

# AT WILL EMPLOYMENT

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"*Employment at will*"<sup>1</sup> – what does it mean to me?<sup>2</sup> Whether you are an employer or an employee, this concept affects your rights in Virginia. Unless you have a written contract of employment or are a public employee, your employment is probably at will. In simplest terms, it means that either the employer or employee is free to terminate employment at any time with or without cause upon reasonable notice. An employee may quit to take another job at any time without fear of incurring liability to the employer for inconvenience or disruption to the business. Likewise, absent improper motives or other statutory or public policy prohibition<sup>3</sup>, an employer may terminate an employee without incurring legal liability under Virginia law.

Of course, as with any rule, there are exceptions. Depending upon the size of the company, there are a number of federal laws governing unlawful discrimination in employment and an employer's right to terminate an employee without cause. In general, if an employer has fewer than 15 employees, the employer is not covered by these federal laws. This legislation includes: the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Pregnancy Discrimination Act among others.<sup>4</sup> Employees of small companies are generally left to pursue state law remedies, if any, in the event of a possible wrongful termination of employment.

In 1985 the Virginia Supreme Court decided the case of *Bowman v. State Bank of Keysville*.<sup>5</sup> Until then, the doctrine of employment at will in Virginia had been applied by Virginia courts almost without exception. In *Bowman*, the Virginia Supreme Court found that two bank employees had been

wrongfully discharged. The employees had been discharged after their refusal to vote their stock in the small community bank, in favor of a proposed merger. The court ruled that the employees had a right to vote their stock without fear of reprisal. Therefore, a retaliatory discharge based upon their exercise of that right, was against public policy and improper.

In the years following the *Bowman* decision, Virginia courts began to find more public policy exceptions to employment at will. Federal discrimination and harassment protection was growing. Claims grounded in the Virginia Human Rights Act<sup>6</sup> (which prevents discrimination or harassment based upon race, color, religion, gender, age, marital status, disability and national origin) were also developing. These cases were referred to as "*Lockhart* claims" after the case of *Lockhart v. Commonwealth Education Systems Corp.*<sup>7</sup> which was decided by the Virginia Supreme Court in 1994. In this case, the Court held that the Virginia Human Rights Act articulated a public policy and that violating it would support a claim for wrongful discharge. The court reached this result in spite of the fact that the terms of the Act provided that it was **not** to be construed to create an individual cause of action!

Thereafter, "*Bowman-Lockhart*" public policy exceptions to employment at will became the legal basis for aggrieved employees to seek damages under Virginia law. If an employee could identify a Virginia public policy which an employer had violated, and that resulted in an adverse employment action against the employee, the employee had a viable claim for damages, whether or not the action resulted in termination.

In 1995, reacting to the *Lockhart* decision, the General Assembly

amended the Human Rights Act to limit the remedies available for wrongful termination under Virginia law. In companies with more than five but fewer than 15 employees, recovery is limited to no more than 1 year's salary and an award of attorney's fees.<sup>8</sup>

Since 1995, there have been a number of efforts to circumvent the limited remedies available to employees in Virginia who believe they have been wrongfully discharged. The claims have been met with varying results in both federal and state courts.

In the case of *Doss v. Jamco, Inc.*<sup>9</sup> decided in 2000, the Virginia Supreme Court made it clear that the Lockhart Amendments eliminated a common law cause of action based upon the policies expressed in the Virginia Human Rights Act. The court ruled that the General Assembly had meant exactly what it said in the amendments to the Human Rights Act. The only action for wrongful termination available for employees under the Act was limited to employers who had more than 5 and fewer than 15 employees. Thus, the court made it clear that the Lockhart Amendments eliminated a common law cause of action based upon the policies expressed in the Virginia Human Rights Act.

However, if an employee is terminated without cause in violation of a specific public policy expressed in a statute or policy *not* included within those expressed in the Virginia Human Rights Act, such a discharge may support a claim of wrongful discharge in Virginia. Statutes and policies expressed in the Virginia Workers Compensation Act, the Virginia Unemployment Compensation Act, the Virginia Fair Employment Contracting Act and the Virginians with Disabilities Act have all been held to support claims of wrongful discharge.

There are other potential remedies

under Virginia law for employees who believe they have been wrongfully terminated. However, there still must be an articulated public policy to support such a claim. Cases deciding which statutes articulate such a policy have been very narrowly construed. This has been done both by the Virginia courts and federal courts applying Virginia law. Other common law remedies that may provide relief to a terminated employee require additional factual grounds. These grounds include: defamation, assault and battery and intentional infliction of emotional distress. These actions generally have more stringent proof requirements including proof of intent, which can be difficult to meet. Moreover, sexual harassment and other discrimination claims under the Virginia Human Rights Act may now be limited to only those resulting in termination. Many Virginia courts are deciding that an employee who quits, rather than continue to be subject to harassment or discrimination, has no remedy. This applies to all those who work for a company with fewer than 15 employees.

Recent cases have again demonstrated how difficult it is for an employee to prevail on a wrongful termination claim based upon public policy in Virginia. Whistleblower claims have generally been unsuccessful. An employee who claimed he was fired for refusing to repair a motor vehicle in way he believed was dangerous did not state a public policy wrongful discharge claim. *Lawrence Chrysler Plymouth v. Brooks*.<sup>10</sup> Nor did an employee who claimed to have been fired for refusing to drop an assault and battery charge against a fellow employee. *Rowan v. Tractor Supply*.<sup>11</sup> A poultry plant worker who claimed to have been fired for

reporting sanitary violations at her employer's poultry plant to government inspectors did not state a claim for wrongful discharge. *Dray v. New Market Poultry*.<sup>11</sup> However, an employee who claimed to have been discharged for refusing to consent to improper sexual demands from her supervisor did state a public policy exception to the employment at will status and prevailed on her claim for damages against her employer. *Mitchem v. Counts*.<sup>12</sup>

Employment at will remains the general rule under Virginia Law. *Bowman* public policy claims are now much more difficult to establish. The General Assembly has tried to strike a balance between the rights of employees to work without discrimination and harassment, and the concerns of employers, when adopting amendments to the Virginia Human Rights Act. The harsh reality is that even a meritless claim can be time consuming and expensive for an employer to defend.

It appears that both Virginia courts and federal courts applying Virginia law are telling at will employees that, absent egregious circumstances such as in the case of *Miller v. Counts*, courts will not find a public policy exception to Virginia's adherence to the employment at will doctrine.



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<sup>1</sup> This article is not intended as legal advice, and should not be construed as legal advice, but only as a general background for understanding the concept of employment at will and related employment actions.

<sup>2</sup> The term "employment at will" is often confused with the unrelated concept of "right to work" which deals with labor union membership.

<sup>3</sup> Virginia statutes prevent termination of an employee for, among other things, filing a workers' compensation claim, excessive absence due to workers' compensation injury, filing of one garnishment, union membership or refusal to join a union, etc.

<sup>4</sup> Applicability of these and similar acts are governed by a number of factors including a threshold number of employees. The specific provisions of the acts and other similar federal legislation are beyond the scope of this article. If you have questions about any employment decision, you should consult competent employment counsel.

<sup>5</sup> 229 Va. 534, 331 S.E.2d 797 (1985).

<sup>6</sup> Va. Code Ann. §2.1-725 now §2.2-3900 *et seq.*

<sup>7</sup> 247 Va. 98, 439 S.E.2d 328 (1994).

<sup>8</sup> Va. Code Ann. §2.2-2639. Because employment cases are generally very expensive to litigate, an award of attorney's fees under federal statutes may exceed the damages an employee can hope to recover. However, recovery of attorney's fees under the Virginia Human Rights Act is limited to twenty-five percent of the back pay award.

<sup>9</sup> 254 Va. 362, 492 S.E.2d 441 (1997).

<sup>10</sup> 251 Va. 94, 465 S.E.2d 806 (1996).

<sup>11</sup> 258 Va. 187, 518 S.E.2d 312 (1999).

<sup>12</sup> 259 Va. 179, 523 S.E.2d 246 (2000).

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