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EMPLOYMENT LAW:

CLAIMED WRONGFUL TERMINATION OF EMPLOYMENT

I. INTRODUCTION: EMPLOYMENT AT-WILL DOCTRINE

This category of issues is the most frequently identified employment law problem by applicants seeking help from legal services staff and the volunteers in the Fairfax Bar Association's Pro Bono Employment Law Project: i.e., "I was fired, I want to sue . . ." Because of the employment at-will doctrine, only a relatively small percentage of workers in Virginia have legally merited claims to bring in court to challenge employment termination. The primary legal recourse for a terminated worker is to file a claim for unemployment compensation benefits.

Generally, to have an enforceable employment contract in Virginia, it must be in writing. The vast majority of workers who do not have written contracts are employees at-will, and can be fired at any time, with or without just cause.

There is a growing body of law (expanding and contracting rights, by legislation and judicial interpretations of common law principles) setting out exceptions to employment at will. If there is available a challenge to termination of employment, it will apply because something in the circumstances underlying the termination fits or may fit an exception to the employer's qualified right to fire employees with or without cause.

II. EXCEPTIONS TO THE EMPLOYMENT AT-WILL DOCTRINE

Following is a partial listing and brief explanation of the main limitations on discharge presently recognized in Virginia. These are the most commonly raised issues, and this is not intended to be comprehensive listing, setting out all of the potentially valid claims. Advocates are still raising and testing in court new public policy (and other tort) theories to try to expand the list of recognized common law protections.

A. FEDERAL STATUTORY RIGHTS FOR WORKERS

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

This statute prohibits discrimination in employment on the basis of race, color, religion, national origin or sex. It also (in theory) provides protection from retaliation for having made a civil rights complaint. The federal statute applies to employers with 15 or more employees.

2. Civil Rights Acts of 1866 and 1870, 42 U.S.C. § 1981, 1982.

These statutes prohibit race discrimination. There are differences between these provisions and the racial prohibition in Title VII. There is no need to exhaust an administrative remedy (as with a Title VII claim), but the burden to prove a violation of Section 1981 can be more difficult to meet (show intentional discrimination).

Chapter 2, Civil Rights Acts, in Employment Law in Virginia, (Volume 1, the Virginia Law Foundation, First Edition), has an excellent summary of the civil rights acts requirements.

3. Age Discrimination in Employment Act, 29 U.S.C. § 621-634.

The ADEA applies to workers 40 or older and to employers with 20 or more employees. 1990 amendments to the Act provide guidance for severance pay agreements and releases of liability, on what has to be included in order for a waiver of federal rights to be effective. There is an administrative exhaustion requirement, to file a claim of discrimination with the Equal Employment Opportunity Commission within 180 days, or a longer -- 300 day period -- in a deferral state (Virginia is a deferral state; there are state and local human rights agencies to which the EEOC can defer investigation of claims).

As with Title VII claims, an action in court cannot be filed until the investigative agency issues a "right to sue" letter. The complainant has 90 days from receipt of the letter to file suit.

4. Americans with Disabilities Act, 42 U.S.C. § 12101 et.seq.;
Rehabilitation Act of 1973 29 U.S.C. § 791 et.seq.

The Americans with Disabilities Act, enacted in 1990, is substantially similar to the Rehabilitation Act, which applies to federal executive agency employees, federal contractors and recipients of federal funds. In Northern Virginia, there are a considerable number of employers and employees covered under the Rehabilitation Act, although rights are substantially the same as the later enacted ADA. The ADA applies to employers with 15 or more employees.

The ADA theoretically protects employment rights of a qualified individual with a disability, who can perform the essential functions of a job with or without reasonable accommodations.

5. Executive Orders governing federal contractors and subcontractors.

Age, handicap, race, color, religion, sex and national origin discrimination are prohibited by Executive Order, and these requirements apply to contracts and subcontracts for at least \$10,000.00. The Office of Federal Contract Compliance Programs is responsible for investigation and enforcement of these complaints.

6. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324 et.seq.

The Immigration and Naturalization Act, 8 U.S.C. § 274B(a)(1) prohibits discrimination in employment on both the basis of national origin and citizenship status. Generally, the national origin discrimination provisions in other civil rights statutes do not extend to cover citizenship status or alienage. Only “protected individuals” are covered by the provision: U.S. citizens, nationals, lawful permanent resident aliens, refugees, persons granted asylum and aliens granted temporary residence. Many workers in Northern Virginia who have not yet acquired permanent residence status are issued work authorization identification cards, enabling them to lawfully work while their applications for political asylum are processed.

Violations of the law are investigated and enforced by the Office of Special Counsel for Unfair Immigration - Related Employment Practices, within the U.S. Department of Justice. There is a 180 day period to file a charge after the discriminatory act. These complaints are litigated before federal administrative law judges, with review by a circuit court of appeals.

7. Family and Medical Leave Act, 29 U.S.C. § 2601

For employers and employees subject to the Act, an employee qualified to take leave must be restored to the same job or an equivalent position (with some exceptions). It is unlawful to discriminate against or discharge any employee for involvement in any proceeding related to FMLA. FMLA complaints are investigated by the U.S. Department of Labor. There is a two year statute of limitations, and administrative exhaustion is not required.

8. Whistleblower protections: Occupational Safety and Health Act, 29 U.S.C. § 651 et.seq.; Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

These federal statutes provide protection from retaliation (discharge) for employees who have filed complaints or cooperated with investigation of possible violation of the acts.

B. STATE STATUTORY RIGHTS FOR WORKERS

1. Virginia Human Rights Act, § 2.1-714-725

This Virginia statute went into effect in 1987. The Act covers all employers and prohibits discrimination in employment based upon race, color, religion, national origin, sex, age, marital status, disability, pregnancy, childbirth and related medical conditions. The law makes violation of a federal discrimination statute a violation of Virginia law. The Virginia Council on Human Rights is the investigative agency for violations, and it has been designated a deferral agency by the E.E.O.C. Recent case law suggests or requires that a discrimination complainant must present a charge to a deferral agency, in order to maintain a federal statutory claim in court. There are 180 days to present a discrimination complaint, after the act complained of.

Generally, if a complaint of discrimination falls within the jurisdiction of the Alexandria Office of Human Rights, the Arlington Human Rights Commission, the Fairfax County Human Rights Commission or the Prince William Human Rights Commission, the state agency refers the charge to the local deferral agency.

The Virginia Human Rights Act gives limited relief from termination of employment to workers with employers with more than 5, but fewer than 15 employees. A employee claiming wrongful discharge may sue in either General District Court or Circuit Court, and the suit must be filed within 180 days of the discharge.

2. Virginia with Disabilities Act, § 51.5-1 to 59

The statute applies to every employer, except for those subject to the federal Rehabilitation Act of 1973. The state agency established to enforce the law, the Department for Rights of Virginians with Disabilities, has limited powers and filing a complaint with the agency does not toll the statute of limitations to bring a private cause of action.

There is an unusual, two-part requirement to meet the statute of limitations: either a suit must be filed within 180 days of the claimed discrimination, or written notice, by registered mail, must be given to the defendant within 180 days, and the action filed withing one year.

3. Local codes prohibiting employment discrimination

Alexandria, Arlington, Fairfax and Prince William all have ordinances, with varying terms, prohibiting discrimination in employment.

4. Workers Compensation, § 65.2-308; excessive absences, § 40.1-27.1

The statute protects an employee who is discharged solely because of filing, threatening to file or cooperating with a compensation claim. The “solely” qualification on the protection substantially weakens its effectiveness as a remedy.

Section 40.1-27.1 provides a remedy for an “unfair employment practice” if the employer discharges an employee for excessive absences, and counts absences that were for days off work due to a compensable injury under Title 65.2. The protection is qualified, and does not apply to absences greater than six months or “if the employer’s circumstances have changed during such employee’s absence so as to make it impossible or unreasonable not to discharge such employee.” This is not quite as weak as the protection in § 65.2-308, and might succeed with a jury on the determination of “unreasonable” not to let the worker be fired.

5. Occupational Safety and Health Act, § 40.1-51.2:1.

This is a state “whistleblower” protection.

6. Fair Housing Act, § 36-96.5

The statute prohibits discharge of an employee who opposes or assists someone to challenge violations of the Virginia Fair Housing Act.

7. Jury Duty or Witness Service, § 18.2-465.1

An employee may not be discharged because of service on a jury or for responding to a summons or witness subpoena

8. Garnishment, § 34-29(f)

The statute prohibits firing an employee because of wage garnishments to collect a single debt.

C. COMMON LAW

The common law theories to challenge a discharge, as wrongful, fall either under contract (express or implied) or tort (negligent act or a violation of public policy). Virginia case law has limited the range of potential contract law claims, but there is still substantial litigation addressing what public policy and negligence tort theories are viable.

1. CONTRACT CLAIMS

The clearest limits on employment at-will are when contracts require cause, or just cause, as grounds for termination. Classically, union employees and

civil service workers, together with high-paid executives, have written contracts with the “for cause” clause. Employment contracts must be in writing in order to be valid. Virginia Statute of Frauds, § 11.2(7).

An employee handbook will ordinarily not be construed to create an implied employment contract. Most handbooks and personnel manuals now go further and add an express disclaimer of enforceability or creation of a contract relationship. Specific provisions and benefits provided for in personnel policies may be legally enforceable, without creating an exception to employment at-will.

2. TORT CLAIMS -- WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Lockhart v. Commonwealth Education Systems Corporation, 247 Va. 98 (1994). The Supreme Court applied a public policy exception to at-will employment discharges, to prohibit those which violate policy underlying laws designed to protect property rights, personal freedoms, health, safety, or welfare of the people in general. The Supreme Court relied upon the public policy against discrimination in the Human Rights Act as the basis for this common law principle (as an alternative to the limited statutory enforcement provision). The legislature subsequently limited such common law reliance upon the Human Rights Act.

Two later case decisions have probably substantially limited the common law, public policy tort theories to challenge discharge. In Doss v. Jamco, 254 Va. 362 (1997), the Virginia Supreme Court eliminated the Human Rights Act as a source of public policy for an exception to at-will employment. Another very recent decision, Dray v. New Market Poultry Products, Inc. (September 17, 1999) may more severely limit Lockhart cases. The court held no common law whistleblower protection existed for an employee fired in retaliation for reporting possible health violations.

III. INTERVIEWING CHECKLIST: TEN QUESTIONS TO HELP DETERMINE IF AN EXCEPTION TO AT-WILL EMPLOYMENT MAY BE PRESENT

1. WHO IS THE EMPLOYER?

Public agency? Federal contractor? Non-profit organization? Franchise or privately-owned firm?

Permanent employees of governmental agencies may have civil service status. There are some procedural protections for employees of governmental contractors, and often there are specific contracts for which people are employed (limiting discharge during the term of the contract, but not a right to continuing employment). Many non-profit agencies (as is true with a number of larger, private firms) have progressive disciplinary procedures, and may provide

opportunity for an informal or formal grievance to the board of directors. There may be opportunity for at least informal advocacy with a private company, for example, when a corporate headquarters may not be aware of an arbitrary personnel practice or local policy of a corporate outlet or franchise operation.

2. WHAT IS THE SIZE OF THE WORKFORCE?

Most often the federal and state statutes that afford some rights to workers have minimum numbers of employees required for coverage.

3. DOES THE EMPLOYEE HAVE ANY LEGALLY-PROTECTED STATUS?

Civil service or union membership? Working on a contract? Over 40? Qualified (and disclosed) handicap or disability?

4. DOES THE EMPLOYER HAVE A PROGRESSIVE DISCIPLINARY PROCESS AND AN OPPORTUNITY TO REQUEST REVIEW OF A DISCHARGE?

The typical disciplinary procedures in employee handbooks and personnel policies provide for one or more oral warnings, then at least one written warning, prior to discharge. More elaborate policies may provide for a “decision - making day” or suspensions, with or without pay, before termination. There might be an opportunity for final review by a human resources director or other supervisor. Some private companies have grievance procedures for non-union workers (often exist when part of the workforce is unionized), and frequently there is some protest process for non-profit organization employees.

5. WAS ANY REASON GIVEN FOR THE DISCHARGE?

It is becoming more common for nothing to be stated in writing as a reason for the discharge, or for the employer to state only very summary, subjective complaints.

6. BEFORE THE DISCHARGE, DID THE EMPLOYEE MAKE A COMPLAINT ABOUT DISCRIMINATION, WORK CONDITIONS OR ACTIVITIES OF THE EMPLOYER TO A LOCAL, STATE OR FEDERAL AGENCY?

There are some explicit “whistleblower” protections for employees in federal and state statutes. Under Virginia common law, there may or may not be a public policy argument to protect an employee against a retaliatory discharge in the absence of a specific anti-retaliation statute.

7. WAS THE DISCHARGE AN INDIVIDUAL TERMINATION, OR PART OF A LARGER REDUCTION-IN-FORCE?

Although rarely applicable locally, there are some protections and relief available for workers displaced by federal trade policies . There may be seniority procedures for larger personnel changes, and issues involving age and demographic impact from staff reductions.

8. DID THE EMPLOYEE QUIT BECAUSE OF UNRESOLVED PROBLEMS AT WORK OR IN RESPONSE TO A RESIGN OR BE FIRED CONFRONTATION?

A constructive discharge claim is at factually more complicated than a firing, but an involuntary resignation can leave open the possibility of a challenge to the working conditions (i.e., hostile work environment).

9. WAS THE EMPLOYEE RECOVERING FROM AN ON THE JOB INJURY, TEMPORARILY DISABLED OR USING/SEEKING PERSONAL OR MEDICAL LEAVE?

“Unexcused” absences are often cited by employers as a reason or the reason for a discharge. Taking intermittent leave to care for a sick relative, or slow recovery from an illness may (even in the absence of formal leave requests, “reasonable accommodation,” etc.) indicate handicap or disability discrimination. Was the employee discharged for unexcused absences for failure to timely submit adequate medical documentation? An employee, with or without health care coverage, may have a defense to the action under state law (§ 40.1-28) even if the federal Family and Medical Leave Act does not apply.

10. HOW LONG WAS THE APPLICANT EMPLOYED, AND DID THE TERMINATION OCCUR SHORTLY BEFORE AN ANNIVERSARY DATE OR VESTING DATE TO RECEIVE ADDITIONAL COMPENSATION OR BENEFITS?

Very often employers require time on the job to be eligible for vacation pay, participation in pension or retirement benefits or receipt of a bonus. The one year mark is significant for possible coverage under the Family and Medical Leave Act and for vacation pay.

IV. POSSIBLE REFERRALS

A. Virginia Employment Commission offices

1. Alexandria office:
5520 Cherokee Avenue
Alexandria, Virginia 22312

813-1300

2. Fairfax office:
13135 Lee Jackson Highway, Suite 340
Fairfax, Virginia 22033
803-1100
3. Woodbridge office:
13370 Minnieville Road
Woodbridge, Virginia 22190
897-0407

B. Federal and state agencies

1. Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20036
(202) 275-7377
2. U.S. Department of Labor
Wage-Hour Field Station -- Falls Church
101 West Broad Street
Falls Church, Virginia 22046
285-2575
3. Virginia Council on Human Rights
1100 E. Bank Street, 12th Floor
Richmond, Virginia 23206
4. Virginia Department of Rights of Virginians with Disabilities
101 N. 14th Street, 17th floor
Richmond, Virginia 23219
(800) 552-3962
5. Virginia Department of Labor
10515 Battleview Parkway
Manassas, Virginia
392-0900

C. Local human rights agencies

1. Alexandria:

Alexandria office of Human Rights
110 N. Royal Street
Alexandria, Virginia 22314
838-6390

2. Arlington:

Arlington County Human Rights Commission
One Courthouse Plaza, Suite 106
2100 Clarendon Boulevard
Arlington, Virginia 22201
228-3929

3. Fairfax:

Fairfax County Human Rights Commission
12000 Government Center Parkway, Suite 318
Fairfax, Virginia 22035
324-3570

4. Prince William:

Prince William County Human Rights Commission
15941 Cardinal Drive, Suite 125
Woodbridge, Virginia 22191
792-4680

V. LEGAL RESOURCES

There are many treatises, newsletters and CLE outlines covering employment termination and discrimination issues generally, as well as individual statutes such as the Family and Medical Leave Act.

Two, good summary treatises for employment discrimination issues (available in the legal services Fairfax office library) are:

Employment Discrimination law and Litigation, M. Rossein (West Group, two volumes).

Disability Discrimination in Employment Law and Litigation, J. Coleman (West Group).

