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Virginia Recognizes Individual Liability for Wrongful Discharge

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In *VanBuren v. Grubb*, No. 120348 (Nov. 1, 2012), a sharply divided Supreme Court of Virginia surprised employers by holding that a common law tort action for wrongful discharge in violation of public policy may be brought against an individual manager or supervisor.

Wrongful Discharge in Virginia

Unlike many states that have substantially revised and effectively limited the operation of the employment-at-will doctrine, Virginia has rejected similar efforts for decades. Today, Virginia is one of the few states that continues to "strongly adhere" to the traditional employment-at-will doctrine. Exceptions to employment at will in Virginia are both few in number and narrow in scope. The state supreme court created one such exception in *Bowman v. State Bank of Keysville*, 229 Va. 534 (1985), holding that a corporate employer could be held liable in tort for wrongfully discharging two shareholder employees of the corporation for refusing to vote their shares in accordance with the wishes of the board of directors.

In the 27 years since *Bowman*, the Supreme Court of Virginia has granted review of several cases in which plaintiffs alleged that their terminations violated public policy. In each case, the court emphasized that the *Bowman* exception to the at-will doctrine is "narrow" and that simple termination of an employee in violation of the policy "underlying any one [statute] does not automatically give rise to a common law cause of action for wrongful discharge." *Rowan v. Tractor Supply Co.*, 263 Va. 209, 213 (2002). Rather, an employee's discharge will support a *Bowman* claim only where the termination:

- violated a policy enabling the exercise of an employee's statutorily created right;
- violated a public policy that was explicitly expressed in a statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy; or
- was based on the employee's refusal to engage in a criminal act.

The Case Before the Court

The Supreme Court of Virginia's decision in *VanBuren v. Grubb* concerned a claim rooted in the

third category. And, like many cases that result in the expansion of common law torts, the allegations made in this case may have influenced the court's decision to expand the wrongful discharge doctrine.

The plaintiff was employed as a nurse by the Virginia Highlands Orthopedic Spine Center from December 2003 until her termination in March 2008. The plaintiff claimed that she had been continually harassed throughout her employment by her supervisor, the doctor who had founded the center. Because of the procedural posture of the case, the allegations made in the complaint were taken as true.

The plaintiff claimed that the doctor would "hug her, rub her back, waist, breast and other inappropriate areas, and attempt to kiss her." In addition, she alleged that she told the doctor that his sexual advances were "offensive" and "unwelcome[]," but that he nevertheless continued to harass her, with several more episodes occurring, despite her repeated objections and rejections of his advances. According to the complaint, in March 2008 the doctor suggested during a closed-door meeting that the plaintiff leave her husband so that she "could accept his love for what it was and what it could be." A few days later, the doctor called the plaintiff into his office and allegedly asked whether she planned to stay with her husband. When she responded in the affirmative, she claims that the doctor fired her. Then, according to the complaint, the doctor offered her roughly a month's severance pay to remain silent about the sexual harassment. He allegedly provided the plaintiff with no other explanation for terminating her employment.

The plaintiff filed suit in the U.S. District Court for the Western District of Virginia, asserting claims of gender discrimination under Title VII, and wrongful discharge in violation of public policy, against the center and the doctor. She alleged that she was terminated because she refused to engage in criminal conduct—adultery in violation of Virginia Code section 18.2-365, and open and "gross lewdness and lasciviousness" in violation of Virginia Code section 18.2-345.[1] The district court granted the defendants' motions to dismiss. On appeal, the U.S. Court of Appeals for the Fourth Circuit certified the question to the Supreme Court of Virginia.

The Decision

The Supreme Court of Virginia "restated" the question certified by the Fourth Circuit as follows:

> Does Virginia law recognize a common law tort claim 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 of the plaintiff, such as in the capacity of supervisor or manager?

The substantive change consisted of the addition of the phrase "but who was the actor in violation of public policy" to the question certified by the Fourth Circuit.

The court began its analysis by observing that in two prior cases it had allowed wrongful discharge claims to go forward against individual defendants, but the issue of individual liability had not been squarely addressed in either case. One of them, *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98 (1994), involved a sole proprietorship whose owner allegedly engaged in egregious sexual misconduct. The other involved the court's recognition of a claim against the directors of a bank in *Bowman*. The court then listed other states that allow individual liability for torts committed in the employment setting and explained that in Virginia it has "long been settled" that employers and employees are "jointly liable and jointly suable" for the employee's wrongful acts. The court noted its "recognition in *Bowman* of a tort of wrongful discharge." (emphasis added). Reasoning that "[l]imiting liability to the employer would follow a contract construction," the court reemphasized that "wrongful discharge remains a tort and tort principles must apply," despite the presence of "components of a contractual relationship." The court then turned to the heart of the matter.

The court noted that it had recognized the common law tort of wrongful discharge to deter discharge arising out of public policy violations. The court's majority reasoned that employer-only liability does not provide sufficient deterrence and that the doctor had left the center—the company he created— in response to this suit. The majority then observed that, if a wrongful discharge claim could not lie against him, "there may be nothing to prevent other business owners" from abandoning their business to evade liability.

1 While the court characterized Virginia Code section 18.2-345 as punishing lewd and lascivious behavior, the statute actually criminalizes lewd and lascivious cohabitation. It is unclear whether, if faced with a challenge to the constitutionality of this section, the Supreme Court of Virginia would uphold it.

The court brushed off concerns that businesses will be hesitant "to rightfully discharge" employees for fear of suit, stating that the "extreme narrowness" of the tort, as well as the requirement that the actions of the individual defendant be shown to have violated public policy, were adequate safeguards against "overuse" of the wrongful discharge tort.

Implications for Employers (and Managers)

In the immediate aftermath of *VanBuren v. Grubb*, employees with managerial or supervisory responsibilities may be sued for wrongful discharge in their individual capacities and may be subject to personal liability in tort for damages arising out of wrongful discharge where it can be shown that they were the "actor[s] in violation of public policy" and "participated in the wrongful firing of the plintiff." Additionally, employers will need to wrestle with additional issues in connection with joint representation and joint defense agreements – such as whether to share counsel with the supervisor/defendant, whether to pay for the supervisor/defendant's defense, etc. However, the case's long-term impact will depend upon the court's openness to future efforts to hold first-level supervisors and mid-level managers liable for wrongful discharge, which remains in question as a result of some of the qualifying language used by the majority and the vigorous dissent by three justices.

The majority opinion seems to suggest at several points that the defendant doctor's position as founder and owner of the business was an important factor in the analysis: "[a]s Grubb was her supervisor *and owner of the company*, we conclude that . . . he too should be subject to liability ;" "[t]he purpose of the wrongful discharge tort . . . is best served if individual employees *in a position of power* are held personally liable . . . " and "[i]f the Court does not recognize individual liability in such cases, there may be nothing to prevent *other business owners* from following this model in an attempt to avoid liability."(emphasis added). The dissenting opinion espouses the view that the majority overlooks one element of the tort analysis: the existence of a legal duty. The dissenters reason that such a duty must arise from the employment relationship between the actual employer and the employee, and that supervisors cannot be liable because they are not parties to that relationship. However, the majority opinion rejected the doctor's argument that liability is limited to the employer because only the employer can discharge an employee. Companies and individual defendants will likely press all of these points in litigation to test the limits of this decision.

On the one hand, time may prove that *VanBuren* simply closed a perceived "loophole" that allowed individuals who owned small businesses, or sole proprietors, to escape liability by abandoning their corporate creations. On the other hand, *VanBuren* may open the door to questionable—and relatively easy to plead—wrongful discharge claims, especially if based on Virginia's older criminal statutes such as Virginia Code section 18.2-345. Such claims, even if directed primarily at the supervisor's conduct, are likely to be brought against the employer as well. However, one source of public policy remains off limits for wrongful discharge claims—the Virginia Human Rights Act. Causes of action based on this law are exclusively limited to the actions, procedures, and remedies afforded by it. *See Doss v. Jamco, Inc.*, 254 Va. 262 (1997); Va. Code Ann. § 2.2-3903.

Either way the courts apply *VanBuren* in the future, employers may minimize the risk of such claims by taking a few key steps: (1) promptly and comprehensively investigating any allegations of harassment, interference with protected rights, or pressure to engage in illegal activity; (2) minimizing—or eliminating—supervisors involvement in termination decisions in the face of claims of alleged interference with an employee's rights protected by public policy or an employee's refusal to engage in illegal acts or other public policy violations; and (3) as always, thoroughly documenting employee misconduct and performance issues. Nevertheless, discharged employees have access to an expanded menu of options in the wake of *VanBuren*, and employers are likely to see an increase in wrongful discharge cases involving claims against both the employing entity and one or more of its managerial employees.

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