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VA Recognizes a New Employment-Based Tort

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The Employment at Will doctrine, which has been broadly embraced throughout the U.S. since the 19th century, provides in general terms that in the absence of a written contract providing for employment for a limited duration, or subject to specific terms of termination, an employment relationship may be terminated by either party without explanation and without liability. In reliance on this doctrine, an employee may quit at any time without giving a reason, and an employer may fire an employee with a parallel absence of notice or explanation.

Background

In 1959, in a case called *Petermann v. International Brotherhood of Teamsters*, Peter Petermann alleged he was terminated for refusal to give false testimony before a legislative investigating committee, and the California Court of Appeals recognized the first judicial exception to employment at will. 174 Cal.App.2d 184 (App. 2d Dist. 1959). As now modified through decades of statutory changes and the judicially imposed modifications of our Common Law, the doctrine will not shield an employer from liability for firing an employee for an "improper reason." The process of defining improper reason has created an imposing body of law throughout the 50 states and Washington, DC, with each state defining its own exceptions and the parameters of them.

Several improper reasons can be found in statutes adopted by the various states or by the federal government with application to the states. For example, firing an employee for reasons of race, color, gender, religion, national origin, age or handicap status — or appearing to do so — will get an employer in trouble anywhere. However some policy-defining federal regulations that may impact the Employment at Will doctrine have limited application, depending on the number of people employed by the employer. For example, the Age Discrimination in Employment Act of 1967 applies only to employers with at least 20 employees; the threshold for the Americans With Disabilities Act of 1990 is 15 employees.

Three Major Exceptions

Aside from these specific statutory requirements, three major exceptions have emerged nationally over the past half-century to the Employment at Will doctrine. These are the implied contract exception, the covenant of good faith exception and the public policy exception. In each case, the viability of the exception and the circumstances to which it applies are determined on a state-by-state basis. For example, in the 12 states that recognize the Implied Contract exception, a terminated at-will employee may still sue for wrongful termination if he or she has received oral or written assurances of continued employment, such as a representation in an employer's personnel policies or an employee handbook. In another 21 states, the employee can rely on the implied contract exception only if he or she was terminated contrary to written assurances of continued employment. The Implied Contract exception is not recognized in the Commonwealth of Virginia or in 12 other states.

Similarly, in 11 states, none of them Virginia, a covenant of good faith and fair dealing is implicitly part of every employment contract, permitting an employee to sue if he or she is terminated for a reason that the state's courts have determined is bad faith. Bad faith has been defined by different state courts in different ways, including the imposition of a "just cause" standard and the prohibition of terminations for malice or ill will. In Nevada, it may be bad faith to terminate an employee in an effort to avoid paying him retirement benefits.

The public policy exception is by far the most common major exception, recognized in some fashion in all states except Alabama, Georgia, Louisiana, Maine, Nebraska, New York and Rhode Island. Under this exception, an employer may not fire an employee if doing so would violate the state's public policy, or a state or federal statute. Once again, whether the grounds for a particular termination violates public policy is determined by the courts of the individual states. As we have seen in California, firing an employee for refusal to provide perjured testimony violates the public policy of the state, and in Illinois, discharging an employee for providing information about criminal activity to law enforcement authorities has been found to violate public policy.

What Happened in Virginia

Recently, the Virginia Supreme Court considered the breadth of its public policy exception in light of confused and sometimes controversial history. Virginia is widely recognized as a business-friendly jurisdiction and the continued vibrancy of the Employment at Will doctrine, relative to other states, is part of the reason. The state recognized no exception until 1985 when the Supreme Court of Virginia handed down *Bowman v. State Bank of Keysville*. 229 Va. 534 (1985).

Betty Bowman's employment at the State Bank of Keysville was terminated by the bank in 1979. She sued, claiming she was

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terminated for an improper reason, specifically in retaliation for her refusal to vote for a proposed merger. Six years later, the Supreme Court of Virginia agreed, holding that terminating Bowman in retaliation for exercising her rights as a stockholder was a violation of public policy. *Id*. The *Bowman* opinion contained language attempting to limit the application of the exception, but its parameters were left unclear, beginning a period of uncertainty in the law as state courts wrestled with the breadth of the exception.

In 1994, in *Lockhart v. Commonwealth Education Systems Corp*., the state's high court expanded the so-called *Bowman* doctrine to include termination in violation of the Virginia Human Rights Act (VHRA). 247 Va. 98 (1994). Lawanda Lockhart claimed that she was terminated from her job at Commonwealth College for reporting racially offensive behavior, and her refusal to engage in such behavior. While reaffirming "our strong adherence to the Employment-at-Will doctrine," the court found that the VHRA was a statement of public policy and that its violation could constitute an exception to the Employment at Will doctrine under the theory espoused in *Bowman*. *Id*. at 106. As a result, it appeared that Virginia law protected not only an employee's actions in reliance in public policy, but also an employee's status as a member of a protected class.

Lockhart, however only increased the uncertainty and the *Bowman* doctrine suffered through a period of confusion and inconsistency. In 1995, the General Assembly amended the VHRA to eliminate its use as the basis of a *Bowman* doctrine exception to employment at will. And in 1997, in *Doss v. Jamco*, the court made it clear that VHRA violations could not be the basis of *Bowman* claims. 254 Va. 362 (1997). In *Mitchem v. Counts,* the court reaffirmed the viability of the *Bowman* doctrine when Mitchem alleged she was terminated for refusal to engage in criminal conduct "of a sexual nature." 259 Va. 179 (2000). In a nuanced legal distinction, the court found that Mitchem's allegations fit within the *Bowman* exception even though they also stated a violation of the VHRA which by its express terms, cannot form the basis of *Bowman* claim. *Id*.

After *Doss* and *Mitchem* and the controversy that preceded these cases, the public policy exception settled into a stable and very narrow exception to Virginia's general policy of employment at will. And so it remained until an unusual intervention by the Fourth Circuit Court of Appeals caused the Virginia Supreme Court to again consider broadening it. It did so on Nov. 1, 2012, when the Virginia Supreme Court recognized a new employment-based tort and handed down its opinion in *VanBuren v. Grubb*. 2012 Va. LEXIS 193 (2012).

VanBuren v. Grubb

The case arose in an unusual context, but one reminiscent of *Mitchem*. Angela VanBuren was employed as a nurse by the Virginia Highland Orthopedic Spine Center, LLC in Radford, VA. The clinic was owned by Dr. Stephen Grubb, an orthopedic surgeon. According to VanBuren, Grubb hugged her, kissed her, rubbed her in inappropriate areas and made unwelcome and offensive sexual advances toward her. VanBuren further alleged that after she rejected these advances, Grubb terminated her employment, giving no explanation for the termination.

VanBuren sued both Grubb and the clinic in federal court under several theories, including wrongful discharge. She substantiated her claim against Grubb by alleging that she had been fired by him for refusing to engage in criminal conduct (adultery and lewd and lascivious conduct are crimes under Virginia law), and that her termination therefore violated public policy under the *Bowman* line of cases. Among other things, Grubb argued that he hadn't employed VanBuren and that he couldn't be personally liable on a theory of wrongful termination.

The U.S. District Court dismissed the claim, ruling that "permitting non-employer liability for the tort of wrongful discharge may very well impermissibly broaden the *Bowman* doctrine beyond the scope that the Virginia Supreme Court would believe prudent." *Vanburen v. Va. Highlands Orthopaedic Spine Ctr., LLC*, 728 F. Supp. 2d 791 (W.D. Va. 2010). When VanBuren appealed to the Fourth Circuit, the appellate court entered an order of certification, asking the Virginia Supreme Court to advise them whether the cause of action upon which VanBuren based her claim against Grubb was recognized in the Commonwealth. *VanBuren v. Grubb*, 471 Fed. Appx. 228 (4th Cir. 2012).

After noting that it was a case of the first impression in Virginia, the Supreme Court formally — although narrowly — recognized "the common law tort of wrongful discharge in violation of established public policy against an individual who was not the plaintiff's actual employer but who was the actor in violation of public policy and who participated in the wrongful firing." 2012 Va. LEXIS 193, at *14.

In a 4-3 ruling, Justice Leroy Millette, Jr., writing for the majority, stated "We find Virginia's existing precedent permitting such acts to be consistent with the Court's established case law regarding agency relationships … . Indeed, the recognition in *Bowman* of a tort of wrongful discharge for public policy reasons leads to this result. Limiting liability to the employer would follow a contract construct. Wrongful discharge, however, is an action sounding in tort." *Id*. at *12.

In her dissent, Chief Justice Cynthia D. Kinser suggested that the majority had turned the focus on the underlying wrongful conduct, rather than the wrongful discharge. *Id*. at *24-25 (Kinser, J. dissenting). It's a valid observation: It is reasonable to wonder if the court has opened the door for a broader array of termination-based torts in the years to come.

However, over the past quarter century, the same question has been asked and answered several times. Recalling the efforts to expand the *Bowman* doctrine, it seems likely that aggressive plaintiffs' attorneys will rely on *VanBuren* in an effort to broaden the exception. It also seems likely that the Virginia Supreme Court will move with caution and care if it chooses to do so.

In the meantime, the case will proceed against both Grubb and the Clinic in the United States District Court for the Western District of Virginia. Like business owners throughout the Commonwealth of Virginia, Grubb, as well as the clinic, are now exposed to financial liability if the court adopts *VanBuren's* allegations of fact.

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