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## Labor and Employment Law

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## LABOR AND EMPLOYMENT LAW

*Vijay K. Mago* \*  
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### I. INTRODUCTION

During the past two years, there have been several significant developments in labor and employment law, both on the state and federal levels. Because developments in both state and federal law likely will have a profound impact on employers and employees throughout Virginia, they warrant significant discussion in this survey.

In addition to examining notable decisions from the Supreme Court of the United States, the United States Court of Appeals for the Fourth Circuit, and the United States District Courts for the Eastern District and Western District of Virginia, this survey also discusses decisions of the Supreme Court of Virginia regarding employment issues as they relate to state law.

Because this article constitutes a survey of labor and employment law, it necessarily is limited in depth as well as substantive and temporal scope. Specifically, this article focuses on developments occurring over the prior two years, since January 2011.

### II. SOCIAL MEDIA

Social media, including Facebook, Twitter, and other social networking sites, now affects the daily lives of Americans, and employers and employees are no exception. As social media con-

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tinues to expand, both employers and employees should be aware of the potential legal effects of their social media conduct.

The Eastern District of Virginia recently addressed individual social media conduct in rejecting a claim by employees that “liking” a political figure on Facebook constitutes free speech.<sup>1</sup> In *Bland v. Roberts*, Judge Jackson granted summary judgment for the defendant, a sheriff who allegedly fired several of his employees in retaliation for “liking” his political opponent on Facebook.<sup>2</sup> Following his reelection, the sheriff declined to retain the six plaintiff employees and an additional six deputies on grounds that their actions “hindered the harmony and efficiency of the Office.”<sup>3</sup> The plaintiffs claimed that the sheriff failed to reappoint them in retaliation for their exercise of their First Amendment right to freedom of political speech.<sup>4</sup> Despite the plaintiffs’ claims, Judge Jackson held that “liking” a political figure on Facebook does not amount to expressive speech as “merely ‘liking’ a Facebook page is insufficient speech to merit constitutional protection.”<sup>5</sup> Additionally, the court held that even if “liking” something on Facebook constitutes expressive speech, the plaintiffs did not sufficiently allege that such speech touched upon a matter of public concern.<sup>6</sup>

Judge Jackson distinguished this case from others, noting that courts have extended constitutional speech protections “to Facebook posts [where the speech at issue consists of] *actual statements*.”<sup>7</sup> Likewise, the court noted that “Facebook posts *can* be considered matters of public concern.”<sup>8</sup> Thus, despite the failure of the *Bland* plaintiffs, employees who post on political pages or discuss political topics on their own Facebook pages likely will be afforded First Amendment protection so long as: (i) the employee makes a substantive statement of public concern as a citizen rather than “a personal matter of personal interest” as an employee; (ii) the employee’s interest in speaking upon the matter out-

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1. See *Bland v. Roberts*, No. 4:11cv45, 2012 WL 1428198, at \*2–3 (E.D. Va. Apr. 24, 2012).

2. *Id.* at \*1.

3. *Id.* (citation and internal quotation marks omitted).

4. *Id.* at \*2.

5. *Id.* at \*3.

6. See *id.* (footnote omitted).

7. *Id.* (emphasis added).

8. *Id.* at \*4.

weighs “the government’s interest in providing effective and efficient services to the public;” and (iii) the employee’s speech was a substantial factor in the termination decision.<sup>9</sup>

### III. TITLE VII

#### A. Retaliation

Retaliation claims remain popular because of the generous protections Title VII affords employees. Because they frequently survive summary judgment and the underlying elements are comparatively easy for jurors to grasp, retaliation claims continue to enjoy increasing popularity. Three recent decisions, one from the Supreme Court and two from the Eastern District of Virginia, expand the scope of Title VII protections for retaliation claims and reinforce the efficacy of such claims.<sup>10</sup>

First, in *Thompson v. North American Stainless, LP*, the Supreme Court expanded the definition of an “aggrieved” person to include third parties, who now can effectively claim retaliation under Title VII.<sup>11</sup> The Court held that an employee was unlawfully retaliated against when he was fired after his fiancée filed a gender discrimination charge with the Equal Employment Opportunity Commission (“EEOC”).<sup>12</sup> The employee’s fiancée had filed a charge against the couple’s employer, alleging sex discrimination.<sup>13</sup> The Court noted that an “aggrieved” person under Title VII includes any person with an interest arguably sought to be protected by the statute, abrogating a narrower lower court decision.<sup>14</sup> Applying Title VII protections to a third party, the Court recognized that the employee at issue fell within the “zone of interests” the statute was meant to protect.<sup>15</sup> Specifically, the em-

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9. See *id.* at \*2–3 (quoting *McVey v. Stacy*, 157 F.3d 271, 277–78 (4th Cir. 1998)) (discussing application of the Fourth Circuit’s three-prong test to determine whether an employment action violates an employee’s First Amendment right to freedom of speech).

10. See *Thompson v. N. Am. Stainless, LP*, 562 U.S. \_\_\_, 131 S. Ct. 863 (2011); *Edwards v. Murphy-Brown, L.L.C.*, 802 F. Supp. 2d 670 (E.D. Va. 2011); *Coles v. Deltaville Boatyard, LLC*, No. 3:10cv491-DWD, 2011 WL 1750896 (E.D. Va. May 6, 2011).

11. See 562 U.S. at \_\_\_, 131 S. Ct. at 868, 870 (citing *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

12. *Id.* at \_\_\_, 131 S. Ct. at 867, 870.

13. See *id.* at \_\_\_, 131 S. Ct. at 867.

14. *Id.* at \_\_\_, 131 S. Ct. at 869 (citing *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (1971)).

15. See *id.* at \_\_\_, 131 S. Ct. at 870.

ployee was targeted directly by the employer as an unlawful reaction to the fiancée's sex discrimination claim.<sup>16</sup>

In *Edwards v. Murphy-Brown, L.L.C.*, the Eastern District of Virginia held in favor of a female employee who brought sexual harassment and retaliation claims against her employer by denying the employer's motion to dismiss.<sup>17</sup> Over the course of six years, this employee filed a series of complaints with her employer regarding sexually offensive behavior, including an incident in which a male employee was caught spying on the plaintiff and another female employee who were changing in the women's shower room, by using peep holes he had drilled in the door.<sup>18</sup> When the incident was reported to the employer's human resources department, the employee was belittled and subsequently reassigned; the offending employees were never reprimanded.<sup>19</sup> In rejecting the employer's motion to dismiss, the court held that the plaintiff plausibly alleged "materially adverse conduct that would dissuade a reasonable person from raising a claim of discrimination."<sup>20</sup> In support of its decision, the court cited the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, in which the Court held that a job reassignment may be actionable retaliation under Title VII.<sup>21</sup> Importantly, the *Edwards* court took a broad view, considering "all circumstances," before deciding that a reasonable juror could find the job reassignment to be "materially adverse."<sup>22</sup>

In a third case, the Eastern District of Virginia again ruled in favor of an employee on his claim of unlawful retaliation under Title VII.<sup>23</sup> In *Coles v. Deltaville Boatyard, LLC*, an employee filed a charge with the EEOC against his former employer alleging that during his employment he was subjected to racial discrimination.<sup>24</sup> The plaintiff's former employer, Deltaville Boatyard, contacted Coles's subsequent employers about the EEOC charge

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16. *Id.* at \_\_\_\_, 131 S. Ct. at 870.

17. 802 F. Supp. 2d 670, 678 (E.D. Va. 2011).

18. *See id.* at 672 (citations and footnote omitted).

19. *See id.* (citations omitted).

20. *Id.* at 678.

21. *Id.* at 677 (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006)).

22. *Id.* at 677-78.

23. *See Coles v. Deltaville Boatyard, LLC*, No. 3:10cv491-DWD, 2011 WL 1750896, at \*8 (E.D. Va. May 6, 2011).

24. *Id.* at \*1 (citation omitted).

and warned the new employers that Coles might file a similar charge.<sup>25</sup> Deltaville suggested that the employers “proceed with restraint and caution” towards Coles, or face similar “trouble.”<sup>26</sup> In response, Coles filed suit alleging that Deltaville’s contact with his subsequent employers constituted unlawful retaliation.<sup>27</sup> The court discussed the *Burlington Northern* test, considering whether the employer’s act “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”<sup>28</sup> After framing the issue this way, the court concluded that Coles met the threshold, explaining that “an employee recently fired by one employer might be dissuaded from filing an EEOC charge for that termination if he knows that it would lead to a warning that he might do the same to subsequent employers.”<sup>29</sup> The court denied the defendant’s motion for summary judgment based on this rationale.<sup>30</sup>

### B. Race Discrimination

The United States Court of Appeals for the Fourth Circuit addressed race discrimination in three recent decisions and held in the employer’s favor in all three.<sup>31</sup> In evaluating the claims, the court focused on the reasonableness of the employers’ responses to complaints of discrimination and the employers’ non-discriminatory reasons supporting their disciplinary decisions.<sup>32</sup>

First, in *EEOC v. Xerxes Corp.*, the Fourth Circuit addressed the reasonableness of an employer’s delayed response in addressing employees’ racial discrimination complaints.<sup>33</sup> Although African American assembly workers complained of racial slurs and pranks from their white coworkers by reporting these incidents to

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25. *See id.* (citations and footnotes omitted).

26. *Id.* at \*1–2 (citation and internal quotation marks omitted).

27. *Id.* at \*2.

28. *Id.* at \*6 (quoting *Burlington N. & Santa Fe Ry.*, 548 U.S. at 61, 68) (internal quotation marks omitted).

29. *Id.* at \*7.

30. *Id.* at \*8.

31. *See Lauture v. Saint Agnes Hosp.*, 429 F. App’x 300, 309 (4th Cir. 2011); *EEOC v. Xerxes Corp.*, 639 F.3d 658, 677 (4th Cir. 2011); *Ali v. Energy Enter. Solutions, LLC*, 414 F. App’x 531, 532 (4th Cir. 2011).

32. *Lauture*, 429 F. App’x at 306, 307; *Xerxes Corp.*, 639 F.3d at 676–77; *Ali*, 414 F. App’x at 531–32.

33. *See* 639 F.3d at 668.

their shift supervisor,<sup>34</sup> no immediate action was taken by the employer or its managers.<sup>35</sup> Importantly, Xerxes had an anti-harassment policy that required employees to report discrimination to both their shift supervisor and the plant manager.<sup>36</sup> Although none of the employees subject to discrimination reported the violations to the plant manager, the substance of the allegations did work its way up through the management chain to the plant manager.<sup>37</sup> In response to these complaints, Xerxes conducted an investigation, interviewed those involved, and suspended two of the offending employees for two days.<sup>38</sup> Xerxes also warned the offending employees that future conduct in violation of the company's anti-harassment policy would not be tolerated, and the company held additional anti-harassment training for all employees.<sup>39</sup>

In a separate incident, an African American employee found a threatening note in his locker referencing the Ku Klux Klan.<sup>40</sup> Xerxes investigated the incident and reported it to the local sheriff, but no employee was found responsible.<sup>41</sup> Nevertheless, Xerxes held a plant-wide meeting, informing all employees of the incident and the involvement of the sheriff's department and reminding all employees of the company's anti-harassment policies.<sup>42</sup> In light of the company's response to both reported incidents, the Fourth Circuit held that the employer's actions were "reasonably calculated to end the harassment and, therefore, reasonable as a matter of law."<sup>43</sup>

A second Fourth Circuit decision, *Ali v. Energy Enterprise Solutions, LLC*, involved claims that a former employee was (i) treated disparately based on his race (because the employer revoked plaintiff's network privileges and paid him less than his coworkers) and (ii) subjected to a retaliatory discharge.<sup>44</sup> In a per

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34. *Id.* at 662–63 (citations omitted).

35. *Id.* at 661–63, 671.

36. *Id.* at 662 (citation omitted).

37. *Id.* at 662–63.

38. *Id.* at 664 (citation omitted).

39. *Id.* at 664–65 (citations and footnote omitted).

40. *Id.* at 665 (citation omitted).

41. *Id.* (footnote omitted).

42. *Id.*

43. *Id.* at 671.

44. 414 F. App'x 531, 531–32 (4th Cir. 2011) (citations omitted).

curiam opinion, the Fourth Circuit affirmed the district court's conclusion that plaintiff Ali's disparate impact claim failed because he could not prove that others outside his protected class were disciplined less severely and because he could not rebut the employer's legitimate, nondiscriminatory reasons for the pay differential.<sup>45</sup> Moreover, Ali's retaliation claim failed based on his refusal to cooperate with the employer's attempt to find a position suitable for reassignment.<sup>46</sup> Because the plaintiff was unable to rebut the employer's defenses supporting its nondiscriminatory rationale, the court affirmed summary judgment in the employer's favor.<sup>47</sup>

Finally, in *Lauture v. Saint Agnes Hospital*, a former hospital employee advanced allegations of discrimination based on race and national origin, hostile work environment harassment, breach of contract, intentional infliction of emotional distress, and constructive discharge.<sup>48</sup> In an opinion written by retired Supreme Court Justice Sandra Day O'Connor, sitting by designation, the Fourth Circuit affirmed the district court's grant of summary judgment in favor of the hospital.<sup>49</sup> Despite the plaintiff's allegations that the hospital failed to investigate her discrimination complaints and issued a report using the phrase "Mexican stand-off" in reference to her disputes with a coworker,<sup>50</sup> the court held that the actions were not "sufficiently severe and pervasive to create an objectively abusive atmosphere," as required to support her hostile work environment claim.<sup>51</sup> The court also held that Lauture failed to prove the hospital treated other employees differently (to support her discrimination claim), as her discipline was within the "range of discipline" the hospital typically imposed for similar employee errors.<sup>52</sup> Next, the court dismissed Lauture's breach of contract claim because, although

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45. *Id.* at 531 (citing *Cook v. CSX Transp. Co.*, 988 F.2d 507, 511 (4th Cir. 1993)).

46. *Id.* at 532 (citing *Montes v. Greater Twin Cities Youth Symphonies*, 540 F.3d 852, 857-58 (8th Cir. 2008); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993)).

47. *See id.*

48. 429 F. App'x 300, 302 (4th Cir. 2011).

49. *Id.* at 302, 309.

50. *Id.* at 307 & n.3 (citations and internal quotation marks omitted).

51. *Id.* at 307 (quoting *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 191 (4th Cir. 2004)) (internal quotation marks omitted) (citing *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 316-18 (4th Cir. 2008)).

52. *Id.* at 306 (quoting *Cook v. CSX Transp. Co.*, 988 F.2d 507, 512 (4th Cir. 1993)) (internal quotation marks omitted).

employee handbooks can constitute contracts, the hospital effectively disclaimed contractual liability by the explicit terms of the handbook.<sup>53</sup> Ultimately, because the plaintiff failed to carry her burden of proof, the court affirmed summary judgment in the hospital's favor on all counts.<sup>54</sup>

### C. *Gender Discrimination, Sexual Harassment & Hostile Work Environment*

#### 1. Gender Discrimination

In a recent controversial decision, the Supreme Court held in favor of mega-retailer Wal-Mart against a group of female employees alleging gender discrimination.<sup>55</sup> In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that the evidence did not support the plaintiffs' allegation that the company operated under a general policy of discrimination, as required to permit certification of the plaintiff class.<sup>56</sup> A group of 1.5 million current and former female Wal-Mart employees alleged that the company discriminated against them, particularly in promotion and compensation decisions.<sup>57</sup> Both the district court and court of appeals approved class certification for the women, but the Supreme Court held that certification of the class was not consistent with Rule 23(a) of the Federal Rules of Civil Procedure, which requires that the class have common "questions of law or fact."<sup>58</sup>

Specifically, the Court held that the employees' case lacked the requisite proof that the company operated under a general policy of discrimination.<sup>59</sup> Wal-Mart's official policy forbids sex discrimination with penalties for violations.<sup>60</sup> The Court found the "[d]issimilarities" between the plaintiffs' claims to be dispositive<sup>61</sup>

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53. *See id.* at 308–09 (citing *Mayers v. Wash. Adventist Hosp.*, 131 F. Supp. 2d 743, 751 (D. Md. 2001)).

54. *Id.* at 309.

55. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2541, 2560–61 (2011).

56. *Id.* at \_\_\_, 131 S. Ct. at 2553 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

57. *Id.* at \_\_\_, 131 S. Ct. at 2547.

58. *See id.* at \_\_\_, S. Ct. at 2547, 2550–51, 2556–57 (citation and footnote omitted).

59. *Id.* at \_\_\_, 131 S. Ct. at 2554.

60. *Id.* at \_\_\_, 131 S. Ct. at 2553 (citations omitted).

61. *Id.* at \_\_\_, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (internal quotation marks

because the pay and promotion decisions were delegated to store managers.<sup>62</sup> Consequently, the claim of each plaintiff would depend on her specific circumstances, rather than a broader discriminatory policy at the corporate level.<sup>63</sup> The Court's holding makes clear that future employee-plaintiffs seeking class certification first must satisfy a narrowly construed commonality requirement.

In another recent case, the Fourth Circuit held in favor of an employer accused of gender-based discrimination.<sup>64</sup> In *Hoyle v. Freightliner, LLC*, the court accepted overstaffing as a non-discriminatory reason for reassigning a female employee to janitorial duties, despite her claim that the real motive was discrimination.<sup>65</sup> While working as a tractor trailer truck assembler for Freightliner, the plaintiff's male coworkers played pranks on her and posted publicly viewable and sexually provocative pictures around the workplace, including in the cafeteria and break room.<sup>66</sup> The plaintiff complained about the inappropriate pictures to her supervisor, who in turn asked some of the employees to take them down; however, the plaintiff asserted that the harassment continued, and she saw additional inappropriate pictures, including a screensaver posted by coworkers on a company computer.<sup>67</sup> Shortly after the screensaver incident, Freightliner transferred the plaintiff to a new position consisting mainly of janitorial duties.<sup>68</sup>

In rebutting the claim of sex discrimination, Freightliner argued that the plaintiff's involuntary transfer was motivated by her "undisputed . . . significant problems with absenteeism."<sup>69</sup> Despite a "last chance agreement" with Freightliner that any additional absenteeism would result in her immediate termination, the plaintiff failed to show up for work and called in sick after the start of her scheduled shift.<sup>70</sup> The Fourth Circuit agreed with the

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omitted).

62. *Id.* at \_\_\_, 131 S. Ct. at 2554, 2560 ("Wal-Mart [was] entitled to individualized determinations of each employee's eligibility for backpay.").

63. *Id.* at \_\_\_, 131 S. Ct. at 2555-56.

64. *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 326 (4th Cir. 2011).

65. *Id.* at 337-38.

66. *See id.* at 326-27.

67. *Id.*

68. *Id.* at 327.

69. *See id.*

70. *Id.* at 327-28 (footnote omitted).

district court's determination that the plaintiff failed to "prove her prima facie case [of sex discrimination] because she has not identified any similarly situated employees who were treated more favorably while on a last chance agreement."<sup>71</sup>

This interpretation of similarly situated employees reaffirms the interpretation the Fourth Circuit established in its prior decisions.<sup>72</sup> Moreover, in dismissing the accompanying claim of retaliation, the Fourth Circuit held that, in light of the plaintiff's continual absenteeism, Freightliner successfully "rebutted [the plaintiff's] prima facie case by alleging legitimate nondiscriminatory reasons for transferring and eventually terminating [her]."<sup>73</sup>

## 2. Sexual Harassment and Hostile Work Environment

The Fourth Circuit recently allowed plaintiffs' claims of sexual harassment to survive in three separate actions.<sup>74</sup> In *Harris v. Mayor of Baltimore*, the Fourth Circuit reversed the decision of the district court, which granted summary judgment in favor of the defendants, despite evidence that company employees posted nude pictures in the workplace.<sup>75</sup> The court held the female employees' sexual harassment and hostile work environment claims were sufficiently supported because coworkers used sexual and profane language and posted nude and sexually explicit photos in public view.<sup>76</sup> The profane language used by male coworkers convinced the court that the harassment in the workplace was sufficiently severe and pervasive to be actionable.<sup>77</sup>

In the second case, the Fourth Circuit acknowledged a split between the circuit courts of appeal in the course of addressing same-sex, third-party sexual harassment.<sup>78</sup> In *EEOC v. Cromer*

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71. *Id.* at 336–37 (quoting *Hoyle v. Freightliner, LLC*, No. 3:07-CV-00169, 2009 WL 2462098, at \*5 (W.D.N.C. Aug. 7, 2009)) (internal quotation marks omitted).

72. *See id.* at 336 (citing *Taylor v. Va. Union Univ.*, 193 F.3d 219, 234 (4th Cir. 1999), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2002)).

73. *See id.* at 337–38.

74. *See Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 332 (4th Cir. 2012); *Harris v. Mayor of Balt.*, 429 F. App'x 195, 197 (4th Cir. 2011); *EEOC v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 603 (4th Cir. 2011).

75. *See* 429 F. App'x at 197, 198–99.

76. *See id.* at 201 (citations omitted).

77. *See id.* at 202.

78. *See Cromer Food Servs., Inc.*, 414 F. App'x at 606 (citing *Dunn v. Wash. Cnty.*, 429 F.3d 689, 691 (7th Cir. 2005); *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005);

*Food Services, Inc.*, the Fourth Circuit vacated a district court award of summary judgment in the employer's favor and held that the evidence was sufficient for the plaintiff's claim to reach a jury.<sup>79</sup> The EEOC brought the action on behalf of a male employee of Cromer Food Services who was responsible for stocking vending machines along a predefined route.<sup>80</sup> One of the required stops was a hospital, where two male employees would taunt this individual by calling him a homosexual and propositioning him.<sup>81</sup> When the employee reported the harassment, his supervisor "failed to take adequate action to combat the harassment on behalf of the hospital employees."<sup>82</sup> Although the employer later offered to switch the harassed employee's shift to an earlier time, the court found such corrective action to be "too little, too late" in the wake of months of inaction between the employee's initial report of harassment and the eventual decision to transfer him.<sup>83</sup>

As stated, the Fourth Circuit also acknowledged a split between the circuit courts of appeal regarding "whether an employer may be liable for the activities of non-employees in a claim for sexual harassment."<sup>84</sup> In seeking to resolve this split, the court held that an employer is liable "if it knew or should have known of the harassment and failed to take appropriate actions to halt it."<sup>85</sup> Obviously, this decision expands employers' potential liability for claims of harassment, as liability now may attach if the employer knew or reasonably should have known of harassment inflicted on employees by third parties, but failed to take corrective action to prevent the encounters leading to the harassment.

Finally, in *Dulaney v. Packing Corp. of America*, the Fourth Circuit held that the plaintiff presented enough evidence to survive summary judgment on her claims of sexual harassment and gender discrimination against her former employer.<sup>86</sup> Dulaney alleged that her former manager conditioned her employment on

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*Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001)).

79. *Id.* at 603.

80. *Id.*

81. *Id.*

82. *Id.* (citation omitted).

83. *Id.* at 608 (citing *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990)).

84. *See supra* note 78 and accompanying text.

85. *See Cromer Food Servs., Inc.*, 414 F. App'x at 607.

86. 673 F.3d 323, 333 (4th Cir. 2012).

receipt of sexual favors.<sup>87</sup> In granting summary judgment, the district court held that, because the employer took no tangible employment action against Dulaney, it was entitled to invoke the *Faragher-Elleerth* defense as a matter of law.<sup>88</sup> Consistent with this holding, the district court found (i) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (ii) Dulaney unreasonably failed to take advantage of the employer's preventative or corrective opportunities.<sup>89</sup> On appeal, however, the Fourth Circuit applied the *Faragher-Elleerth* definition of "tangible employment action" to find that evidence in the record, including a company memorandum labeling Dulaney as "terminated," presented a genuine issue of material fact as to whether the plaintiff actually did suffer a tangible employment action.<sup>90</sup> Moreover, the court found that other evidence in the record (e.g., a company manager laughing at Dulaney when she first complained) at least suggested a nexus between the plaintiff's harassment and termination, such that summary judgment was inappropriate.<sup>91</sup>

Altogether, these cases illustrate the Fourth Circuit's willingness to review the entire record with scrutiny when presented with grants of summary judgment in the employer's favor, but only where genuine disputes of material fact in the record have been ignored or marginalized or when the corrective actions proffered by the employer are not actually prompt or corrective.

#### IV. AMERICANS WITH DISABILITIES ACT AND AGE DISCRIMINATION IN EMPLOYMENT ACT

##### A. *Americans with Disabilities Act*

This year, the Fourth Circuit established unequivocally that an employee's inability to work overtime does *not* constitute a disability under the Americans with Disabilities Act ("ADA").<sup>92</sup> In *Bo-*

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87. See *id.* at 325–26 (citations and footnotes omitted).

88. *Dulaney v. Packaging Corp. of Am.*, No. 7:09-cv-00063, 2010 WL 4736615, at \*4 (W.D. Va. Nov. 15, 2010); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998); *Burlington Indus. v. Elleerth*, 524 U.S. 764–65 (1998).

89. See *Dulaney*, 2010 WL 4736615, at \*5.

90. See *Dulaney*, 673 F.3d at 331–32.

91. *Id.* at 333.

92. See *Boitnott v. Corning Inc.*, 669 F.3d 172, 176 (4th Cir. 2012).

*Boitnott v. Corning Inc.*, the court affirmed the district court's grant of summary judgment, holding that the plaintiff employee's inability to work overtime due to cardiac difficulties and treatment did not constitute a disability.<sup>93</sup>

Corning, in an effort to promote efficiency and continuity in its manufacturing processes, limited its workforce primarily to twelve-hour shifts, rotating its employees between daytime and nighttime schedules.<sup>94</sup> After experiencing cardiac difficulties and a diagnosis of leukemia, Boitnott, an employee of Corning, was medically restricted to eight work hours per day.<sup>95</sup> Based on his ability to work a normal workweek total of forty hours, "Corning took the position that [Boitnott did not qualify as] disabled under the ADA."<sup>96</sup> Because the twelve-hour shift schedule expectation exceeded his medical restriction, Boitnott did not return to work but, instead, applied for long-term disability benefits.<sup>97</sup> Not surprisingly, these long-term disability benefits subsequently were terminated because of Boitnott's ability to work a normal forty-hour workweek.<sup>98</sup> At the same time, Boitnott filed a charge of discrimination with the EEOC, alleging that Corning failed to afford him a "reasonable accommodation" by refusing to allow him to work only eight hours per day.<sup>99</sup> Boitnott asserted that his inability to work more than eight hours per day, as a result of his physical impairments, rendered him "disabled" under the ADA.<sup>100</sup>

Thereafter, Corning and the employee union of which Boitnott was a member entered into negotiations and authorized a new position limited to eight-hour shifts; Boitnott was hired for the position and formally returned to work with Corning in September 2005.<sup>101</sup> The lawsuit, however, remained.

The Fourth Circuit, in affirming summary judgment for Corning, held that "an inability to work overtime does not constitute a 'substantial' limitation on a major life activity under the ADA."<sup>102</sup>

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93. *See id.* at 172-73.

94. *Id.* at 173 (citations omitted).

95. *Id.* (citations omitted).

96. *Id.*

97. *Id.*

98. *Id.* (citation omitted).

99. *Id.* (citation and internal quotation marks omitted).

100. *Id.* at 172.

101. *Id.* at 174 (citations omitted).

102. *Id.* at 176.

In support of its decision, the court noted that, importantly, “[a]ll circuits courts which have addressed this issue have held that an employee under the ADA is not ‘substantially’ limited” in “one or more major life activities’ if [he] is capable of working a normal forty hour work week but is not able to work overtime.”<sup>103</sup>

This decision makes clear that employers do not have to provide reasonable accommodation for employees who can work normal forty-hour workweeks but are not physically able to work additional hours, so long as the employee’s inability to work overtime does not “significantly restrict[]” the employee’s ability to perform a class of jobs or a broad range of jobs, as compared to the average person of comparable training, skills, and abilities.<sup>104</sup> Put more simply, the employer does not have to offer any accommodation so long as the employee’s inability to work overtime does not restrict him from working in his chosen field. In this case, there was no evidence that Boitnott’s inability to work overtime “‘significantly restricted’ his ability to perform a class of jobs or a broad range of jobs” and, therefore, the district court’s grant of summary judgment for Corning was affirmed.<sup>105</sup>

### B. *Age Discrimination in Employment Act*

In January 2011, the Fourth Circuit clarified that even governmental bodies are not exempt from an EEOC-issued subpoena requesting personnel information relating to an investigation.<sup>106</sup> In *EEOC v. Washington Suburban Sanitary Commission*, Judge Wilkinson held that the state utility’s assertion of legislative immunity and privilege was “premature” and, thus, did not provide a basis for the court to decline to enforce the subpoena.<sup>107</sup> The court reasoned that, under the Age Discrimination in Employ-

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103. *Id.* at 175 (citing *Bialko v. Quaker Oats Co.*, 434 F. App’x 139, 142 (3d Cir. 2011); *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 598–99 (6th Cir. 2002); *Miller v. Sw. Bell Tel. Co.*, No. 01-21318, 2002 WL 31415083, at \*5 (5th Cir. Oct. 7, 2002); *Kellogg v. Union Pac. R.R. Co.*, 233 F.3d 1083, 1087–88 (8th Cir. 2000); *Taylor v. Nimock’s Oil Co.*, 214 F.3d 957, 960–61 (8th Cir. 2000); *Tardie v. Rehab. Hosp. of R.I.*, 168 F.3d 538, 542 (1st Cir. 1999); *Berg v. Norand Corp.*, 169 F.3d 1140, 1145 (8th Cir. 1999); *Parkinson v. Anne Arundel Med. Ctr., Inc.*, 214 F. Supp. 2d 511, 514–15 (D. Md. 2002)).

104. *See id.* (quoting 29 C.F.R. § 1630.2(j)(3), app. at 390 (2011)) (internal quotation marks omitted).

105. *See id.* at 176–77.

106. *See EEOC v. Wash. Suburban Sanitary Comm’n*, 631 F.3d 174, 177 (4th Cir. 2011)).

107. *Id.*

ment Act, the EEOC has authority to investigate claims of age discrimination.<sup>108</sup> Along with this investigative authority, “Congress gave the EEOC commensurate authority to subpoena information and gave district courts jurisdiction to enforce those subpoenas.”<sup>109</sup> Although the EEOC’s subpoena authority has its limits, including the evidentiary limitation of legislative privilege, the court held that, while it recognized “the importance of legislative immunity and privilege, [it did] not believe the EEOC’s modified subpoena threaten[ed] them at the present time.”<sup>110</sup> The court noted that the EEOC limited its subpoena in an effort to avoid requesting potentially privileged information from the sanitary commission; accordingly, the court concluded it had “no basis for not enforcing the subpoena.”<sup>111</sup>

## V. RESTRICTIVE COVENANTS AND TRADE SECRETS

### A. *Restrictive Covenants*

Although Virginia is regarded as an employer-friendly state, recognizing only a very narrow exception to the employment-at-will doctrine, Virginia courts strongly disfavor covenants not to compete as restraints on trade.

The Supreme Court of Virginia recently reiterated this position in *Home Paramount Pest Control Cos. v. Shaffer*, holding that a non-compete provision restricting the employee from working in the same industry in “any” capacity, even indirectly, was overbroad and unenforceable.<sup>112</sup>

In *Shaffer*, the employer sued Shaffer, its former employee, and Shaffer’s new employer, alleging breach of contract and tortious interference with contract.<sup>113</sup> During his employment with Home Paramount, Shaffer signed a non-competition agreement in which he agreed not to “engage directly or indirectly or concern himself[] in any manner whatsoever in the carrying on or conducting the business of exterminating, pest control, termite control and/or

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108. *See id.* at 180 (citing 29 U.S.C. § 626(a) (2006)).

109. *Id.* (citing 29 U.S.C. § 626(a)).

110. *Id.* at 180, 182 (citing *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996)).

111. *See id.* at 185.

112. 282 Va. 412, 414, 419, 718 S.E.2d 762, 763, 765 (2011).

113. *See id.* at 415, 718 S.E.2d at 763.

fumigation services.”<sup>114</sup> The provision set forth a time limitation of two years.<sup>115</sup> Shaffer, however, resigned from Home Paramount and, within this two-year period, accepted employment with another pest control company.<sup>116</sup>

In assessing the enforceability of this restriction, the Supreme Court of Virginia noted it will enforce a non-competition agreement only if the employer proves it 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.”<sup>117</sup> As part of this assessment, the court considered the “‘function, geographic scope, and duration’ elements of the restriction.”<sup>118</sup> Regarding the “function” prong, the court reasoned that valid restrictions prohibit “an employee from engaging in *activities* that actually or potentially compete with the employee’s former employer.”<sup>119</sup> When, as here, the employer seeks to limit its former employee from working for its competition in *any* capacity, the employer must establish a legitimate business interest for doing so or the restriction will fail.<sup>120</sup>

The court found that Home Paramount failed to establish any legitimate business interest in support of its broad restriction and observed that the provision “prohibits Shaffer from working for [his new employer] or any other business in the pest control industry in any capacity,” including even indirect engagement.<sup>121</sup> Accordingly, the court concluded that the provision was overbroad and unenforceable.<sup>122</sup>

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114. *Id.* at 414–15, 718 S.E.2d at 763.

115. *Id.* at 415, 718 S.E.2d at 763.

116. *See id.*

117. *Id.*, 718 S.E.2d at 763–64 (quoting *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005)) (internal quotation marks omitted).

118. *Id.* at 415–16, 718 S.E.2d at 764 (quoting *Simmons v. Miller*, 261 Va. 561, 581, 544 S.E.2d 666, 678 (2001)).

119. *Id.* at 417, 718 S.E.2d at 765 (quoting *Omniplex World Servs. Corp.*, 270 Va. at 249, 618 S.E.2d at 342)) (internal quotation marks omitted).

120. *Id.* at 417–18, 718 S.E.2d at 765 (citing *Modern Env’ts, Inc. v. Stinnett*, 263 Va. 491, 495, 561 S.E.2d 694, 696 (2002)).

121. *Id.* at 418, 718 S.E.2d at 765.

122. *Id.* at 420, 718 S.E.2d at 766.

## B. *Trade Secrets*

In stark contrast, Virginia courts, through application of the Virginia Uniform Trade Secrets Act (“VUTSA”),<sup>123</sup> place a much lighter burden on employers advancing claims of trade secrets violations.

This year, the Supreme Court of Virginia highlighted this more lenient standard in *Collelo v. Geographic Services, Inc.*, holding that the VUTSA does not require that one accused of misappropriating a trade secret also must actually use the trade secret to compete with the holder of the trade secret.<sup>124</sup> Geographic Services performs “geographic names, or ‘geonames,’ work.”<sup>125</sup> In 2006, Geographic Services hired Collelo and trained him to perform its geonames work.<sup>126</sup> In so doing, Geographic Services exposed Collelo to confidential information and purported trade secrets.<sup>127</sup> Given the nature of his employment, Collelo signed an employment contract containing a non-disclosure provision that prohibited Collelo from disclosing Geographic Services’ confidential information “to any person or entity without first obtaining [Geographic Services’] written consent.”<sup>128</sup> In 2008, Collelo resigned from Geographic Services and accepted a position with Boeing, working in a non-geonames capacity.<sup>129</sup> Soon thereafter, however, Geographic Services learned that Collelo was performing geonames work and, accordingly, advised Boeing that Collelo was violating the non-disclosure provision in his employment contract.<sup>130</sup> After Geographic Services learned that Collelo continued to perform geonames work at Boeing, it filed a motion for judgment against Collelo and Boeing for breach of contract, tortious interference with a contract, and violations of the VUTSA.<sup>131</sup>

At trial, the defendants filed a motion to strike, arguing, among other things, that Geographic Services offered no evidence that

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123. VA. CODE ANN. §§ 59.1-336 to -343 (Repl. Vol. 2006 & Cum. Supp. 2012).

124. 283 Va. 56, 71, 721 S.E.2d 508, 516 (2012) (citing VA. CODE ANN. § 59.1-336 (Repl. Vol. 2006)).

125. *Id.* at 61, 721 S.E.2d at 510.

126. *Id.* at 62, 721 S.E.2d at 511.

127. *Id.*

128. *Id.* (internal quotation marks omitted).

129. *Id.* at 63, 721 S.E.2d at 511.

130. *Id.*

131. *Id.*, 721 S.E.2d at 511–12.

Boeing competes directly with Geographic Services for geonames work and, consequently, Collelo could not be found in breach of the non-disclosure provision at issue.<sup>132</sup> Reasoning that Boeing and Geographic Services were not market competitors, the trial court granted defendants' motion.<sup>133</sup>

On appeal, the Supreme Court of Virginia reversed in part and affirmed in part.<sup>134</sup> Specifically, the court held that, in order for the trade secrets claim to be actionable under the VUTSA, Boeing did not have to actually use the misappropriated trade secret to compete with Geographic Services.<sup>135</sup> Accordingly, the trial court erred in granting the defendants' motion to strike under the VUTSA.<sup>136</sup> Despite this holding, the supreme court affirmed the trial court's dismissal of the breach of contract and tortious interference with a contract claims because Geographic Services failed to present sufficient evidence of any damages.<sup>137</sup>

As a result of the *Collelo* case, the message to employers and employees is clear. Misappropriation is complete—and actionable—merely by disclosure of the trade secret without consent or acquisition by a person who “knows or has reason to know that the trade secret was acquired by improper means.”<sup>138</sup>

## VI. FAIR LABOR STANDARDS ACT

Finally, in a matter of first impression, the Fourth Circuit clarified what constitutes “protected activity” under the Fair Labor Standards Act (“FLSA”).<sup>139</sup> In *Minor v. Bostwick Laboratories, Inc.*, the Fourth Circuit applied recent precedent from the Supreme Court to hold that intra-company complaints qualify as “protected activities” under the FLSA.<sup>140</sup>

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132. *Id.* at 64, 721 S.E.2d at 512.

133. *Id.*

134. *Id.* at 80, 721 S.E.2d at 520.

135. *Id.* at 71, 721 S.E.2d at 516 (citing VA. CODE ANN. § 59.1-336 (Repl. Vol. 2006)) (“Accordingly, the Trade Secrets Act does not require that one who is accused of misappropriating a trade secret use the allegedly misappropriated trade secret to compete with the holder of the trade secret.”).

136. *Id.* at 79, 721 S.E.2d at 520.

137. *See id.* at 76, 721 S.E.2d at 518.

138. VA. CODE ANN. § 59.1-336 (Cum. Supp. 2012).

139. *See Minor v. Bostwick Labs., Inc.*, 669 F.3d 428, 431 (4th Cir. 2012).

140. *Id.* at 436–37 (citing *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1325, 1333 (2011)).

Specifically, the Fourth Circuit addressed whether a complaint lodged by Minor, a unionized employee of Bostwick, during a department meeting—as opposed to a complaint filed with a court or government agency—triggered the protection of the FLSA’s anti-retaliation provision.<sup>141</sup> During this meeting with Bostwick’s chief operating officer, Minor complained that she believed her supervisor willfully violated the FLSA by altering employees’ time sheets to reflect that they had not worked overtime when, in fact, they had.<sup>142</sup> Six days later, Bostwick terminated Minor’s employment, explaining that there was “too much conflict with [her] supervisors and the relationship just [was not] working.”<sup>143</sup>

Minor filed a complaint against Bostwick in the Eastern District of Virginia alleging that Bostwick fired her in retaliation for engaging in protected activity, as defined by the FLSA’s anti-retaliation provision.<sup>144</sup> In ruling on Bostwick’s motion to dismiss, the district court held that complaints are protected by the FLSA’s anti-retaliation provision only if they constitute a formal, official proceeding.<sup>145</sup> Because Minor alleged only that she was discharged in retaliation for reporting the alleged violations to company management during this department meeting, the district court granted Bostwick’s motion to dismiss.<sup>146</sup>

On appeal, the Fourth Circuit looked to the Supreme Court’s recent decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, in which the Court resolved whether an employee’s oral complaints qualified as a protected activity under the FLSA’s anti-retaliation provision.<sup>147</sup> In holding that such oral complaints did qualify as protected activity, the Court explained that “[t]o fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.”<sup>148</sup> Although the Court declined to address whether an intra-

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141. *Id.* at 431.

142. *Id.* at 430.

143. *Id.* (alterations in original) (citation and internal quotation marks omitted).

144. *Id.* at 430–31 (footnote omitted).

145. *Id.* at 431.

146. *Id.*

147. *Id.* at 432 (citing *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1325, 1330 (2011)).

148. *Kasten*, 563 U.S. at \_\_\_, 131 S. Ct. at 1335.

company complaint constitutes a protected activity under the FLSA expressly, it framed the fair notice requirement in terms of whether a "reasonable employer" would understand a particular complaint to be an assertion of rights under the FLSA.<sup>149</sup>

Although it adopted the *Kasten* Court's reasoning, the Fourth Circuit recognized that the case was not directly controlling and, consequently, reviewed the anti-retaliation provision independently and concluded that the statute's language, "filed any complaint," is ambiguous as to whether intra-company complaints qualify as protected activity.<sup>150</sup> Finally, after considering the purpose of the FLSA and its anti-retaliation provision, the Fourth Circuit declined to adopt the district court's formalistic approach, instead holding that "[a]llowing intracompany complaints to constitute protected activity . . . comports with the statute's objectives as described by Congress's findings and the Supreme Court's interpretation of those findings."<sup>151</sup> Accordingly, the Fourth Circuit reversed and remanded the district court's grant of the employer's motion to dismiss.<sup>152</sup>

When viewed together with the Supreme Court's decision in *Kasten*, this decision may tie the hands of employers seeking to discipline or terminate employees who arguably have engaged in protected activity under the FLSA through an intra-company complaint. Although any employee complaint must provide adequate and fair notice to the employer and be "sufficiently clear and detailed for a reasonable employer to understand it," these decisions make clear that the FLSA's anti-retaliation provision does not merely cover formal and official complaints to courts or administrative bodies.<sup>153</sup> Indeed, the Supreme Court has held consistently that the FLSA "must not be interpreted or applied in a narrow, grudging manner,"<sup>154</sup> and the majority of circuits have focused on the FLSA's remedial purpose in holding that intra-company complaints constitute protected activities.<sup>155</sup> For this

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149. *Id.* at \_\_\_, 131 S. Ct. at 1334–35 (citations omitted).

150. *Minor*, 669 F.3d at 433–35.

151. *Id.* at 437.

152. *Id.* at 439.

153. *Kasten*, 563 U.S. at \_\_\_, 131 S. Ct. at 1335; *Minor*, 669 F.3d at 436–37.

154. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

155. *See, e.g., Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 626 (5th Cir. 2008); *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 181 (8th Cir. 1975).

reason, employers should expect courts to apply a more flexible, interpretive approach in addressing whether an employee's criticism qualifies for protection under the FLSA's anti-retaliation provision.

## VII. CONCLUSION

There were several important developments in labor and employment law, on both the federal and state levels, during the past two years. A federal court in Virginia clarified that social media activity must constitute "actual statements" in order for an employee to take shelter under the First Amendment from employment discipline, and another court expanded even further the scope of retaliation claims, such that a third party can constitute an "aggrieved" person able to make a claim under Title VII. Further, the Fourth Circuit addressed a split between its sister courts when it held that employers can be liable for the harassment of *non*-employees if the employer knew or should have known of the harassing conduct yet failed to take prompt, corrective action to mitigate interaction. Significantly, not all of these cases expanded the rights of employees, as the Fourth Circuit also clarified that an employee's inability to work overtime does not constitute a "disability" under the ADA.

Altogether, although Virginia remains an employer-friendly state, Virginia courts continue to scrutinize the acts of employers to apply—and sometimes expand—the protections available to employees. While the courts' application of the VUTSA may ease the burden for employers asserting trade secrets violations, we saw the Fourth Circuit, in three separate cases, indicate its willingness to scrutinize district courts' grants of summary judgment in the employer's favor, requiring lower courts to consider the entire record before them and not marginalize issues which may be genuine disputes of material fact. Ultimately, however, summary judgment still remains a viable conclusion for employers defending employment-related cases.

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