallels and variants between the two statutes, the Court overturned the United States Court of Appeals for the Fifth Circuit's ruling declaring that disparate-impact claims "are categorically unavailable under the ADEA."[18] Due to the facts of *Smith*, however, the Court did not permit a disparate-impact claim to proceed.[19] The Court, in part, based its reasoning on its previous ruling in *Griggs v. Duke Power Co.*,[20] finding Congress legislatively expanded disparate-impact coverage expressed by Title VII through the passage of the 1991 Amendments to Title VII; this expansion, however, was not offered to the ADEA.[21] Therefore, the scope of the ADEA in allowing a disparate-impact claim is "narrowly construed"[22] and maintains its limited range as expressed in the Court's previous decision in *Wards Cove Packing Co. v. Atonio*.[23] Additionally, the Court interpreted section 4(f)(1) of the ADEA to "narrow[] its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" [24]

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14. *Id.*

15. *Id.* at 231–32.

16. *Id.* at 232.

17. *Id.* at 240–41. In the text of the opinion, the Court recognizes that congressional deliberations purposefully eliminated "age" as one of the protected classes in the enactment of the Title VII. *Id.* at 240. Thus, the two statutes are not identical in their express language or in their interpretation. *Id.* at 241.

18. *Id.* at 231–32 (citing Smith v. City of Jackson, 351 F.3d 183, 195 (5th Cir. 2003)).

19. *Id.* at 232.

20. *Id.* at 234–35 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)). In *Griggs*, the Court held that discrimination exists when an employee is adversely affected or deprived of an employment opportunity because of a protected basis unique to the individual employee. 401 U.S. at 431–32. Discrimination is not, by definition, obviously intentional, and "good faith" does not erase disparate-impact discrimination or "redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

21. *Smith*, 544 U.S. at 240.

22. *Id.*

23. 490 U.S. 642 (1989).

24. *Smith*, 544 U.S. at 233 (quoting Age Discrimination in Employment Act (ADEA) of

Writing for the majority, Justice Stevens found the petitioners, the group of police offers over the age of forty, failed to establish a valid disparate-impact claim.[25] Based on the facts of the case, the Court found the petitioners did nothing more than expose the plan's greater benefit to more junior officers; the petitioners did not meet the requirement, as created by *Wards Cove Packing Co.*, of identifying any specific test, requirement, or practice in the allegedly discriminatory pay plan resulting in an adverse impact on older workers.[26] The Court further specified that "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact."[27] Based on this, the Court ruled that the City's pay plan was "based on a 'reasonable factor other than age;'"[28] in this case, it was based on the City's desire to bring police officers' salaries to a more comparable position with salaries of other police officers in the region and to retain employees.[29] Significantly, however, the Court held that "a disparate-impact theory [is] cognizable under the ADEA,"[30] and the RFOA provision is not contrary to but supports this conclusion.[31]

Ultimately, the Court held that the ADEA does make allowance for a disparate-impact claim because the language of the ADEA prohibits deprivation of an employment opportunity or an otherwise adverse employment action due to the employee's age.[32] The Court's ruling in *Smith* created the venue in which adversely impacted plaintiffs can sing their grievances while simultaneously warning employers that a valid RFOA must exist to avoid disparate-impact liability.[33]

1967 § 4(f)(1), 29 U.S.C. § 623(f)(1) (2000)).

25. *Id.* at 232.

26. *Id.* at 241–42.

27. *Id.* at 241.

28. *Id.* at 242.

29. *Id.*

30. *Id.* at 236. The Court took this opportunity to distinguish this decision and clarify that it never addressed whether disparate-impact liability existed under the ADEA in its decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *Smith*, 544 U.S. at 236–39.

31. *Smith*, 544 U.S. at 239–40.

32. *Id.* at 237–38.

33. *Id.* at 243 (noting that the "reasonableness inquiry" test is not the same as the "business necessity" test, and as both are categories under the theory of disparate-impact, the distinction is important).

Further interpretation of the ADEA was offered by the United States District Court for the Western District of Virginia. In *Reiterman v. Costco Wholesale Management*,[34] the court offered a reminder to employers that facts which feasibly construe a scheme of age discrimination are adequate to state a claim for relief under the ADEA.[35] Reiterman claimed that ill-intending management transferred her to a different department as part of a scheme to lead to her termination.[36] Reiterman's new department was traditionally staffed by younger employees and was characterized by a fast pace work environment to which the fifty-two year old Reiterman had trouble adjusting.[37] Rejecting the defendant's motion to dismiss for failure to state a claim and relying on the language of 29 C.F.R. § 1625.7(f), the court determined that Reiterman had sufficiently stated facts that, if proven, "could constitute a violation of the ADEA."[38]

III. TITLE VII

A. *The Jurisdictional Threshold of Title VII*

The Supreme Court jumped back in the labor and employment domain, this time interpreting the threshold requirements of a Title VII claim, with its decision in *Arbaugh v. Y & H Corp.*[39] Arbaugh sued her former employer, alleging a violation of Title VII based on sexual harassment.[40] Successful in her suit, Arbaugh won a favorable verdict from a jury, and the district court entered judgment in her favor based on the verdict.[41] Through a post-judgment motion, Y & H Corp. moved to dismiss the action based on lack of federal subject-matter jurisdiction.[42] Concedingly, yet stating its reluctance, the district court granted the motion and cited Federal Rule of Civil Procedure 12(h)(3), interpreting the rule as necessitating the employer to employ fifteen or more em-

34. *See* No. CIV.A.5:05CV00012, 2005 WL 1800085 (W.D. Va. July 28, 2005).
35. *Id.* at *2.
36. *Id.*
37. *Id.* at *1.
38. *Id.* at *2.
39. 126 S. Ct. 1235 (2006).
40. *Id.* at 1238.
41. *Id.*
42. *See id.*

ployees before becoming subject to Title VII coverage.[43] Thus, the district court vacated Arbaugh's judgment and dismissed Arbaugh's Title VII claim without prejudice.[44] The United States Court of Appeals for the Fifth Circuit affirmed.[45] The Supreme Court reversed the Fifth Circuit's ruling, holding that the employee's status under Title VII is an element of a plaintiff's claim for relief, which, if not challenged prior to a trial on the merits, is conceded.[46] Further, the Court held that the Title VII "employee-numerosity requirement" is not a jurisdictional requirement that can be raised at any stage of litigation and result in dismissal of the plaintiff's claim.[47]

Pursuant to 28 U.S.C. § 1331, federal courts have subject-matter jurisdiction for all cases arising out of a federal question, i.e., arising under the Constitution, federal statutes, or treaties of the United States.[48] As repeatedly expressed by the *Arbaugh* Court, Title VII is a federal statute, and an action arising under Title VII, meeting prerequisite requirements, creates a federal question invoking federal subject-matter jurisdiction that "'can never be forfeited or waived.'"[49] Moreover, 42 U.S.C. § 2000e-5(f)(3) is the federal jurisdictional guarantee provision of Title VII, ensuring a federal forum to all Title VII plaintiffs.[50] Arbaugh was guaranteed a federal forum for her complaint arising under Title VII.[51] The issue for the Court to determine was whether or not Title VII's fifteen employee requirement "is jurisdictional or simply an element of a plaintiff's claim."[52]

An employer who can be liable under Title VII is defined as a person who employees fifteen or more individuals.[53] Employing at least fifteen individual employees, then, makes the employer subject to the jurisdiction of the federal courts. Justice Ginsburg, writing for the Court, held that in accordance with the language

43. *Id.* at 1238–39.
44. *Id.* at 1238.
45. Arbaugh v. Y & H Corp., 380 F.3d 219, 231 (5th Cir. 2004).
46. *Arbaugh*, 126 S. Ct. at 1244–45.
47. *Id.* at 1238–39.
48. 28 U.S.C. § 1331 (2000).
49. *Arbaugh*, 126 S. Ct. at 1244 (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)); *see* Venkatraman v. REI Sys., Inc., 417 F.3d 418, 420 (4th Cir. 2005).
50. *Arbaugh*, 126 S. Ct. at 1239–40.
51. *Id.*
52. *Id.* at 1242.
53. 42 U.S.C. § 2000e(b) (2000).

of Title VII, Congress did not create the fifteen employee mark as a jurisdictional barrier.[54] The Court offered two reasons for its holding. First, the Court held that unlike "28 U.S.C. § 1332's monetary floor," Title VII's "15-employee threshold" is not only in a separate provision from its § 2000e-5(f)(3) jurisdictional requirement, it "'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'"[55] Secondly, the Court reasoned that the fifteen employee requirement is not a Federal Rule of Civil Procedure 12(h)(3) basis for dismissal, but is similar to a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim.[56] Likening Y & H's post-verdict motion to a 12(b)(6) motion, in essence an affirmative defense, the Court held that challenging the existence of a requirement of a plaintiff's claim can be raised at any point up until the verdict is entered, but Y & H's motion, like a 12(b)(6) motion, is moot after the verdict's entry.[57] Ultimately, the Court determined that Title VII itself created a "bright line" by which the employee-numerosity requirement is "an element of a plaintiff's claim for relief, not a jurisdictional issue."[58]

B. *Retaliation*

In *Laber v. Harvey*,[59] the plaintiff, Laber, alleged he suffered discrimination based on his religion under Title VII, his age under the ADEA, and retaliation.[60] Showing concern strictly for the impact on the labor and/or employment law landscape, the United States Court of Appeals for the Fourth Circuit's ruling in the case is significant as it addresses the claim of retaliation.

Laber, a civilian employee of the U.S. Army ("the Army"), was granted leave to amend his complaint against the Army for discrimination based on his religion.[61] The Equal Employment Opportunity Commission's ("EEOC") Office of Federal Operations ("OFO") found that Laber had been subject to discrimination be-

54. *Arbaugh*, 126 S. Ct. at 1238–39.
55. *Id.* at 1245 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)).
56. *Id.* at 1240.
57. *Id.*
58. *Id.* at 1244–45.
59. 438 F.3d 404 (4th Cir. 2006).
60. *Id.* at 409–10.
61. *Id.* at 432.

cause his religious beliefs served as the basis of a promotion denial and thus an adverse employment action.[62] Laber's claim for religious discrimination followed from the Army's failure to promote Laber to an overseas position in Tel Aviv, Israel in 1990.[63] Laber filed a charge, and an investigation and several petitions for clarification ensued, resulting in a final determination on March 10, 2003.[64] During 1993, by which time Laber was over the age of forty, Laber applied for an operations research analyst position for which the Army's civilian personnel office "determined [him to be] 'minimally qualified,'" which does not correlate to actually qualified.[65] Laber interviewed with the selecting officer, Richard Scott, and Scott ultimately hired a male candidate under the age of forty.[66] After his unsuccessful pursuit of the operations research analyst position, Laber filed a charge against the Army alleging that the final 2003 OFO remedy was inadequate, the Army had further discriminated against him on the basis of his age, and the Army retaliated against him for his prior EEOC complaint.[67] The United States District Court for the Eastern District of Virginia denied Laber's claims and dismissed his suit, resulting in Laber's appeal to the Fourth Circuit.[68]

The significant charge, in light of the defined scope of this survey, is Laber's retaliation claim. The Fourth Circuit considered the elements necessary to establish a prima facie case of retaliation and applied them to Laber's case: "(1) he engaged in protected activity; (2) an adverse employment action was taken against him; and (3) there was a causal link between the protected activity and the adverse action."[69] The Army denied it was liable for retaliation claiming: (1) the personnel office that determined Laber was "minimally qualified" for the analyst position was not the same decision maker as the person, Scott, who ultimately chose not to hire Laber;[70] and (2) Scott had no knowledge of Laber's previous discrimination complaints at the time Scott

62. *Id.* at 409–10.
63. *Id.* at 411.
64. *See id.* at 411–12.
65. *Id.* at 412, 431.
66. *Id.* at 412.
67. *See id.* at 410, 413.
68. *Id.* at 410.
69. *Id.* at 432.
70. *Id.* at 431.

made the decision not to promote Laber.[71] The district court agreed with the Army, holding that Laber failed to establish a prima facie case of retaliation.[72] The Fourth Circuit upheld the district court's ruling that Laber had not established a prima facie case of discrimination, relying on the district court's finding that Laber did not inform Scott "about his prior EEO activity [until] after Scott made the decision not to select Laber for the position."[73] The Fourth Circuit further determined that the Army had "satisfied its burden of producing a legitimate, non-discriminatory reason for [Laber's] non-selection by introducing evidence that Laber was not qualified for the job."[74] Ultimately, the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the Army and denied Laber's claim of retaliation.[75]

In *Cuffee v. Tidewater Community College*,[76] the United States District Court for the Eastern District of Virginia held in favor of an employer that retaliation was not present.[77] The court ruled that an employee's voluntary request and receipt of a transfer to a position of lesser responsibility does not amount to retaliation, under Title VII, on the part of the employer.[78] Cuffee, the plaintiff, was promoted and moved to the main office of Tidewater Community College ("TCC") as the supervisor of accounts receivable.[79] Shortly after her transfer, Cuffee experienced a personality clash with her immediate supervisor.[80] Additionally, three years after her transfer, Cuffee requested and received a reclassification of her position, resulting in higher pay and additional responsibilities.[81] After a short number of years, Cuffee claimed that she had been racially discriminated against, being the subject of an incorrect and lower job reclassification, and had not received proper salary increase increments despite being asked to handle an unbearable workload.[82] Cuffee requested a transfer to

71. *See id.* at 414.
72. *See id.*
73. *Id.* at 432.
74. *Id.*
75. *See id.*
76. 409 F. Supp. 2d 709 (E.D. Va. 2006).
77. *See id.* at 711, 721.
78. *See id.*
79. *See id.* at 712.
80. *See id.*
81. *See id.* at 712–13.
82. *See id.* at 713–14.

a lower job classification, that of cashier supervisor at a different campus location, characterizing the request as a "'constructive involuntary demotion.'"[83] Cuffee's request was granted, and notwithstanding the fact that the transfer was a demotion, Cuffee maintained her salary.[84] The court stated that:

> In order to establish a *prima facie* case of employment discrimination, Cuffee must show: (1) that she is part of a protected class; (2) that she was meeting her employers [sic] legitimate performance expectations; (3) that she was subjected to an adverse employment action; and, (4) that the circumstances of the adverse action "rationally support the inference that the adverse employment action was motivated by unlawful considerations."[85]

Explaining why Cuffee did not suffer from disparate compensation, disparate promotion, or constructive demotion, the court found that Cuffee's transfer request, resulting in a change to a lower position while retaining the salary of a more advanced job grade, barred her from proving that she had suffered an adverse employment action in the terms, conditions, or benefits of her employment.[86] Ultimately, the court held that Cuffee could not make out a claim for employment discrimination as there was "simply no basis for a claim that she was subjected to an adverse employment action."[87]

C. *Race Discrimination and Pretext*

In February 2006, the Supreme Court of the United States remanded *Ash v. Tyson Foods, Inc.*,[88] to the United States Court of Appeals for the Eleventh Circuit, correcting what it deemed to be an erroneous standard for determining both evidence of contextual racial discrimination and evidence of pretext.[89] Alleging discrimination under Title VII, two African-American employees of Tyson Foods claimed race barred their aspirations for promo-

83. *Id.* at 714.

84. *Id.*

85. *Id.* at 717 (quoting Chika v. Planning Research Corp., 179 F. Supp. 2d 575, 581 (D. Md. 2002)); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995).

86. *See Cuffee*, 409 F. Supp. 2d at 717–19.

87. *See id.* at 717.

88. 126 S. Ct. 1195 (2006) (per curiam).

89. *See id.* at 1196–97.

tion.[90] The Eleventh Circuit found that the word "boy" alone, when not accompanied by a racial indicator, such as black or white, is not by itself evidence of discrimination.[91] The Supreme Court found that such a ruling was erroneous as it failed to consider "various factors including context, inflection, tone of voice, local custom, and historical usage," especially as the alleged statements were made by a plant manager who awarded the management positions sought by the African-American employees to two Caucasian employees.[92] Building on the facts of the case, the Supreme Court also determined that the Eleventh Circuit's standard requiring the disparity between candidates to be so strong as to "'jump off the page and slap you in the face'"[93] in order to establish pretext was both erroneous and unhelpfully imprecise.[94] The Court expressly stated that its opinion was not intended to define the standards for pretext claims based on superior qualifications.[95] Finally, the Court remanded the case to the Eleventh Circuit.[96]

D. *An Employer's Legitimate Expectations*

The United States Court of Appeals for the Fourth Circuit solidified its adherence to existing opinions regarding adverse employment decisions when it issued its ruling in *Baqir v. Principi*.[97] Baqir alleged he suffered discrimination by being subjected to a hostile work environment based on his race (black), color, religion (practicing Muslim), national origin[98] (Pakistani), and age.[99] The

90. *See id.* at 1196.
91. *See id.* at 1197.
92. *Id.*
93. *Id.* (quoting Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004)).
94. *See id.*
95. *See id.* at 1198.
96. *See id.*
97. 434 F.3d 733 (4th Cir. 2006).
98. *See id.* at 741. *See generally* Venkatraman v. REI Sys., Inc., 417 F.3d 418 (4th Cir. 2005). Venkatraman, an American citizen of East Indian origin, worked for REI as a software engineer. *Id.* at 419. Venkatraman was employed from July 2001 until March 2002, when he was fired. *Id.* Venkatraman's complaint alleged that REI only fully compensated white employees with overtime, and that he, Venkatraman, had not been as equally compensated as white employees. *Id.* Venkatraman sued his former employer, REI, alleging that he was terminated in retaliation for complaining of the pay disparity and unequal treatment. *See id.* In addition to retaliation, Vankatraman alleged racial and national origin discrimination as well as wrongful discharge. *Id.* The United States District Court for the Eastern District of Virginia dismissed all of Venkatraman's claims, noting that

United States District Court for the Western District of North Carolina granted summary judgment for the employer, and the Fourth Circuit affirmed.[100]

Baqir was hired to practice interventional cardiology in the Veterans Affairs Medical Center in Asheville, North Carolina ("the VA").[101] Baqir's solidification of this employment position depended on his "'satisfactory completion of the credentialing process' and 'approval by the Medical Center Director.'"[102] After an independent assessment of Baqir's skills by a fellow state hospital, it was unanimously determined that Baqir did not yet possess the requisite skill set to practice interventional cardiology and was "'not ready to perform all the duties of an interventional cardiologist.'"[103] The VA terminated Baqir's employment, citing that Baqir had failed to gain the necessary privileges to practice interventional cardiology at the VA hospital.[104] Baqir filed an administrative complaint against the hospital, complaining he had been subjected to a hostile work environment from the first day of his employment because he was told by a Hindu colleague not to talk to him and because he was told he would not be an interventional cardiologist.[105]

The Fourth Circuit analyzed Baqir's charge by first determining whether Baqir's illegal discrimination allegations established a prima facie case for discrimination, the first requisite step to prove illegal discrimination.[106] Reiterating the standards of all hostile environment discrimination cases, the court established that Baqir must prove:

> (1) [H]e is a member of a protected class, (2) he suffered an adverse employment action (such as discharge), (3) he was performing his job duties at a level that met the employer's legitimate expectations at the time of the adverse employment action, and (4) his position re-

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Venkatraman had failed to exhaust his administrative remedies and failed to properly allege his national origin as a basis for discrimination. *Id.* at 419–20. The United States Court of Appeals for the Fourth Circuit affirmed. *Id.* at 424.

99. *See Baqir*, 434 F.3d at 734.
100. *Id.*
101. *Id.* at 735.
102. *Id.*
103. *Id.* at 738.
104. *See id.* at 740.
105. *See id.* at 737.
106. *See id.* at 742.

> mained open or was filled by a similarly qualified applicant outside the protected class.[107]

Assessing the facts of the case, the court determined that Baqir failed to establish a prima facie case of discrimination because he could not prove the third requisite element: that he was performing his job duties as an interventional cardiologist at a level that met the VA hospital's legitimate expectations at the time of his termination.[108] The court accepted the facts as presented on the record and the assessment of the independent physicians who observed Baqir and reported his capabilities to the VA.[109] "Simply put, Baqir was hired to serve at the Asheville VA Center as an interventional cardiologist who could work independently and without further training, but he was unable to meet the VA's expectations in that regard."[110] The VA, in turn, committed no act of discrimination in his resulting termination.[111] In determining that the third element is not based on an employee's past performance with another employer or the employee's recommendations or credentials, the court held that the critical question, favorable to all employers, is whether or not the employee meets the legitimate expectations of the acting employer.[112]

The United States Court of Appeals for the Fourth Circuit's decision in *Warch v. Ohio Casualty Insurance Co.*,[113] further solidified its position regarding employers' reliance on legitimate job expectations. Warch alleged age discrimination in termination against Ohio Casualty.[114] The court granted Ohio Casualty summary judgment.[115] In its ruling, the Fourth Circuit held that Warch's employment history of warnings for submitting unacceptable work product, reprimands, counseling, and probation during the years immediately prior to his termination would preclude a jury from finding that Warch could make out a prima facie case of discrimination.[116] Specifically, the court held that Warch would not be able to meet the third element of a prima fa-

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107. *Id.*
108. *Id.*
109. *See id.*
110. *Id.*
111. *Id.*
112. *See id.* at 743.
113. 435 F.3d 510 (4th Cir. 2006).
114. *Id.* at 512.
115. *Id.*
116. *See id.* at 512–17.

cie case of age discrimination: that "(3) he was discharged despite his qualifications and performance."[117] Thus, the court held that Warch could not meet his employer's legitimate expectations of qualifications and performance.[118] Status in a protected class, then, does not preclude an employer from terminating an employee who cannot meet the employer's legitimate job expectations.

IV. VOSH: AN EMPLOYER'S RESPONSIBILITY FOR SAFETY

For the first time in some years, the Court of Appeals of Virginia issued a decision relevant to the labor and employment arena. In its decision in *Davenport v. Summit Contractors, Inc.*,[119] the court of appeals affirmed the trial court's decision effectively limiting the power of the state agency, the Virginia Occupational Safety and Health Program ("VOSH").[120] Summit Contractors, Inc. ("Summit") was the general contractor for a housing project.[121] Summit subcontracted the siding work to Sunbelt Contractors, Inc. ("Sunbelt").[122] While visiting the siding worksite subcontracted to Sunbelt, VOSH found what its agents deemed to be serious violations of federal Occupational Safety and Health Act ("OSHA") standards.[123] The OSHA standards cited were listed as violations of the Virginia Administrative Code, which incorporates sections of OSHA safety and health regulations for construction sites.[124] Although Sunbelt was responsible for failure to provide its employees with hardhats and fall protection, and Summit employees were equipped with hardhats and were not

117. *Id.* at 513 ("[T]o establish a prima facie case of unlawful age discrimination, Warch must show that (1) he is a member of the protected class; (2) he was qualified for the job and met OCIC's legitimate expectations; (3) he was discharged despite his qualifications and performance; and (4) following his discharge, he was replaced by a substantially younger individual with comparable qualifications." (citing O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312–13 (1996); Causey v. Balog, 162 F.3d 795, 802 & n.3 (4th Cir. 1998))).

118. *Warch*, 435 F.3d at 518.

119. 45 Va. App. 526, 612 S.E.2d 239 (Ct. App. 2005).

120. *See id.* at 527, 534, 612 S.E.2d at 240, 243.

121. *Id.* at 527, 612 S.E.2d at 240.

122. *Id.*

123. *Id.*

124. *Id.* (noting that 16 VA. ADMIN. CODE § 25-175-1926 incorporates various provisions of 29 C.F.R. § 1926).

involved in the area requiring fall protection, VOSH issued violations against both Sunbelt and Summit.[125]

Summit appealed VOSH's issuance of citations, arguing that VOSH's ultra vires administrative "'multi-employer citation policy'" contained in its Field Operations Manual "ha[d] not been promulgated as a rule or regulation pursuant to the Virginia Administrative Process Act, Code § 2.2-4000 *et seq.*"[126] The court considered the language of the Virginia Occupational Safety Health Act ("VOSHA"), which statutorily gives the right to an employee to bring any possible violation of their working condition "'to the attention of *their* employer'" or to VOSH.[127] More specifically, the court held that the OSHA provision making the general contractor responsible for assuming all obligations "'whether or not he subcontracts any part of the work'"[128] was not adopted by the Virginia legislature.[129] The court rejected VOSH's joint employer liability concept in issuing citations against an employer who "neither creates the worksite hazard nor allows his employees to be exposed to it."[130]

The court adopted Summit's position, entered summary judgment, and dismissed the citations against Summit as a matter of law.[131] The Virginia legislature has the right to implement such a vicarious liability policy, but it has not yet done so; thus, Summit could not be held liable as it had no part in endangering Sunbelt's employees.[132] Ultimately, the court of appeals's decision forces VOSH to streamline its net casting approach of citations issuance, severely reduces VOSH's self-imposed authority, and relieves general contractors from "shotgun" liability.

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125. *See id.* at 527–28, 612 S.E.2d at 240.

126. *Id.* at 528, 612 S.E.2d at 240–41.

127. *Id.* at 529, 612 S.E.2d at 241.

128. *Id.* at 530, 612 S.E.2d at 241–42 (quoting 29 C.F.R. § 1926.16(b) (2005)).

129. *Id.* at 530–31, 612 S.E.2d at 241–42 (finding that "[n]ot included among the provisions adopted into Virginia law, however, were subparts A and B of 29 C.F.R. Part 1926. One of those omitted provisions, 29 C.F.R. § 1926.16(b), states that 'the prime contractor assumes all obligations prescribed as employer obligations under the standards contained in this part, whether or not he subcontracts any part of the work.' Nothing similar to this provision was incorporated by reference into Virginia law. Nor did the Board promulgate any regulations addressing the relationship between a general contractor and the employees of a subcontractor" (footnotes omitted) (quoting 29 C.F.R. § 1926.16(b) (2005))).

130. *Id.* at 532, 612 S.E.2d at 242.

131. *See id.* at 534, 612 S.E.2d at 243.

132. *See id.* at 532, 612 S.E.2d at 242.

V. EMPLOYMENT AT-WILL

A. *Reductions in Force*

Economic forces can result in a business either prospering or perishing. In cases where an employer is in danger of perishing unless it can cut costs, many employers cut costs by reducing their workforce, i.e. terminating employees. This year, much like years in the past, Virginia courts held that an employer has the discretion to reduce its employee workforce in a non-discriminatory manner.

1. Preferential Treatment Based on Numerical Quotas Not Required

The Newport News Omni Hotel ("Hotel"), owned by Economos Properties, Inc. ("Economos"), eliminated job positions as part of a reduction in force ("R.I.F.") brought on by economic constraints.[133] Kathleen Garrow, the plaintiff, sued Economos alleging the elimination of her job was based on her gender, a violation of Title VII.[134] The United States District Court for the Eastern District of Virginia granted Economos's motion for summary judgment, holding that "[t]he record [was] devoid of any evidence that Garrow's sex was even a consideration in the decision to eliminate the position" she held, as the R.I.F. proposed by Economos adversely affected both men and women and "both men and women were spared" adverse employment actions when the R.I.F. was not implemented in full.[135]

Garrow was employed at the Hotel as the director of sales, but she aspired to work on an Economos property in Florida as a hotel manager.[136] Simultaneously, she informed Economos that her husband had received a job offer in Florida, and she would be moving to join him.[137] Economos accommodated Garrow's request and created the position of assistant general manager of the Hotel for Garrow, simultaneous with her responsibilities as director

133. *See* Garrow v. Economos Props., 406 F. Supp. 2d 635, 636–37 (E.D. Va. 2005).

134. *Id.* at 636, 638; *see* Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000 & Supp. III 2005).

135. *Garrow*, 406 F. Supp. 2d at 641.

136. *See id.* at 636.

137. *See id.*

of sales.[138] Soon after Garrow took on the additional job responsibilities and title, the Hotel began to experience financial difficulty and its budget showed lower than anticipated performance.[139] In an effort to regain profitable status, the Hotel underwent a R.I.F., resulting in elimination of bonus payments for one employee, reduction in salaries for several employees, elimination of an accounting position, and termination of Garrow's employment.[140] Garrow claimed gender discrimination, alleging the R.I.F. was discriminatory, as "only female employees were harmed by [Economos's] cost cutting decisions while male employees were given preferential treatment."[141]

The court reasoned that a plaintiff proceeding under Title VII has two options available by which to prove her case.[142] First, the plaintiff may present direct or indirect evidence of the presence of discrimination, the "ordinary standards of proof" scenario, or the plaintiff may rely on the "burdenshifting framework" established by *McDonnell Douglas Corp. v. Green*.[143] As Garrow proceeded using the burden shifting method, the court charged that she must present facts which would lead a trier of fact to conclude, with reasonable probability, that the adverse employment action Garrow suffered—the loss of her employment due to the R.I.F.—was the result of discrimination.[144] To establish the existence of discrimination, Garrow had to successfully establish a prima facie case of discrimination.[145] The relevant standard of such a case is: (1) membership in a protected class, (2) suffering an adverse employment action, (3) job performance at a level that meets the employer's legitimate expectations at the time the adverse action occurred, and (4) replacement of the plaintiff by someone who was not a member of the protected class or the plaintiff's position remaining open.[146] The court reasoned that Garrow could not establish the fourth element.[147] Economos had created the position of assistant general manager not out of necessity, but solely to ac-

138. *See id.*
139. *See id.* at 637.
140. *See id.*
141. *Id.* at 638.
142. *Id.* at 639.
143. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
144. *See id.* at 640.
145. *Id.*
146. *Id.*
147. *See id.*

commodate Garrow's request to learn hotel operations to better position her for a potential position in the future.[148] The assistant general manager position was eliminated with Garrow's termination, making it impossible for the position to be filled by someone outside the plaintiff's class or for the position to be left open.[149] Moreover, Garrow's position as director of sales (1) did not remain open and (2) was filled by another woman, someone in Garrow's protected class.[150]

Because the court found that Garrow could not establish a prima facie case for discrimination, the employer was not required to prove a nondiscriminatory reason for the elimination of Garrow's position as part of the Hotel's R.I.F.[151] The court granted Economos's motion for summary judgment, noting:

> Contrary to plaintiff's assertions, the law does not require an employer to take a Noah's ark approach to reductions in force, *i.e.*, maintaining absolute gender parity even if it means randomly firing a man so that he can be marched out the door in tandem with a woman whose job was legitimately deemed non-essential.[152]

2. Faithful Employee Principle Not a Basis for Discrimination

Holding that "federal law does not recognize the violation of [the faithful employee] principle as a basis for a discrimination lawsuit," the United States District Court for the Western District of Virginia concluded that the Kmart Corporation had not discriminated against its former employee when the corporation underwent a reduction in force at its Abingdon, Virginia location.[153] In *Andrezyski v. Kmart Corporation*,[154] Andrezywski had been an employee of Kmart for thirty-five years when she was laid off as part of a R.I.F. originating from Kmart corporate head-

148. *See id.*

149. *See id.*

150. *Id.*

151. *See id.* at 640–41.

152. *Id.* at 642 (citing Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 994 n.2 (1988) ("Congress expressly provided that Title VII not be read to require preferential treatment on numerical quotas.")).

153. *See* Andrezyski v. Kmart Corp., 358 F. Supp. 2d 511, 518 (W.D. Va. 2005).

154. 358 F. Supp. 2d 511. In the complaint, Andrezywski's name was spelled differently than in her affidavit or Kmart's records. *Id.* at 512 n.1. In referring to the plaintiff, this article, like the court, will use the affidavit and corporate record spelling, Andrezywski.

quarters.[155] Andrezywski sued Kmart alleging discrimination on the basis of age in violation of the ADEA[156] and sex discrimination in violation of Title VII.[157]

A plaintiff must prove all four elements of a prima facie case to successfully plead age or sex discrimination.[158] These elements are: (1) membership in a protected class; (2) suffering an adverse employment action; (3) job performance at a level that meets the employer's expectations; and (4) replacement of the plaintiff by someone who was not a member of the protected class.[159] The plaintiff's sex (female) and age (over forty) placed her into two protected classes.[160] Andrezywski alleged that she suffered an adverse employment action pursuant to the R.I.F.[161] She claimed she was discriminated against on the basis of her age when her hours were later reduced from full-time to part-time as part of Kmart's R.I.F. process.[162] She also claimed that the Abingdon location deviated from the Kmart corporate R.I.F. guidelines by not considering certain employees who were male or younger in age in the R.I.F. evaluation process.[163]

There are two circumstances in which a plaintiff, after an R.I.F., can establish a prima facie case of discrimination. In the first instance, "the plaintiff may demonstrate the fourth element of her prima facie case of age or sex discrimination by showing that 'her employer did not treat . . . [age or sex] neutrally, or there were other circumstances giving rise to an inference of discrimination.'"[164] Alternatively, the plaintiff can present a prima facie showing when the employer announces that selection of employees in an R.I.F. is performance-based and the "'process of selection produced a residual work force that contained some un-

155. *Id.* at 512–13.

156. Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621–633a (2000).

157. Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000 & Supp. III 2005).

158. *Andrezyski*, 358 F. Supp. 2d at 514.

159. *See id.* at 514–15.

160. *See id.* at 515.

161. *Id.*

162. *See id.*

163. *See id.* at 516.

164. *Id.* at 515 (alteration in original) (quoting Dugan v. Albemarle Co. Sch. Bd., 293 F.3d 716, 720–21 (4th Cir. 2002)).

protected persons who were performing at a level lower than that at which the plaintiff was performing.'"[165]

The court concluded that the Abingdon R.I.F. occurred in compliance with the corporate mandated "Workforce Adjustment Guidelines."[166] Kmart had in place a "gender-neutral [Abingdon] R.I.F. policy"[167] and "an age-neutral R.I.F. policy"[168] to which it adhered when including Andrezywski as part of the R.I.F.[169] Andrezywski failed to produce evidence that she suffered any adverse action as a result of her sex or age or that the R.I.F. resulted in a workforce at the Abingdon store with either an irregularly large ratio of male to female employees or with a substantial number of individuals younger in age than Andrezywski.[170] Ultimately, the court held to the legal maxim that there is "no inference of discrimination when [an] employer adheres to neutral, established polices and procedures for a R.I.F.,"[171] and thus, Andrezywski's termination had not been determined on the basis of her sex or age, and she had not suffered discrimination.[172]

B. *Covenants Not To Compete*

The Supreme Court of Virginia took the opportunity to further clarify the "overbroad" component of the state's covenant not to compete doctrine. In *Omniplex World Services Corp. v. US Investigations Services, Inc.*,[173] the court held that a former employer's noncompetition provision was overly broad, making the provision unenforceable.[174] Offering reasoning for its decision, the court determined that if the provision sought to be enforced by the employer does not limit the former employee's subsequent employ-

165. *Id.* (quoting Corti v. Storage Tech. Corp., 304 F.3d 336, 340 n.6 (4th Cir. 2002) (Title VII); Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 429–30 (4th Cir. 2000) (ADEA)).

166. *See id.* at 515–16.

167. *Id.* at 515.

168. *Id.* at 516.

169. *Id.* at 515–18.

170. *See id.* at 515.

171. *Id.*

172. *Id.* at 518.

173. 270 Va. 246, 618 S.E.2d 340 (2005).

174. *Id.* at 250, 618 S.E.2d at 342–43.

ment to that which is in competition with the former employer, the provision is overly broad and unenforceable.[175]

To begin its analysis, the court reiterated well-established standards applied in determining the validity and subsequent enforceability of a covenant not to compete in Virginia.[176] "A noncompetition agreement between an employer and an employee will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy."[177] The court also took the opportunity to remind Virginia employers that covenants not to compete are considered to be restraints on trade and are generally disfavored.[178] Moreover, should any ambiguities exist in the covenant, the employer bears the burden of proof to establish the covenant exists within the parameters of the aforelisted three-prong measuring guide.[179] Any ambiguities are interpreted in favor of the employee.[180] Lastly, "Whether the covenant not to compete is enforceable is a question of law" which the court reviews *de novo*.[181]

Determining the validity of a covenant not to compete is a balancing act between the employee's right to secure gainful employment and "the employer's legitimate interest in protection from competition by [the] former employee based on the employee's ability to use information or other elements associated with the employee's former employment."[182] In *Omniplex*, Schaffer, the former employee, worked monitoring alarms and intrusion detection equipment.[183] Schaffer's subsequent employment with US Investigations Services required Schaffer's services in travel arrangements and obtaining visas and passports.[184] Omniplex sued Schaffer and her new employer, claiming breach

175. *See id.*

176. *See id.* at 249, 618 S.E.2d at 342.

177. *Id.* (citing Modern Env'ts, Inc. v. Stinnett, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002); Simmons v. Miller, 261 Va. 561, 580–81, 544 S.E.2d 666, 678 (2001)).

178. *Id.*

179. *See id.*

180. *Id.*

181. *Id.* (citing *Simmons*, 261 Va. at 581, 544 S.E.2d at 678; Motion Control Sys., Inc. v. East, 262 Va. 33, 37, 546 S.E.2d 424, 426 (2001)).

182. *Id.* (citing Worrie v. Boze, 191 Va. 916, 927–28, 62 S.E.2d 876, 881 (1951)).

183. *Id.* at 248, 618 S.E.2d at 341.

184. *Id.*

of her covenant not to compete.[185] Schaffer, in accordance with the provision at issue, was "prohibited from performing 'any services . . . *for any other employer* in a position supporting Omniplex's [Sensitive Government] Customer.'"[186] The court noted that instead of the provision preventing Schaffer from competing with other security staffing businesses, the provision prohibited Schaffer from gaining employment with "*any* business that provides support of any kind" to Omniplex's Sensitive Government Customer.[187] The *Omniplex* court noted several prior rulings expressing that covenants not to compete are upheld only when the former employee is directly and actually prohibited from competing with the employer.[188] In this case, the court ruled that covenanting to prohibit employment in any enterprise of any kind that serviced the same customer as Omniplex failed to limit Schaffer's subsequent employment to that which would be in direct competition with Omniplex.[189] Therefore, the non-compete provision was held to be "overbroad and unenforceable."[190]

VI. DEFAMATION

The precise legal language and pleading standard required to plead defamation has been given a spin by the Supreme Court of Virginia. The court refined the requirement to prove defamation in its recent holding in *Government Micro Resources, Inc. v. Jackson*.[191] Jackson sued his former employer, Government Micro Resources, Inc. ("GMR"), for defamation.[192] Jackson's suit was victorious in the circuit court, resulting in the award of both compensatory and punitive damages based on the defamation claim.[193] GMR appealed, alleging that Jackson failed to assert in his pleadings one of the statements that the jury relied upon in awarding him compensation based on the defamation claim and

185. *Id.* at 248–49, 618 S.E.2d at 341–42.
186. *Id.* at 250, 618 S.E.2d at 342 (first alteration in original).
187. *Id.*, 618 S.E.2d at 342–43.
188. *See id.* at 249–50, 618 S.E.2d at 342.
189. *See id.* at 250, 618 S.E.2d at 343.
190. *Id.*
191. 271 Va. 29, 624 S.E.2d 63 (2006).
192. *Id.* at 35, 624 S.E.2d at 66.
193. *Id.*

arguing that statements that express only opinion are not defamatory per se.[194]

Altering the face of defamation law in Virginia, the court held that: (1) if Jackson's original motion for judgment, which asserted a claim for defamation, did not "recite all the specifics of the alleged defamatory statement," it was not a good pleading, but "may nevertheless state a 'substantial cause of action imperfectly;'"[195] and (2) false statements made by the defendants about the reasons for Jackson's discharge were defamatory per se.[196]

Addressing the pleading portion, the court added that the imperfect pleading could, for lack of a better comparison, be cured by supplying the "allegedly defamatory statement" in a subsequent pleading, for instance, in the bill of particulars.[197] Jackson cured his imperfect pleading by submitting a bill of particulars and a supplemental answer (including five allegedly defamatory statements) which "reasonably" referred to the defamatory statements that formed the basis of his claim.[198] The court refrained from impeding on the relevant Virginia one-year statute of limitations[199] by holding that the original pleading must make some reasonable reference to the allegedly defamatory statement or the statement would constitute a separate claim.[200] If such a separate claim was determined to exist, the defamation claim would be subject to the one year statute of limitations separate from those defamations reasonably referred to in the original pleadings.[201]

Addressing the issue of defamation per se, the court held that "in considering whether a statement was one of fact or opinion, we do not isolate parts of an alleged defamatory statement."[202]

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194. *Id.* at 35, 40, 624 S.E.2d at 66, 68.

195. *Id.* at 38, 624 S.E.2d at 67 (quoting Federal Land Bank of Balt. v. Birchfield, 173 Va. 200, 217, 3 S.E.2d 405, 411 (1939)).

196. *See id.* at 41, 624 S.E.2d at 69. *See generally* Fuste v. Riverside Healthcare Ass'n, 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003) (expressing that statements, which do not express fact but only opinion, cannot be proven to be false and are therefore not actionable as defamation).

197. *Gov't Micro Res., Inc.*, 271 Va. at 38, 624 S.E.2d at 67.

198. *See id.* at 38–39, 624 S.E.2d at 68.

199. *See* VA. CODE ANN. § 8.01-247.1 (Repl. Vol. 2000 & Cum. Supp. 2006) ("Every action for injury resulting from libel, slander, insulting words or defamation shall be brought within one year after the cause of action accrues.").

200. *See Gov't Micro Res., Inc.*, 271 Va. at 38, 624 S.E.2d at 67–68.

201. *Id.*

202. *Id.* at 40, 624 S.E.2d at 69 (citing Am. Commc'n Network, Inc. v. Williams, 264 Va.

The defendants contended that because the two defendants allegedly making the defamatory statements could not testify as to the exact words of either alleged defamatory statement, "Jackson failed to carry his burden of proof" because he could not prove matters of fact.[203] The court held that testimony from other witnesses, and from Jackson himself, was "sufficient to satisfy the standard that the defamatory words 'must be substantially proven as alleged.'"[204]

VII. ATTORNEY'S FEES AND SANCTION AWARDS

In *Chaplin v. DuPont Advance Fiber Systems*,[205] the United States Court of Appeals for the Fourth Circuit demonstrated the serious stance it imposes on an attorney's duty to conduct a reasonable investigation to ensure the validity of a claim when filing a Title VII suit.[206] The Fourth Circuit affirmed the district court's award imposing fees and Federal Rule of Civil Procedure 11 sanctions against the plaintiffs' attorney.[207] The employer, DuPont, implemented a policy "banning the display of offensive symbols on DuPont property in 2000;" the Confederate battle flag was included in the employer's list of offensive symbols.[208] Plaintiff employees sued DuPont under Title VII, alleging discrimination based on national origin (Confederate Southern American), religion (Christian), and race (Caucasian).[209] The Fourth Circuit reviewed the district court's award for abuse of discretion.[210] Finding that the evidence clearly demonstrated a void in the plaintiffs' ability to establish a prima facie showing of religious discrimination, as the plaintiffs had never requested an accommodation from their employer for their religious beliefs, the court concluded that the plaintiffs' attorney had failed to conduct a reasonable in-

336, 341–42, 568 S.E.2d 683, 686 (2002)).

203. *Id.* at 41, 624 S.E.2d at 69.

204. *Id.* (citing Fed. Land Bank of Balt. v. Birchfield, 173 Va. 200, 215, 3 S.E.2d 405, 410 (1939)).

205. 124 Fed. Appx. 771 (4th Cir. 2005) (per curiam) (unpublished decision).

206. *See id.* at 773.

207. *See id.* at 776.

208. *Id.* at 773.

209. *See id.*

210. *See id.* at 774.

vestigation to determine the factual bases of plaintiffs' claims.[211] In fact, the court found, the evidence was unrefuted that not until some months after the DuPont policy had been implemented and after the employees had filed an EEOC charge did the employees seek accommodation from their employer.[212] Thus, the court affirmed that the attorney had violated Rule 11(b)(3).[213]

The court found that the imposed sanctions against the employees' attorney arising from the employees' plea of discrimination based on race and national origin, although not supported by fact and failing to allege that DuPont's policy was discriminatory against Caucasians, were erroneous as race and national origin are by nature multi-racial.[214] The Fourth Circuit, however, did find that the attorney was aware of and neglected employment discrimination's well-established requirement that the employee must suffer some adverse employment action.[215] Finding that the employees "failed to aver that they had suffered any adverse employment action," the "race discrimination claim, as pled, was unwarranted by existing law."[216] Based on these facts, the court affirmed the award of sanctions holding the attorney had violated Rule 11(b)(2).[217]

VIII. ARBITRATION

Employers can rest assured that employment contracts containing arbitration clauses will result in an arbitration tribunal as opposed to a courtroom, at least when the enforceability of the arbitration clause is at issue. In a February 21, 2006 opinion, the Supreme Court of the United States ruled that the courts were not open to the party challenging the validity of a contract "ab initio" when the contract contains an arbitration clause requiring arbitration.[218] A contract containing a provision to settle disputes

211. *See id.*
212. *See id.*
213. *Id.*
214. *See id.* at 775.
215. *See id.*
216. *Id.*
217. *See id.* at 775–76 ("Rule 11(b)(2) requires an attorney to certify that 'the claims . . . are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.'").
218. *See* Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1207, 1210 (2006).

by binding arbitration pursuant to the contract's arbitration provision shall indeed be settled by the expressed arbitration provision.[219] Such a challenge must be heard by an arbitrator.[220]

IX. SIGNIFICANT LEGISLATIVE DEVELOPMENTS

The Virginia legislature was fairly quiet in enacting legislation affecting private sector employers.

On March 30, 2006, the legislature approved a reenactment of the worker's compensation title allowing individual self-insurer employers to increase the minimum allowable debt ratio to 2.2:1.[221] Formerly, self-insured employers were required to maintain a debt to equity ratio of less than 2:2.[222] With the passage of this legislation, the Worker's Compensation Commission can certify an individual employer as a self-insurer with higher debt and lower equity. Calculations for partial incapacity compensation applicable to those employees who are "commissioned employees, self-employed," or have an "income derived from an employer in which the injured worker . . . has an ownership interest" also saw a change at the hands of the legislature.[223] This amount of worker's compensation to the partially incapacitated worker is determined by intervals of thirteen weeks or a one-time leave of less than thirteen weeks.[224] The worker's "post-injury average weekly wage" is computed by dividing the worker's total earnings during the period of incapacity; the method of division varies according to the duration of the partial incapacity.[225] The new language also allows employers to seek a retroactive readjustment of temporary partial benefits which can result in payment due to the employee or credit owed to the employer.[226]

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219. *Id.* at 1209.

220. *Id.* at 1210.

221. Act of Mar. 30, 2006, ch. 265, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 65.2-801(B) (Cum. Supp. 2006)).

222. VA. CODE ANN. § 65.2-801(B) (Repl. Vol. 2002).

223. Act of Apr. 5, 2006, ch. 660, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. § 65.2-502(A) (Cum. Supp. 2006)).

224. VA. CODE ANN. § 65.2-502(A) (Cum. Supp. 2006).

225. *Id.*

226. *See id.*

One of the more significant legislative developments in the past year is one that never developed. Senate Bill 1172[227] was introduced with the intent to create economic certainty in the employment relationship as a "[b]ill to amend the Code of Virginia by adding a section numbered 40.1-26.1."[228] The bill proposed to place restrictions following termination on an employee's ability to compete with his former employer.[229] In general, covenants not to compete are governed by two axioms established by common law.[230] These axioms are established by two sets of comparisons, the first being reasonable duration, geographic area, and scope,[231] and the second being the employer's legitimate business interest balanced against the employee's ability to earn a livelihood.[232] The proposed bill would have: (1) detailed the circumstances under which a covenant would be valid, including the common law axioms and requirements of the former employment relationship;[233] (2) assigned burdens for proof and pleading requirements;[234] (3) limited the court's discretion by directing when the court could refuse or must enforce a covenant;[235] and (4) stated the relief a court can provide.[236] In essence, the proposed statute would have significantly altered the common law.

Other legislative developments include a revamping of the employee stock ownership plans for professional corporations.[237] This act redefines the meaning of "professional service" characterizing professions which meet the criteria of the statute and details those individuals, both the professionals who are licensed and those individuals who are employees of the professional corporations, who may participate in the plan.[238] The legislature also created a new program allowing small employer health insurance

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

228. *Id.* (relating to the validity of covenants restraining competition by former employees).

229. *Id.*

230. *See, e.g.*, Modern Env'ts, Inc. v. Stinnett, 263 Va. 491, 561 S.E.2d 694 (2002).

231. *See id.* at 496, 561 S.E.2d at 696.

232. *See id.* at 493, 561 S.E.2d at 695.

233. S.B. 1172, Va. Gen. Assembly (Reg. Sess. 2005) (proposing subsections (A), (B)).

234. *See id.* (proposing subsections (C), (D)).

235. *See id.* (proposing subsections (E), (F), (G), (H), (I)).

236. *See id.* (proposing subsections (J), (K)).

237. *See* Act of Apr. 5, 2006, ch. 672, 2006 Va. Acts ___ (codified as amended at VA. CODE ANN. §§ 13.1-543, -544, -549, -549.1, -550 (Repl. Vol. 2006) and VA. CODE ANN. § 54.1-4412 (Supp. 2006)).

238. *See id.* (codified as amended at VA. CODE ANN. § 13.1-543 (Repl. Vol. 2006)).

pooling.[239] The statute creates the "small employer health group cooperative" entity and defines the circumstances by which the entity can negotiate with issuers of health insurance to provide health benefits to eligible employees and eligible dependents of the qualifying small employer.[240] A small employer is defined in connection with a group health policy.[241] The new statute section defines small employer by the number of individuals employed with respect to a health care plan year.[242] Membership in the entity, treatment of the entity as a single employer, and provisions defining health insurance issuers are also addressed.[243]

X. CONCLUSION

Many developments transpired in labor and employment law in both the federal and state arenas. Federally, the long standing practice guideline that an employer was not subject to Title VII unless at least fifteen individuals were employed has been jolted by the Court's interpretation of the Title VII. On the state level, the Supreme Court of Virginia has slapped the hand of the state agency VOSH and offered precise delineation of defamation as a cause of action. The legislature deferred to the common law and rejected the opportunity to specifically define the enforceability of covenants not to compete, altered compensation for employees seeking worker's compensation, and created a pooling standard for small employers seeking to provide a health care option to their employees. Overall, the labor and employment field was bustling with activity over the past year, both reiterating standards and offering some significant refinement.

239. *See* Act of Mar. 31, 2006, ch. 427, 2006 Va. Acts ___ (codified at VA. CODE ANN. §§ 38.2-3551 to -3555 (Cum. Supp. 2006)).

240. *See id.*

241. *Id.* (codified at VA. CODE ANN. § 38.2-3551 (Cum. Supp. 2006)).

242. *See id.*

243. *See id.* (codified at VA. CODE ANN. §§ 38.2-3551 to -3555 (Cum. Supp. 2006)).