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## Annual Survey of Virginia Law: Employment Law

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## EMPLOYMENT LAW

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### I. INTRODUCTION

This article surveys the judicial and legislative developments in Virginia employment law between June 1990 and June 1991. Developments in the areas of worker's compensation and unemployment compensation, each of which has its own distinctive body of law, are outside the scope of this article.

During the period covered by this article there were few significant judicial developments in the area of employment law. Several cases dealt with the topic of wrongful discharge, with both the Supreme Court of Virginia and Virginia's circuit courts adding to the growing body of law in this area. The courts also continued to wrestle with the reasonableness test for covenants not to compete. But, the most extensive developments in the area of employment law area occurred in the legislative arena. The Virginia General Assembly adopted a number of legislative changes to the Code of Virginia ("Code") which affect Virginia employment law and practice.

### II. JUDICIAL DEVELOPMENTS

#### A. *Wrongful Discharge Litigation*

With its decision in *Falls v. Virginia State Bar*,<sup>1</sup> the Supreme Court of Virginia finally resolved a debate that had been raging among Virginia employment law specialists for a number of years. The debate concerned the applicability of the statute of frauds<sup>2</sup> to

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1. 240 Va. 416, 397 S.E.2d 671 (1990).

2. The Virginia statute of frauds provides, in pertinent part, that "[u]nless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall

an oral employment contract providing for "just cause" dismissal.

The issue was first addressed by the court in *Silverman v. Bernot*.<sup>3</sup> In *Silverman*, an employer had orally promised his employee that if she would remain in his service until she reached age sixty-two or until his death, whichever occurred first, she would receive a pension for the rest of her life. The court first observed that the crucial inquiry under the statute of frauds is whether a contract *could* be performed fully on either side within a year from its effective date. It then held that the contract was not invalidated by the statute of frauds since it *could* have been performed fully within a year after its effective date — for example, if the employer had died.<sup>4</sup> The court thus distinguished between termination of a contract by operation of law and completion by performance. The court also suggested that the statute of frauds defense might have succeeded if the contract had provided only for the employee to work for the employer until age sixty-two.<sup>5</sup>

Thereafter, in *Frazier v. Colonial Williamsburg Foundation*,<sup>6</sup> the United States District Court for the Eastern District of Virginia held that the statute of frauds did not apply to an oral "just cause" employment contract because such a contract "could be performed within one year since, for example, [the employee] could have been discharged for cause within a year of having been hired."<sup>7</sup> Although the Fourth Circuit ultimately rejected this holding because of the district court's failure to observe the distinction made in *Silverman* between "termination by operation of law" and "completion by performance",<sup>8</sup> *Frazier* provided a glimmer of hope to plaintiffs seeking to overcome the statute of frauds defense. All sides anxiously awaited the decision of the Supreme Court of Virginia in *Falls v. Virginia State Bar*.

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be brought . . . [u]pon any agreement that is not to be performed within a year . . . ." VA. CODE ANN. § 11-2(8) (Cum. Supp. 1991).

3. 218 Va. 650, 239 S.E.2d 118 (1977).

4. *Id.* at 654-55, 239 S.E.2d at 121.

5. *Id.* at 654-55, 239 S.E.2d at 121-22.

6. 574 F. Supp. 318 (E.D. Va. 1983).

7. *Id.* at 320.

8. In *Windsor v. Aegis Servs., Ltd.*, 691 F. Supp. 956 (E.D. Va. 1988), *aff'd per curiam*, 869 F.2d 796 (4th Cir. 1989), Judge Ellis of the United States District Court for the Eastern District of Virginia rejected the *Frazier* holding and held that an oral "just cause" employment contract is unenforceable under the statute of frauds because it cannot be performed fully within a year. In a per curiam opinion, the Fourth Circuit subsequently affirmed and adopted Judge Ellis' decision. *Windsor v. Aegis Servs., Ltd.*, 869 F.2d 796 (4th Cir. 1989) (per curiam).

In *Falls*, the former Director of Administration for the Virginia State Bar alleged that he had been hired by the Bar with verbal assurances that his employment would continue "as long as his performance was satisfactory."<sup>9</sup> When Falls was subsequently discharged, allegedly without cause, he filed a suit against the Bar alleging breach of his employment contract. The trial court concluded that the statute of frauds barred enforcement of Falls' oral employment contract, thus sustaining the Bar's demurrer and dismissing Falls' action.<sup>10</sup>

On appeal, Falls argued that the statute of frauds was inapplicable because his employment contract was capable of being performed within a year, upon the occurrence of any one of three events: his death, resignation or discharge for cause.<sup>11</sup> The Supreme Court of Virginia, however, rejected Falls' argument. Recalling the distinction drawn earlier in *Silverman* between termination of a contract by operation of law and completion of a contract by performance, the court stated:

Although occurrence of any of the three contingencies mentioned by Falls would have terminated his performance during the first year of his employment, the parties' contract did not expressly provide that the occurrence of any of these contingencies would constitute full performance. Absent such an agreement, upon occurrence of any of those contingencies, Falls' contract would end, not by performance, but by termination. . . . Because Falls' contract contains no such provision providing for full performance in the event of those contingencies, the statute of frauds is applicable.<sup>12</sup>

Another recent decision addressed the applicability of the "public policy" exception to the employment-at-will doctrine. In the 1985 decision of *Bowman v. State Bank of Keysville*,<sup>13</sup> the Supreme Court of Virginia recognized a "narrow exception" to the employment-at-will doctrine for discharges in violation of public policy. Because the court reaffirmed the validity of the employment-at-will doctrine and declined to expand the public policy exception so as to provide redress for purely private rights or inter-

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9. *Falls*, 240 Va. at 418, 397 S.E.2d at 672.

10. *Id.* at 417, 397 S.E.2d at 672.

11. *Id.* at 418, 397 S.E.2d at 672.

12. *Id.* at 419, 397 S.E.2d at 672-73.

13. 229 Va. 534, 331 S.E.2d 797 (1985).

ests,<sup>14</sup> Virginia courts have been unwilling to apply the public policy exception except in cases where the discharge was either in response to the employee's refusal to commit an unlawful act or a result of the employee's exercise of a statutory right.

Despite the narrowness of the public policy exception to the employment-at-will doctrine, discharged employees continue to try to bring their cases within the exception. For example, in *Bussey v. Arlington County Residences, Inc.*,<sup>15</sup> an at-will employee claimed that her discharge from her job of placing mentally retarded persons in group homes was in response to her refusal to make placements "contrary to the federal and state regulations regarding placements of retarded individuals."<sup>16</sup> Observing that an "employee asserting a wrongful discharge as against public policy must be a member of the class to be protected by a public right established by a law",<sup>17</sup> the Circuit Court of Arlington County held that the employee had failed to identify any established public policy or specific law violated by her dismissal.<sup>18</sup> Accordingly, the circuit court granted the employer's motion for summary judgment and dismissed the employee's wrongful discharge claim.

While every employment relationship is contractual in nature,<sup>19</sup> either party to an at-will employment relationship may end the relationship at any time for any reason, or for no reason at all, upon giving reasonable notice to the other.<sup>20</sup> Thus, a wrongful discharge claim is a cause of action in tort rather than contract.<sup>21</sup> In *Hayslett v. Harriott Family Restaurants, Inc.*,<sup>22</sup> an employee alleged that

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14. In *Miller v. SEVAMP, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987), an employee claimed that she had been discharged because she appeared as a witness at a fellow employee's grievance hearing. The supreme court, however, refused to allow her wrongful discharge claim to proceed on public policy grounds, stating that the "narrow exception" to the employment-at-will doctrine recognized in *Bowman* did not provide redress for discharges violative of purely private rights or interests. *Id.* at 467-68, 362 S.E.2d at 918.

15. No. 89-1069 (County of Arlington Cir. Ct. Nov. 2, 1990).

16. *Id.*, slip op. at 1.

17. *Id.*, slip op. at 4.

18. *Id.*

19. See *Humphrees v. Boxley Bros. Co.*, 146 Va. 91, 97, 135 S.E. 890, 891 (1926) (holding that "[t]he relation of employer and employee can only exist by virtue of contract, express or implied").

20. *Miller*, 234 Va. at 465, 362 S.E.2d at 917.

21. See *Bowman v. State Bank of Kempsville*, 229 Va. 534, 331 S.E.2d 797 (1985). The court in *Bowman* stated: "[c]onsequently, applying a narrow exception to the employment-at-will rule, we hold that the plaintiffs have stated a cause of action *in tort* . . ." *Id.* at 540, 331 S.E.2d at 801 (emphasis added).

22. 20 Va. Cir. 496 (County of Rockbridge Cir. Ct. 1990).

she had been discharged by her employer because she had filed a workers' compensation claim<sup>23</sup> and had reported certain accounting irregularities to her employer's personnel manager. Unfortunately, because the employee failed to file suit within the two-year statute of limitations applicable to tort actions,<sup>24</sup> the action was dismissed by the Circuit Court of Rockbridge County.<sup>25</sup>

The existence of an alternative, exclusive remedy may also bar a wrongful discharge action. In *Pruitt v. Johnston Memorial Hospital, Inc.*,<sup>26</sup> an employee alleged that her employer had failed or refused to provide her with a safe work environment and that, despite her repeated complaints, the employer had allowed the unsafe conditions to persist. Ultimately, when these conditions forced her to quit, she filed suit against her employer alleging that she had been constructively discharged from her employment.<sup>27</sup> The Circuit Court of Washington County rejected the employee's argument. Holding that sections 40.1-51.2 through 40.1-51.3.2 of the Code provide the exclusive remedy for an employee who has been denied a safe work environment, the court sustained the employer's demurrer and dismissed the employee's wrongful discharge claim.<sup>28</sup>

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23. Section 65.1 of the Code provides a cause of action against an employer that discharges an employee "solely because the employee intends to file or has filed a claim under [the Virginia Workers' Compensation Act] or has testified or is about to testify in any proceeding under this Act." VA. CODE ANN. § 65.1-40.1 (Repl. Vol. 1987).

24. See VA. CODE ANN. § 8.01-243.A (Repl. Vol. 1984) ("[u]nless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued.").

25. *Hayslett*, 20 Va. Cir. at 498.

26. 21 Va. Cir. 188 (County of Washington Cir. Ct. 1990).

27. *Id.*

28. Section 40.1-51.2(b) of the Code provides that an employee may file a complaint of hazardous conditions with the Virginia Department of Labor and Industry and thereby cause an inspection of the workplace "to be made as soon as practicable" by the Department. VA. CODE ANN. § 40.1-51.2(b) (Repl. Vol. 1990). The court's opinion in *Pruitt* indicates that the employee had not availed herself of this right. Had she done so and been discharged or discriminated against as a result, the employee then would have had an actionable claim against her employer under § 40.1-51.2:1, which provides: "No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others." VA. CODE ANN. § 40.1-51.2:1 (Repl. Vol. 1990).

## B. Restrictive Covenants

### 1. Covenants Not to Compete

Unfortunately, Virginia courts provided little enlightenment in the area of restrictive covenants during the period covered by this article. Indeed, the opinions of the Virginia circuit courts remain as varied as the facts of each case.<sup>29</sup> As a consequence, counsel for employers remain uneasy about drafting restrictive covenants and counsel for employees frequently are unable to provide clear guidance concerning their clients' duties under such covenants.

Most of the confusion in the area of restrictive covenants results from ambiguity in Virginia's three-pronged reasonableness test.<sup>30</sup> Traditionally referred to as the "Rule of Reasonableness",<sup>31</sup> the test was adopted by the Virginia Supreme Court in 1956.<sup>32</sup> Although every Virginia case since 1956 has recited this test,<sup>33</sup> analysis of the decisions suggests that the courts continue to apply an earlier test. Before 1956,

[t]he test to be applied to the question whether an agreement not to engage in a certain business is violated by accepting employment in that business, has been said to be whether in its scope and character, the employment is such as to result in all likelihood in substantial interference with the business which was the subject of the

29. Compare *Kida v. Chesterfield Veterinary Clinic*, 19 Va. Cir. 95 (County of Chesterfield Cir. Ct. 1990) (entire restriction unenforceable) with *Consolidated Indust. Roofing, Inc. v. Williams*, 17 Va. Cir. 341 (City of Roanoke Cir. Ct. 1989) (partial enforcement).

30. In *Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 548, 290 S.E.2d 882 (1982), the supreme court articulated a three-pronged test for determining the reasonableness of a restrictive covenant:

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

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

(3) Is the restraint reasonable from the standpoint of a sound public policy?

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

31. Note, *Employee Covenants Not To Compete: Where Does Virginia Stand?*, 15 U. RICH. L. REV. 105, 117-18 (1980).

32. *Meissel v. Finley*, 198 Va. 577, 95 S.E.2d 186 (1956).

33. See, e.g., *Grant v. Caroteck Inc.*, 737 F.2d 410, 412 (4th Cir. 1984); *Alston Studios, Inc. v. Lloyd V. Gress & Assoc.*, 492 F.2d 279, 282 (4th Cir. 1974); *Blue Ridge Anesthesia & Critical Care, Inc. v. Gidick*, 239 Va. 369, 389 S.E.2d 467 (1990); *Roanoke Eng'g Sales Co. v. Rosenbaum*, 223 Va. 548, 552, 290 S.E.2d 882, 884 (1982); *Foti v. Cook*, 220 Va. 800, 805, 263 S.E.2d 430, 433 (1980); *Richardson v. Paxton Co.*, 203 Va. 790, 794, 127 S.E.2d 113, 117 (1962); *Meissel v. Finley*, 198 Va. 577, 580, 95 S.E.2d 186, 187 (1956).

contract.<sup>34</sup>

While no longer recited by the courts, this test appears to live on through its application by the courts. Indeed, the only certain rule is that Virginia does not favor restrictive covenants.<sup>35</sup>

For example, in *Johnson v. E.R. Carpenter Co., Inc.*,<sup>36</sup> the owner of a company sold his business but remained with the company as a vice president. An employment contract was not part of the sales agreement between the parties. However, following the sale of the business, the new owner presented the former owner with an employment contract containing a restrictive covenant on a "take-it-or-leave-it" basis.<sup>37</sup> After the former owner signed the contract, he was terminated. Thereafter, the employer sought to enforce the terms of the restrictive covenant.

Traditionally, because of the more equal bargaining power that generally exists between buyers and sellers, the courts do not scrutinize restrictive covenants involved in the sale of businesses as strictly as those entered into between employers and employees.<sup>38</sup> Nevertheless, in *Johnson*, the Circuit Court of the City of Richmond refused to enforce the restrictive covenant between the parties. Despite the recent holding of the Supreme Court of Virginia in *Paramount Termite Control v. Rector*,<sup>39</sup> the court rejected the covenant for lack of consideration. In doing so, the court drew a distinction between restrictive covenants presented to employees as a "condition of their continued at-will employment" and those that are imposed without the opportunity for continued employment.<sup>40</sup> The court also refused to grant injunctive relief under the doctrine of unclean hands.<sup>41</sup>

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34. *Stoneman v. Wilson*, 169 Va. 239, 247, 192 S.E. 816, 819 (1937).

35. *Grant v. Carotek, Inc.*, 737 F.2d 410, 411 (4th Cir. 1984); *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 285 (4th Cir. 1974); *Stoneman v. Wilson*, 169 Va. 239, 247, 192 S.E. 816, 818 (1937).

36. 20 Va. Cir. 380 (City of Richmond Cir. Ct. 1990).

37. *Id.* at 385. The evidence showed that the employee had relocated his family from California and no longer had the option to back out of the deal.

38. The disparity of bargaining power between employers and employees is, perhaps, the factor that most frequently influences courts to void restrictive covenants appearing in employment contracts. See, e.g., *Richardson v. Paxton Co.*, 203 Va. 790, 127 S.E.2d 113 (1962).

39. 238 Va. 171, 380 S.E.2d 922 (1989). In *Paramount*, the Supreme Court of Virginia held that an at-will employee's continued employment provided the consideration necessary to support a post-employment restrictive covenant.

40. *Johnson*, 20 Va. Cir. at 387.

41. *Johnson*, 20 Va. Cir. at 387 (citing *Everett v. Bodwell*, 185 Va. 405, 38 S.E.2d 319 (1946)).

It is clear from the court's opinion in *Johnson* that the timing of the contract was the pivotal factor in its decision. Indeed, the court suggested that if the employment contract had been bargained for and concluded as part of the sale of the business, the covenant would have been enforceable.<sup>42</sup>

In another case, *Kantor v. Health Innovations, Inc.*,<sup>43</sup> the circuit court examined a restrictive covenant precluded the employee from directly or indirectly soliciting business from the employer's clients for one year. When the employee subsequently went to work for a former customer of the employer, the employer filed suit. Surprisingly, the employer sued the customer rather than the former employee, alleging a violation of the Virginia Uniform Trade Secrets Act.<sup>44</sup> However, because the employer did not allege that the customer had tortiously interfered with or induced a breach of the employee's terminable at-will contract, the trial court sustained the customer's demurrer and dismissed the suit.<sup>45</sup> The court thus avoided having to evaluate the enforceability of the covenant.

## 2. Covenants Protecting Trade Secrets

In *Dionne v. Southeast Foam Converting & Packaging, Inc.*,<sup>46</sup> a former employee of the defendant, a family-owned manufacturer, left the business to begin a competing enterprise. Because the employee possessed knowledge of a secret manufacturing process that he intended to use in his new business, the company promptly filed suit against him, seeking to enforce the terms of a confidentiality agreement. On the basis of a Michigan federal court decision, the employee argued that he could not be found guilty of misappropriating a trade secret that he "personally developed or substantially contributed to developing while employed at SEFCO."<sup>47</sup> The court, however, rejected the employee's argument, observing that Virginia's Uniform Trade Secrets Act defines "misappropriation" as the "[d]isclosure or use of a trade secret of another without express or implied consent by a person who . . . knew or had reason to know that his knowledge of the trade secret was . . . [a]cquired

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42. *Id.* at 385.

43. No. 116727 (County of Fairfax Cir. Ct., Aug. 9, 1990).

44. VA. CODE ANN. § 59.1-336 to -343 (Repl. Vol. 1987).

45. *Kantor*, No. 116727, slip op. at 2.

46. 240 Va. 297, 397 S.E.2d 110 (1990).

47. *Id.* at 303, 397 S.E.2d at 113.

under circumstances giving rise to a duty to maintain its secrecy or limit its use. . . ."<sup>48</sup>

### C. Other Judicial Developments

In *Singleton v. International Association of Machinists*,<sup>49</sup> the supreme court reaffirmed Virginia's authority to prohibit union security agreements. In *Singleton*, a private employer at Washington National Airport terminated a non-union employee under a collective bargaining agreement that required the employer to condition its employment contracts upon a employee's union membership. Although the employee was rehired after he reluctantly joined the union, he brought suit against the union for violation of Virginia's right-to-work laws.<sup>50</sup> Because both the state and federal governments share police power jurisdiction over National Airport by virtue of the Metropolitan Washington Airports Act,<sup>51</sup> the court was asked to determine whether Virginia's right-to-work law (which forbids union security agreements) or federal law (which permits them)<sup>52</sup> controlled. Citing a provision of the federal Labor Manage-

48. VA. CODE ANN. § 59.1-336(2)(b)(2) (Repl. Vol. 1987).

49. 240 Va. 403, 397 S.E.2d 856 (1990).

50. Virginia's right to work law is reflected in sections 40.1-58, -59, -60, -65, -67 of the Code of Virginia.

Section 40.1-58 provides: "It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization." VA. CODE ANN. § 40.1-58 (Repl. Vol. 1990).

Section 40.1-59 provides:

Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, . . . is hereby declared to be against public policy and an illegal combination or conspiracy.

*Id.* § 40.1-59.

Section 40.1-60 provides: "No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer." *Id.* § 40.1-60.

Section 40.1-65 provides: "Any agreement, understanding or practice which is [designed] to cause or require any employer . . . to violate any provision of this article is hereby declared to be an illegal agreement, understanding or practice and contrary to public policy." *Id.* § 40.1-65.

Section 40.1-67 provides: "Any . . . person . . . injured as a result of any violation . . . of any provision of this article . . . shall be entitled to injunctive relief against any and all violators. . . ." *Id.* § 40.1-67.

These sections were recognized by the court in a footnote. *Singleton*, 240 Va. at 404-05 n.1, 397 S.E.2d at 857 n.1.

51. 49 U.S.C. § 2458(c) (1990).

52. 29 U.S.C. § 158(a)(3) (1990); see *Oil Chem. & Atomic Workers v. Mobil Oil Corp.*, 426

ment Relations Act,<sup>53</sup> the court upheld Virginia's authority to prohibit union security agreements.<sup>54</sup>

Unlike their private counterparts, most public employers in Virginia are required by law to establish and maintain a grievance procedure for their employees. During the past year, the supreme court addressed two appeals arising from grievance proceedings. In *Zicca v. City of Hampton*,<sup>55</sup> an employee was dismissed from his position as a golf course superintendent because he allegedly made inappropriate remarks to his supervisor. Following a hearing, a grievance panel directed the city to reinstate the employee "to his former position as Golf Course Superintendent with full back-pay less thirty (30) working days which will be shown as a disciplinary suspension in his record."<sup>56</sup> Despite this directive, when the employee returned to work, he was assigned to a temporary position in the city's Aerospace Park and later was transferred to a newly-created position of maintenance manager.<sup>57</sup> The employee filed suit, asking that the city be required to reinstate him to his former position as golf course superintendent. The trial court dismissed the suit, finding that the city had complied technically with the decision of the grievance panel.<sup>58</sup>

On appeal, the supreme court reversed, holding that the grievance panel's decision was binding on the city.<sup>59</sup> The court characterized the city's reinstatement of the employee to his original position and its reassignment of him to a new position on the following day as "merely subterfuges" by which the city had attempted to circumvent the panel's decision.<sup>60</sup>

In another grievance procedure case, *Tazewell County School Board v. Gillenwater*,<sup>61</sup> an intermediate school teacher filed an appeal of her annual performance evaluation. The teacher alleged

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U.S. 407, 416 (1976).

53. The court observed that § 164(b) of the Labor Management Relations Act provides, in pertinent part, that "[n]othing in this [Act] . . . shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State . . . in which such execution or application is prohibited by State . . . law." 240 Va. at 406, 397 S.E.2d at 859 (quoting 28 U.S.C. § 164(b)(1990)).

54. *Singleton*, 240 Va. at 407, 397 S.E.2d at 859.

55. 240 Va. 468, 397 S.E.2d 882 (1990).

56. *Id.* at 469, 397 S.E.2d at 882-83.

57. *Id.*, 397 S.E.2d at 883.

58. *Id.* at 470, 397 S.E.2d at 883.

59. *Id.* at 471, 397 S.E.2d at 883.

60. *Id.*

61. 241 Va. 166, 400 S.E.2d 199 (1991).

that the principal who conducted the evaluation had violated several procedures governing teacher evaluations.<sup>62</sup> The appeal was unsuccessful. Approximately one year later, the board informed the teacher that she was being transferred to an elementary school. Alleging that the transfer was an act of reprisal for the appeal she had filed the preceding year, the teacher filed a statement of grievance.<sup>63</sup> Both the superintendent of schools and the school board denied the grievance, concluding that personnel transfers were not subject to the grievance procedure.<sup>64</sup> The trial court, however, disagreed and held that the teacher's allegations were subject to the grievance procedure.<sup>65</sup>

On appeal, the supreme court reversed. Although the court acknowledged that "acts of reprisal as the result of utilization of the grievance procedure" fell within the definition of grievance,<sup>66</sup> it observed that the teacher had alleged that her transfer was an act of reprisal for having filed an appeal of her evaluation, and that the school board's evaluation plan was not part of the statutory grievance procedure.<sup>67</sup> Moreover, the court observed that the grievance procedure applicable to public school teachers in Virginia expressly excludes matters pertaining to the "transfer [or] assignment . . . of teachers within the school division."<sup>68</sup>

Finally, in a case of first impression in Virginia, the Circuit Court of Virginia Beach allowed an employee to seek personal injury damages in a breach of contract action against her employer. In *Guffey v. Virginia Beach General Hospital*,<sup>69</sup> a hospital employee was abducted and raped as she arrived for work. Alleging that her employer had breached its agreement to "provide security officers who would patrol the premises and afford protection to both patients and staff",<sup>70</sup> the employee sought damages for "pain and suffering resulting from bodily injury and mental anguish from humiliation and permanent deformity."<sup>71</sup>

The employer demurred to the employee's claim for personal in-

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62. *Gillenwater*, 241 Va. at 167-68, 400 S.E.2d at 199.

63. *Id.* at 168, 400 S.E.2d at 200.

64. *Id.*

65. *Id.*

66. VA. CODE ANN. § 22.1-306 (Repl. Vol. 1985).

67. *Gillenwater*, 241 Va. at 170, 400 S.E.2d at 201.

68. *Id.* (quoting VA. CODE ANN. § 22.1-306 (Repl. Vol. 1985)).

69. 21 Va. Cir. 401 (City of Virginia Beach Cir. Ct. 1990).

70. *Id.* at 402.

71. *Guffey*, 21 Va. Cir. at 402.

jury damages. It argued that damages for breach of contract are limited to the pecuniary loss sustained, and that "pecuniary losses are limited to those items that can be clearly measured in monetary terms and do not include pain and suffering or mental anguish and humiliation."<sup>72</sup> The circuit court, however, rejected the employer's argument. Observing that "[u]nder contract law, a party who proves a breach of contract is entitled to recover for damages sustained as a result of that breach,"<sup>73</sup> the court concluded that the employee should be allowed to pursue her claim for personal injury damages under a breach of contract theory. To rule otherwise, the court held, would deprive the employee of a remedy under the employment contract solely because of the nature of her loss.<sup>74</sup>

### III. LEGISLATIVE DEVELOPMENTS

During its 1991 session, the Virginia General Assembly enacted a number of legislative changes in the area of employment law. These changes occurred primarily in Title 40.1 of the Code, but the legislature executed a number of other changes as well.

The General Assembly amended and reenacted sections 2.1-716 and 2.1-717 of the Virginia Human Rights Act<sup>75</sup> by expanding the definition of "unlawful discriminatory practice" to include conduct violative of any state or federal law prohibiting discrimination on the basis of race, color, religion, national origin, sex, age, marital status or disability.<sup>76</sup> The definition previously was limited to violations of state law, the Civil Rights Act of 1964,<sup>77</sup> and the Fair Labor Standards Act.<sup>78</sup> This is an important and timely amendment in light of Congress' recent enactment of the Americans With Disabilities Act.<sup>79</sup>

The legislature also increased Virginia's minimum wage, as established in section 40.1-28.10 of the Code. From its effective date on July 1, 1991 until July 1992, the minimum wage will be increased from \$1.00 per hour to \$3.65 per hour. Thereafter, Vir-

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72. *Id.* at 403.

73. *Id.*

74. *Id.* at 404.

75. VA. CODE ANN. §§ 2.1-714 to -725 (Repl. Vol. 1987).

76. *Id.* § 2.1-716 (Cum. Supp. 1991).

77. 42 U.S.C. § 200a to 200h-6 (1990).

78. 29 U.S.C. § 201-19 (1990).

79. Pub. L. 101-336, 104 Stat. 327 (1990).

ginia's minimum wage will be set at a rate not less than the federal minimum wage.<sup>80</sup> The General Assembly also added an important enforcement mechanism by providing that employees may retain private attorneys to collect moneys owed by employers as the result of noncompliance with the minimum wage provision.<sup>81</sup>

The General Assembly also added several new sections to the Virginia Occupational Health and Safety Act<sup>82</sup> to provide for the registration of Virginia contractors found guilty of flagrant violations of the Act. Again, the legislature sought to buttress these changes with an enforcement mechanism. The commissioner was granted the authority to assess interest and collect past-due penalties for violations of the Act.<sup>83</sup>

Finally, the General Assembly enacted wholesale changes to Virginia's statutorily-imposed local government grievance procedures. Significant portions of sections 15.1-7.1 and 15.1-7.2 of the Code were amended, and responsibilities and procedures were redefined.<sup>84</sup> Most of section 15.1-7.1, which dealt with the establishment of a grievance procedure, was deleted and little of substance was added. In addition, all but the title of section 15.1-7.2 was deleted and replaced with detailed information concerning definitions, responsibilities, coverage and compliance.

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80. VA. CODE ANN. § 40.1-28.10 (Cum. Supp. 1991).

81. *Id.* § 40.1-29(F) (Cum. Supp. 1991).

82. *Id.* §§ 40.1-135 to -138.

83. *Id.*

84. Compare *id.* § 15.1-7.1, -7.2 (Repl. Vol. 1989) with *id.* § 15.1-7.1, -7.2 (Cum. Supp. 1991).

