

2013 Virginia Employment Law in Review

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In anticipation of a new year, the following is a brief overview of selected notable employment-related cases in Virginia from 2013. These cases involve non-competition agreements, discrimination claims and bankruptcy issues. Each case has components to keep in mind when dealing with employment matters in Virginia.

Demurrer Not Proper Challenge Non-Compete

Assurance Data, Inc. v. Malyevac, 286 Va. 137 (2013)

This appeal arises from a Fairfax Circuit Court case where the judge granted a demurrer to the employee on the issue of the enforceability of a non-compete in the employment contract. The Virginia Supreme Court reversed the judgment, finding that the purpose of a demurrer was to determine whether a cause of action states a claim upon which relief can be granted, not to decide the merits of the case (i.e. whether the non-complete was enforceable). The court emphasized that the enforceability of a non-compete must be decided on the merits of the case on a case-by-case basis. Thus, going forward, the proper method for challenging a non-compete is a plea in bar or summary judgment motion that would allow the court to “evaluate and decide the merits of a case.”

Bankruptcy Chapter 13 Debtor has Standing to Sue on Discrimination Claim

Royal v. R&L Carriers Shared Servs., L.L.C., 2013 U.S. Dist. LEXIS 57416 (E.D. Va. Apr. 22, 2013)

An employee had a pending Chapter 13 bankruptcy case he had filed several years, prior to when he filed the discrimination lawsuit in the Eastern District of Virginia. The employee failed to disclose to the bankruptcy court that he had filed a discrimination charge with the EEOC and that he had filed the lawsuit. The employer moved to dismiss arguing that the bankruptcy trustee had exclusive standing to sue on the employer’s claim. Additionally, employer argued that the employee was judicially estopped from pursuing its claim due to his earlier nondisclosure in the bankruptcy matter where he failed to disclose any possible claim against the employer. The court denied the motion, finding that a debtor in a Chapter 13 case had standing to bring civil actions in court even though the pre-petition cause of action belongs to the bankruptcy estate. This differs from a Chapter 7 debtor, where solely the trustee can bring suit on behalf of the bankruptcy estate. The court also found that judicial estoppel did not apply because the bankruptcy court had yet to rule on plaintiff’s requested relief.

Bankruptcy Chapter 7 Debtor has No Standing to Sue on Discrimination Claim

Vanderheyden v. Peninsula Airport Comm'n, 2013 U.S. Dist. LEXIS 399 (E.D. Va. Jan. 2, 2013)

An employee filed a charge with the EEOC after being terminated and subsequently, eight months later, filed a Chapter 7 bankruptcy. The employee failed to disclose the EEOC charge or potential claims against her employer in her bankruptcy petition or to the court. The court granted the discharge and closed the matter. The employee then received a right to sue letter from the EEOC and filed a lawsuit six months after the bankruptcy case was closed. The employer moved to dismiss claiming that the employee lacked standing, and she was judicially estopped due to her non-disclosure in the bankruptcy matter. The court dismissed the matter, finding that only the bankruptcy trustee had standing in a Chapter 7 estate, and further that her failure to disclose the claim to the bankruptcy court "constituted a representation that no actual or potential claim existed;" therefore, the trustee would be judicially estopped from bringing a claim.

Individual Employees Not Liable under Age Discrimination in Employment Act (ADEA) or Title VII

Ferrell v. Babcock & Wilcox Co., 2013 U.S. Dist. LEXIS 19505 (W.D. Va. Feb. 13, 2013)

An employee filed a lawsuit for age discrimination and retaliation against the company and six of its employees. The court dismissed the individual employees stating that employees, even supervising employees, are not proper defendants under the ADEA or Title VII, only employers.

"European" is a Constitutionally Protected Class; No Enhanced Burden for Reverse Discrimination Claim

McNaught v. Va. Cmty. College Sys., 933 F. Supp. 2d 804, 817 (E.D. Va. 2013)

A professor, born in the United States who identified his ethnicity as being from the United States and Europe, claimed reverse discrimination where he was not selected for certain positions in which individuals of Indian and Korean ethnicity were hired. The court ultimately dismissed the case finding that the employer had shown a legitimate non-discriminatory reason for failure to select him but not before making two important rulings. First, the court found that the professor had established a prima facie case of national origin discrimination by showing he was of European descent. Second, the court considered whether in a reverse discrimination claim a party of a majority class must set out "background circumstances to support the suspicion that the Defendant is the unusual employer who discriminates against the majority."

The 3rd, 5th and 11th Circuits do not require a showing of background circumstances, while the 6th, 7th, 8th, 10th and D.C. Circuits require it. After determining the 4th Circuit had not taken a position on whether there was an additional requirement in a reverse discrimination case, the court found that it would follow the 3rd, 5th and 11th Circuits and apply the same standard in both ordinary and reverse discrimination cases. Whether or not the 4th Circuit will adopt this line of reasoning is unclear.

Costs Awarded to Employer in Employment Discrimination Case

Arthur v. Pet Dairy, 2013 U.S. Dist. LEXIS 169768 (W.D. Va. Dec. 2, 2013)

An employer moved under Rule 54 of the Federal Rules of Civil Procedure for the Court to enter an order compelling the employee to pay the defendant's bill of costs totaling \$3,131.87. Under Rule 54, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs-other than attorney's fees-should be allowed to the prevailing party." There is a presumption that costs should be awarded to the prevailing party. Therefore, while the court may deny an award of costs, it needs to articulate the reasons for doing so.

The rare circumstances that justify a denial of costs include:

- (1) "misconduct by the prevailing party worthy of a penalty";
- (2) "the losing party's inability to pay";
- (3) the "excessiveness [of the costs] in a particular case";
- (4) the "limited value of the prevailing party's victory"; or
- (5) "the closeness and difficulty of the issues decided."

Cherry v. Champion Int'l Corp., 186 F.3d 442, 446 (4th Cir. 1999) (citation omitted).

While the employee argued he was unable to pay, the court found that the employee's claims were too tenuous and were rebutted by the record.