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## STATE LAW EMPLOYMENT ISSUES

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### 7-1 GRIEVANCES

#### 7-1.01 Requirement

Pursuant to Va. Code § 15.2-1506, every locality with more than fifteen employees must have a grievance procedure that “affords an immediate and fair method” for resolving disputes between the locality and its employees. The required components of such a procedure are set forth in Va. Code § 15.2-1507. The local government attorney and the chief administrative officer must file a certification with the local circuit court clerk stating that the procedure is in compliance. Any amendments to the procedure must also be certified. Va. Code § 15.2-1507(A). Absent a compliant grievance process enacted by the locality, the state grievance procedure applies.<sup>2</sup> Va. Code §§ 2.2-3000 through 2.2-3008. As a general rule, the procedural requirements of § 15.2-1507 are the minimum rights that are afforded local government employees; a locality may expand the rights and employees covered under the grievance process.

#### 7-1.02 Definition of Grievance

A grievance is “a complaint or dispute by an employee relating to his employment.” Va. Code § 15.2-1507(A)(1). The four grievable issues include tangible actions relating to: (1) discipline; (2) discrimination; (3) retaliation; and (4) misapplication of policy. There is a rebuttable presumption that an adverse action taken against the employee within the first six months after being reinstated by a grievance panel is an act of retaliation.<sup>3</sup> *Id.*

There are eight non-grievable issues that embrace the traditional management prerogatives: the establishment and revision of wages or salaries, position classification or general benefits, work activity accepted by the employee as a condition of employment, the contents of established personnel policies, and the hiring, promotion, transfer, assignment, and retention of employees. Va. Code § 15.2-1507(A)(2); *see York Cnty. Sch. Bd. v. Epperson*, 246 Va. 214, 435 S.E.2d 647 (1993); *Tazewell Cnty. Sch. Bd. v. Gillenwater*, 241 Va. 166, 400 S.E.2d 199 (1991).

#### 7-1.03 Employees Covered

Non-probationary full and part-time employees are eligible to file grievances. Va. Code § 15.2-1507(A)(3)(a). At the discretion of the local government, certain classes of high-

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<sup>1</sup> This chapter has been a collaborative effort over the years with contributions by Richard Caplan of Newport News; Cynthia Hudson, formerly with the Hampton City Attorney’s Office; Peter Andreoli, formerly with Fairfax County; Thomas Winn of Woods Rogers; Bayard Harris; Fielding Douthat, Jr.; and Phyllis Katz. The Grievance and *Bowman* Doctrine sections of this chapter were originally authored by S. Craig Brown, then-Charlottesville City Attorney.

<sup>2</sup> Although the General Assembly enacted a law that allows an award of attorney’s fees to a state grievant who substantially prevails on the merits of his or her grievance, the provision does not apply to local governments or their agencies. Va. Code § 2.2-3005.1.

<sup>3</sup> A whistle blower covered by a local grievance procedure may initiate a grievance alleging retaliation for whistle blowing and request relief through that procedure. Va. Code § 2.2-3012.

level managerial employees may be excluded (e.g., chief administrative officer and deputies, department heads, and temporary or seasonal employees). Va. Code § 15.2-1507(A)(3). Assistant county attorneys may also be excluded if they are appointees of an elected group or individuals. See *Ballard v. Page Cnty. Bd. of Sup'vrs*, 56 Va. Cir. 89 (Page Cnty. 2001) (economic development director excluded as agency head); see *City of Virginia Beach v. Hay*, 258 Va. 217, 518 S.E.2d 314 (1999). Local constitutional officers are not required to provide a grievance procedure for their employees; however, by agreement with the governing body of the locality, the constitutional officer may place employees under the locality's grievance procedure and personnel system. Va. Code § 2.2-3008.

Virginia Code § 15.2-1507(A)(4) allows community service boards, redevelopment and housing authorities, and regional authorities to either be covered by the local governing body's grievance procedure, with the consent of the locality, or by its own grievance procedure, which must be consistent with the state grievance procedure. Local departments of social services must adopt either the locality's grievance policy (consent apparently not required) or a policy approved by the State Board of Social Services that is consistent with the state's grievance policy. Va. Code § 63.2-219. Directors of the local departments may not be excluded from the grievance procedure. *Id.* Construing Va. Code § 15.2-1507(A)(4) (§ 62.3-219 is similarly worded), the Virginia Supreme Court held that when an allowed entity opts not to use the locality's procedure, then its grievance procedure is governed by the state requirements and the statutory provisions for local government procedures are not applicable. *Andrews v. Richmond Redev. & Hous. Auth.*, 292 Va. 79, 787 S.E.2d 96 (2016). The Court further held that pursuant to Va. Code § 2.2-3006 under the state procedure the only grounds for an appeal to the circuit court is that the decision was contradictory to law. An assertion that the decision was not consistent with policy is not grounds for appeal. See also *Passaro v. Va. Dep't of State Police*, 67 Va. App. 357, 796 S.E.2d 439 (2017) (appellate review of hearing officer's determination is limited to issues of law; issues of fact, policy, or procedure are outside scope of judicial review).

#### 7-1.04 Questions of Grievability and Access to the Procedure

At any time prior to the panel hearing,<sup>4</sup> either party may ask the chief administrative officer to decide whether a complaint is grievable or whether the employee has access to the procedure. Va. Code § 15.2-1507(A)(9)(a).

If the chief administrative officer determines that the complaint is not grievable or that the employee does not have access to the grievance procedure, the employee may appeal the decision to the circuit court. The decision of the circuit court regarding grievability is final and is not appealable. Va. Code § 15.2-1507(A)(9)(b); *City of Danville v. Franklin*, 234 Va. 275, 361 S.E.2d 634 (1987). There is some divergence in the standard of review that circuit courts apply to the chief administrative officer's grievability or access decision. In *Ford v. City of Richmond*, 40 Va. Cir. 397 (City of Richmond 1996), a probable cause standard was applied to determine if a complaint should be grievable. The courts in *Brito v. City of Norfolk*, 81 Va. Cir. 340 (City of Norfolk 2010), *Drewery v. City of Roanoke*, 63 Va. Cir. 609 (City of Roanoke 2001), and *Asbury v. City of Roanoke*, 63 Va. Cir. 176 (City of Roanoke 2003) concluded that the standard was whether the grievant had sufficiently stated a claim of grievability. Other circuit courts have applied an arbitrary and capricious standard in the review of a determination of non-grievability. See, e.g., *Gonzalez v. Hill*, 105 Va. Cir. 516 (Fairfax Cnty. 2020); *Lasus v. George Mason Univ.*, 29

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<sup>4</sup> In what is probably a drafting error, subsection (a) omits specific reference to a hearing officer even though its heading is "Qualification for panel or administrative hearing."

Va. Cir. 51 (Fairfax Cnty. 1992) (decision under state grievance statute).<sup>5</sup> A complaint can still be grievable even if the remedies sought are beyond the panel's authority to grant. *Brito v. City of Norfolk*, 81 Va. Cir. 340 (City of Norfolk 2010) (alleged inconsistent application of a commercial driver's license requirement).

Challenges to the employee's right to file a grievance are questions of access. An employee does not have access if his position falls under any of the excluded classes (e.g., probationary status) or if the grievance was not initiated within the time period allowed. If an employee voluntarily resigns his position, the right to grieve a termination is forfeited. See section 7-1.04(e).

#### 7-1.04(a) Sufficiency of Facts

A complaint does not become grievable merely because the employee alleges that the action taken was discriminatory, retaliatory, or a form of discipline. See *Krochalis v. City of Roanoke*, 53 Va. Cir. 427 (City of Roanoke 2000). Mere conclusory statements and unsubstantiated opinion do not establish grievability. If an employee can raise facts that suggest a given situation under the applicable personnel rules violated policy, the matter is grievable and would merit a hearing. *Kin v. City of Richmond*, No. CL14-2804 (City of Richmond Cir. Ct. Aug. 5, 2014) (prima facie facts that grievance was for violation of policy); *Ford v. City of Richmond*, 40 Va. Cir. 397 (City of Richmond 1996) (police officers alleging transfers as disciplinary); see also *Anderson v. City of Richmond*, 27 Va. Cir. 358 (City of Richmond 1992) (complaints were not grievable where the employees offered insufficient evidence that their transfers were actually demotions); *Dennison v. Frederick Cnty.*, 16 Va. Cir. 158 (Frederick Cnty. 1989) (the employee must establish a "probability of grievability" before the complaint can go to the grievance panel).

Moreover, the principles governing an appeal from a determination that an employee's complaint is not grievable are the same as those applied in determining whether a complaint's factual allegations are sufficient to state a claim upon which relief can be granted. *Brito v. City of Norfolk*, 81 Va. Cir. 340 (City of Norfolk 2010) (citing *Asbury v. City of Roanoke*, 63 Va. Cir. 176 (City of Roanoke 2003)). That is, assertions of fact must be treated as true. The employee must be given the benefit of all inferences that can be fairly drawn from the facts alleged and the truth of the assertions of fact that can be fairly and justly inferred from the complaint must be assumed. *Id.*

#### 7-1.04(b) Written Counseling

Written "counseling" placed in the employee's file was grievable as a disciplinary measure when it was the cause of a lower performance evaluation, despite the city's policy that such counseling was not grievable. *Randolph v. City of Richmond*, 66 Va. Cir. 102 (City of Richmond 2004). Furthermore, a written warning can be grieved as discipline when it is likely to be a factor in depriving the employee of an employment benefit in the future. *Gillispie v. Va. Dept. of Environmental Quality*, 67 Va. Cir. 580 (City of Richmond 2004).

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<sup>5</sup> In particular, the Fairfax County Circuit Court has fairly consistently applied the arbitrary and capricious test in reviewing grievability determinations.

The state government and local government grievance statutes are frequently confused, in large part because when it was first enacted and until the enactment of SB 777 in 1991, the local government statute piggy-backed on the state government statute. If the locality has adopted a grievance procedure and certified it in accordance with Va. Code § 15.2-1507, the state government grievance procedure has no application to a grievance by a local employee. See *Andrews v. Richmond Redev. & Hous. Auth.*, 292 Va. 79, 787 S.E.2d 96 (2016) (noting statutory schemes for grievances have "divergent features," most significantly with regard to the right to judicial review). However, while there are significant differences between the two statutes, both statutes in many instances use the same or similar language in their provisions. For a variety of reasons, one is more likely to find a reported case under the state statute.

These cases should not foreclose an argument that counseling memos are not grievable. It is up to the locality to define what constitutes actual or formal "disciplinary action" under local ordinances and regulations. The state statute provides that a grievance panel or hearing officer has no authority to "formulate policies or procedures or to alter existing policies or procedures" of a locality. See Va. Code § 15.2-1507(A)(10)(b)(1). The court in *Randolph v. City of Richmond*, 66 Va. Cir. 102 (City of Richmond 2004) essentially did so, and rewrote city policy in defining what constitutes actual disciplinary action by applying definitions from outside references (dictionaries) despite the lack of ambiguity in the city's personnel policy. Virginia Code § 15.2-1507(A)(1) identifies disciplinary actions as "including" dismissals, disciplinary demotions, and suspensions. There is no mention of counseling memos, although localities are free to include them and written reprimands if they wish. In *Gillispie v. Virginia Department of Environmental Quality*, 67 Va. Cir. 580 (City of Richmond 2004), the court went a step further and held that a supervisor's email to an employee was grievable despite the constructive purpose served by it. See also Va. Code § 9.1-506 (informal counseling distinguished from disciplinary action in the Law Enforcement Officers Procedural Guarantee Act).

Counseling memos fulfill an important function that benefits both the employer and employee short of taking formal disciplinary action. Documenting substandard performance or conduct achieves a number of objectives, including notifying the employee of a problem, maintaining a written record of the underlying facts, assisting in the later completion of employee evaluations, and establishing a basis for imposing progressive discipline for future violations. Under the *Randolph* case, *supra*, every counseling memo that is "linked" to or incorporated in an employee evaluation would be grievable if pay or benefits are or may be affected. Such a requirement may chill an employer's need to notify employees of substandard performance or conduct when disciplinary action is not yet necessary. Also, employee evaluations serve many purposes, and it is not surprising that the contents could and do affect future promotions, pay increases, and the like. However, such matters concern the internal management of personnel. Employee evaluations are generally not grievable, unless a misapplication of policy is alleged. The underlying due process rights which are incorporated into state and local grievance procedures are not designed or required to protect against every governmental action affecting an employee's pay or benefits in an insubstantial way.

#### **7-1.04(c) Unsatisfactory Performance Evaluation**

An unsatisfactory performance evaluation was not grievable absent facts to show that it was based on improper considerations. *McClung v. City of Roanoke*, 50 Va. Cir. 269 (City of Roanoke 1999); *Duke v. Commonwealth, Dept. of Motor Vehicles*, 50 Va. Cir. 413 (City of Richmond 1999) (merely disagreeing with basis of evaluation does not make it grievable); *but see Asbury v. City of Roanoke*, 63 Va. Cir. 176 (City of Roanoke 2003)).

#### **7-1.04(d) Performance Demotions**

Performance demotions are expressly grievable; it is therefore immaterial that an employee selected demotion from a list of options. *Deale v. City of Richmond*, 51 Va. Cir. 351 (City of Richmond 2000).

#### **7-1.04(e) Resignation**

While an employee's voluntary resignation is not grievable, a resignation procured by duress is tantamount to a discharge, and therefore grievable. *Rust v. City of Winchester*, 47 Va. Cir. 252 (City of Winchester 1998). A disciplinary sanction imposed post-resignation is also grievable. *In re Grievance of Williams*, 62 Va. Cir. 383 (Arlington Cnty. 2003). However, in *Abdo v. O'Neill*, 47 Va. Cir. 307 (Fairfax Cnty. 1998), the refusal to allow an employee to withdraw a voluntary resignation was not grievable. If the resignation is submitted voluntarily, the right to procedural protections is waived. *Morrell v. Stone*, 638 F. Supp. 163 (W.D. Va. 1986). However, a termination may be characterized as a voluntary resignation

only if given with full knowledge of the procedural rights available to the employee and given without threat of discharge. *Himmelbrand v. Harrison*, 484 F. Supp. 803 (W.D. Va. 1980).

#### **7-1.04(f) Misapplication of Policy**

In *Runnels v. O'Neill*, 46 Va. Cir. 208 (Fairfax Cnty. 1998), the court held that a complaint regarding the failure to promote is grievable if a good-faith assertion is made that presents an objectively reasonable allegation of a violation of applicable policies. In *Daniels v. City of Newport News*, 52 Va. Cir. 75 (City of Newport News 2000), the court held that the grievant need not show a widespread violation of established policy. Instead, a single instance of a different application of policy was sufficient to make the failure to promote grievable. See also *Hatchett v. City of Richmond*, 63 Va. Cir. 554 (City of Richmond 2004) (change in evaluation three months after initial evaluation given is grievable as possible misapplication of evaluation process). When employees won competitive promotions and the announced promotions were postponed due only to budget cuts, employees were entitled to grieve as an unfair promotion policy when the city decided to begin a new promotion process and not promote based on the prior selection. *Creecy v. City of Richmond*, 42 Va. Cir. 499 (City of Richmond 1997); cf. *Brandon v. City of Richmond*, 59 Va. Cir. 374 (City of Richmond 2002) (cancellation of promotion procedure not grievable because procedure not sufficiently established).

#### **7-1.04(g) Disability**

The alleged failure to make proper accommodation for a disability is not grievable, *Scammell v. Old Dominion Univ.*, 45 Va. Cir. 78 (City of Norfolk 1997), though this holding may no longer be valid given amendments to the Virginia Human Rights Act requiring reasonable accommodation for a disability. See section 7-3.03; see also *November v. City of Richmond*, 66 Va. Cir. 326 (City of Richmond 2005) (failure to provide employee with a reasonable accommodation given a medical condition is grievable as an application of policy unfairly applied). Note also that localities must, in their employment hiring policies and practices, "take into consideration or give preference to" an individual's status as a person with a disability, provided that the person meets all of the requirements of the position. Va. Code § 15.2-1509.

#### **7-1.04(h) Failure to Re-appoint**

Failure to reappoint the deputy of a constitutional officer at expiration of term was not a termination and was therefore not grievable. *Garrett v. Johnson*, 80 Va. Cir. 357 (City of Roanoke 2010); *Williams v. McDonald*, 69 F. Supp. 2d 795 (E.D. Va. 1999).

#### **7-1.04(i) Procedural Issues**

A locality's technical violation of personnel rules was not a grievable issue because the employee had no legal redress even if the violation was proved. *Jones v. City of Richmond*, 42 Va. Cir. 342 (City of Richmond 1997); see also *Pierce v. Cnty. of Chesterfield*, 54 Va. Cir. 25 (Chesterfield Cnty. 2000) (procedural failings regarding initial grievance over transfer were timely cured, and thus transfer was not grievable); *Drewery v. City of Roanoke*, 63 Va. Cir. 609 (City of Roanoke 2001) (grievable issue "accrued" when applicant who did not initially meet promotion eligibility requirements was promoted, not when applicant was added to list as eligible for promotion).

#### **7-1.04(j) Minimum Rights**

The grievance procedure statute outlines the minimum rights that eligible employees must be provided. It expressly permits the locality to provide greater rights to its employees, so long as they do not violate the general law or the public policy of the Commonwealth. Va. Code § 15.2-1507(A)(5)(c).



When drafting or reviewing a locality's personnel policies, counsel should, among other things, ensure that the policies are in compliance with all statutory requirements, state and federal.<sup>6</sup>

### 7-1.05 General Procedural Requirements

A grievance procedure can have no more than four steps for airing complaints at successively higher levels of local government management, followed by the panel hearing or a hearing before an administrative hearing officer.<sup>7</sup> Va. Code § 15.2-1507(A)(5)(a). The first step is an informal discussion with the immediate supervisor. For all subsequent steps, the grievance must be reduced to writing, and face-to-face meetings between the employee and management are required. Witnesses are allowed at each management step meeting and at the final hearing. At the final management step, and at a hearing before a panel or administrative hearing officer, the employee may be represented.<sup>8</sup>

The procedure must also provide specific time limitations for each party at each stage of the procedure. Va. Code § 15.2-1507(A)(6). Objections to the timeliness of the initiation of grievance should be made at the earliest possible stage so that the objection is not waived. See *In re Ashley*, 25 Va. Cir. 359 (Fairfax Cnty. 1991) (an objection to the timeliness of a grievance was waived when it was not raised until the final step of the procedure). Reliance on a locality's written policy that corrective counseling is not discipline and, therefore, not grievable does not relieve an employee from timely filing a grievance. *Hatchett v. City of Richmond*, 63 Va. Cir. 554 (City of Richmond 2004). When an employee agreed to an extension of time for the setting of a hearing, then the requirement that the hearing be held within thirty days of filing is waived, and there is no requirement that a hearing be set within thirty days of when the extended time period is over. When the locality's grievance procedure provides that a written decision must be issued within ten days, the decision must be received by the employee within those ten days. *Funn v. City of Richmond*, No. LS-187-4 (City of Richmond Cir. Ct., Mar. 22, 2004). The parties can agree to extend the time period for the convening of the hearing. *Davis v. City of Richmond*, No. CL06-670-1 (City of Richmond Cir. Ct., Mar. 21, 2006).

The procedural time periods prescribed in Va. Code § 15.2-1507(A)(6) are "substantial procedural requirements" that may be extended by mutual agreement. Should a violation occur, the party in non-compliance must be notified in writing of the non-compliance and given an opportunity to cure. Va. Code § 15.2-1507(A)(7)(a); see *Murphy v. Norfolk Cmty. Servs. Bd.*, 260 Va. 334, 533 S.E.2d 922 (2000) (employee cured

<sup>6</sup> Most, if not all, Virginia localities are subject to the requirements of the federal Americans with Disabilities Act, which requires reasonable accommodation. See Chapter 6, Federal Law Employment Issues, section 6-5.05(e).

<sup>7</sup> There is an apparent conflict between Va. Code § 15.2-1507(A)(5)(a), which implies that a hearing officer may be used only with the agreement of both parties, and Va. Code § 15.2-1507(A)(10)(a), which indicates that the locality is to specify in its grievance procedure whether its final hearings are before either a panel or a hearing officer, with no ability to switch between the two, or for a grievant to object to the use of a hearing officer if that is the method elected by the locality. The author is not aware of any case law or Attorney General's opinion on this matter, but the local government attorney should be cognizant of this issue and consult the legislative history of the statute, HB 1678, 2009 Va. Acts ch. 736, if the issue arises.

<sup>8</sup> In *Horner v. Department of Mental Health*, 268 Va. 187, 597 S.E.2d 202 (2004), *overruled on other grounds*, *Woolford v. Va. Dep't of Taxation*, 294 Va. 377, 806 S.E.2d 398 (2017), the Supreme Court held that statutory language applicable to the state grievance procedure ("[e]ach level of management review shall have the authority to provide the employee with a remedy") meant that the first-level decision, if accepted by the employee, was not reviewable by higher management levels. Virginia Code § 2.2-3003(D) was subsequently amended and now provides that each management level decision is subject to the agency head's approval. As Va. Code § 15.2-1507 was not amended, *Horner* may be persuasive to a court.

non-compliance when he delivered the required submission within one day of notice of non-compliance); see also *Manolis v. Griffin*, 58 Va. Cir. 58 (Fairfax Cnty. 2001) (untimeliness cured); *Dobbins v. Henrico Cnty.*, 49 Va. Cir. 372 (Henrico Cnty. 1999) (although paperwork was not correctly completed before time period expired, grievance was allowed because grievant had reasonable belief that grievant had done what was necessary). Time periods are not applicable to the panel when it failed to comply with procedural requirements. Va. Code § 15.2-1507(A)(7); *Fitzgerald v. Fairfax Cnty. Civil Serv. Comm'n*, 65 Va. Cir. 35 (Fairfax Cnty. 2004).

The chief administrative officer determines compliance issues. Compliance determinations made by the chief administrative officer are subject to judicial review by filing a petition with the circuit court within thirty days of the compliance determination. Va. Code § 15.2-1507(A)(7)(b); see *Fitzgerald v. Fairfax Cnty. Civil Serv. Comm'n*, 60 Va. Cir. 395 (Fairfax Cnty. 2002) (when procedure was not followed, the party must first seek compliance determination from chief administrative officer). The statutory deadline cannot be set aside on the ground that there was a valid excuse for being noncompliant. *Alexandria Redev. & Hous. Auth. v. Walker*, 290 Va. 150, 772 S.E.2d 297 (2015).

### 7-1.06 Rules for the Hearing

Except in the case of localities having a grandfathered panel composition under Va. Code § 15.2-1507(A)(10)(a)(2), the final step of the grievance procedure is a hearing before a three-member panel or administrative hearing officer.<sup>9</sup> In the case of a panel, one member is selected by the grievant, one member is selected by the locality, and a third member is chosen by the first two. If agreement cannot be reached on the third member, the selection is made by the chief judge of the local circuit court. The third member is the chair of the panel when selected from an impartial source. Va. Code § 15.2-1507(A)(10)(a)(4).

The local government is required to adopt rules for the conduct of the panel hearing. Virginia Code § 15.2-1507(A)(10)(b) lists eight provisions that must be a part of the hearing rules. The ninth sub-section expressly authorizes the locality to adopt such other provisions that may facilitate fair and expeditious hearings, with the understanding that grievance hearings are not intended to be conducted like court proceedings, and that the rules of evidence do not necessarily apply. For example, the burden of proof is not included as a required element, so a locality may provide in its rules that the employee has the burden of proof.

### 7-1.07 Remedies

Virginia Code § 15.2-1507 does not enumerate the remedies that a panel or hearing officer may grant. A panel or hearing officer can uphold or reverse the action of the locality. It is not clear, however, whether it can modify the action taken, or order any type of affirmative relief. In *Jones v. Carter*, 234 Va. 621, 363 S.E.2d 921 (1988), the hearing panel ordered that the employee be promoted with retroactive back pay. The Court held that the power to promote could not be inferred in the face of the "conspicuous silence" of the statute and the Department of Employee Relations Counselors Grievance Procedure for State Employees on the remedial powers of grievance panels. Furthermore, the determination of whether a grievance panel has the authority to promote is properly a legislative matter for the General Assembly and the state officials charged with the administration of the grievance procedure. *Id.* at 625-26;<sup>10</sup> see also *Va. Dep't of Taxation v. Daughtry*, 250 Va. 542, 463 S.E.2d 847

<sup>9</sup> As noted in section 7-1.05, there is an apparent conflict between Va. Code §§ 15.2-1507(A)(5)(a) and 15.2-1507(A)(10)(a).

<sup>10</sup> *Jones* was decided prior to the extensive revision of the statutes regarding the grievance procedure for local government employees made by 1991 Va. Acts ch. 661 (SB 777). At the time *Jones* was decided, the statutes dealing with local governments' grievance procedures (former Va.

(1995) (a grievance panel had no authority to order the transfer of an employee who had been terminated). The Attorney General has determined that state grievance procedure panels may not award damages or attorneys' fees to a successful grievant. 1978-1979 Op. Va. Att'y Gen. 121.

While the local government employees' grievance procedure statute, Va. Code § 15.2-1507, is fairly detailed, it is not a grievance procedure in and of itself. The statute mandates that a local government procedure must include certain provisions, while it permits local governments to add others. Even in the cases where the Code requires a specific provision, it leaves it up to the local government to fill in some of the blanks. See, e.g., Va. Code § 15.2-1507(A)(5) and (A)(6) (general requirements of procedure; time limits).

For example, the locality must grant access to its "nonprobationary" "permanent" full-time and part-time employees. Va. Code § 15.2-1507(A)(3)(a). However, the statute does not define what a non-probationary permanent employee is. The statute permits the locality to exclude certain categories of employees, such as temporary, limited term, and seasonal employees, from access to its grievance procedure. Va. Code § 15.2-1507(A)(3)(a)(1)-(7). However, the statute also permits the locality to allow employees in any or all of those categories to have access to its procedure. Va. Code § 15.2-1507(A)(3)(b).

More important, the statute itself expressly provides that "[n]othing contained in this section shall prohibit a local government from granting its employees rights greater than those contained herein, provided such grant does not exceed or violate the general law or public policy of the Commonwealth." Va. Code § 15.2-1507(A)(5)(c).

Following the decision in *Jones*, a number of localities added specific remedies provisions to their grievance procedures describing the types of remedies the panel might apply to different grievances. For example, in the case of disciplinary actions, a local grievance procedure may provide that in addition to either affirming or reversing the discipline that had been imposed, the panel may impose a lesser discipline. In the absence of such a specific provision, the panel would be limited to either affirming or reversing the management decision.<sup>11</sup>

### 7-1.08 The Effect of the Decision

The decision of the hearing panel or officer is "final and binding and shall be consistent with provisions of law and written policy." Va. Code § 15.2-1507(A)(10)(a)(6).<sup>12</sup> The question of

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Code §§ 15.1-7.2 and 15.1-7.2) required them to adopt a grievance that "fully and closely complied" with the definition of a grievance and the minimum provisions of the state grievance procedure. Local governments had to submit their grievance procedures to the state Department of Employee Relations Counselors for review and approval. Disputes between local government and the Department over their procedures were a major factor leading to the introduction of SB 777. As a result, local government grievance procedures have their own separate statutory basis.

<sup>11</sup> The power to either affirm or reverse the management decision is implicit in the requirement to have a grievance procedure that provides a final and binding decision concerning a dispute between the employee and the employer locality. As a practical matter, in many disciplinary grievances, the issue for the panel ultimately turns out to be not whether the employee should be disciplined at all but whether the "punishment" imposed "fits the crime." Where its only option is to affirm or reverse the imposed discipline, a panel may end up reversing the discipline imposed, with the result that the employee ends up with no discipline at all for his or her misconduct, simply because it believes the discipline was too harsh.

<sup>12</sup> The state grievance procedure statute provides that a hearing officer's decision is "final and binding if consistent with law and policy." Va. Code § 2.2-3005.1(C)(iii). In *Virginia Polytechnic*



whether the relief granted is consistent with written policy is determined by the chief administrative officer of the local government. Va. Code § 15.2-1507(A)(10)(a)(7).<sup>13</sup> There is no right of appeal from such a determination. *Fitzgerald v. Fairfax Cnty., Civil Serv. Comm'n*, 65 Va. Cir. 35 (Fairfax Cnty. 2004); see also *In re Spinosa*, 69 Va. Cir. 114 (City of Richmond 2005) (when the panel's decision contravened written policy as determined by the chief administrative officer, the panel's decision was contrary to law).

Either party may petition the circuit court for an order directing the implementation of the decision. Va. Code § 15.2-1507(A)(11). If the decision is within the authority of the panel or hearing officer and otherwise consistent with law and policy, it may not be ignored and treated as a mere recommendation. *Angle v. Overton*, 235 Va. 103, 365 S.E.2d 758 (1988).<sup>14</sup>

In *Larock v. City of Norfolk*, 301 Va. 100, 872 S.E.2d 432 (2022), the Virginia Supreme Court held that the circuit court exceeded its authority when it refused to enforce a grievance panel's decision to reinstate a city employee. The employee had been fired for allegedly forging a signature. She filed a grievance and, following a hearing, the panel decided to reinstate her and award her backpay. After the hearing but before the panel's decision was announced, the city learned that the employee had, after her termination, used her credentials to log into the city's secure computer database on five occasions and access confidential files. The city manager then refused to implement the panel's decision, reasoning that the employee's potentially felonious actions would be grounds for termination or other serious disciplinary action, and were incompatible with reinstatement. The circuit court agreed with the city manager, and also found that the employee had violated the clean hands doctrine. The Supreme Court reversed, holding that the circuit court's authority was limited to implementing or refusing to implement the panel's decision; it did not have authority to consider the grievance *de novo* or to modify the panel's decision. The Court further held that the lower court had erred in invoking its equitable powers to apply the clean hands doctrine. The Court remanded the case with directions for the circuit court to enter an order consistent with the panel's decision.

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*Institute v. Quesenberry*, 277 Va. 420, 674 S.E.2d 854 (2009), the Supreme Court held that an appellee has the burden of identifying an applicable constitutional provision, statute, regulation, or state court precedent that the hearing officer contradicted. See also *Va. Dep't of Alcoholic Beverage Control v. Tyson*, 63 Va. App. 417, 758 S.E.2d 89 (2014) (employee challenged the pre-termination procedural process, not the termination itself; circuit court had no authority to review *de novo* the facts in the agency record; court of appeals found no due process rights of employee were violated); *Martin v. Univ. of Va. Med. Ctr.*, 91 Va. Cir. 424 (City of Charlottesville 2015) (although couched as a violation of due process, the substance of the claims challenged factual findings of the hearing officer and thus were beyond judicial review).

In *Andrews v. Richmond Redevelopment & Housing Authority*, 292 Va. 79, 787 S.E.2d 96 (2016), the Supreme Court held that, pursuant to Va. Code § 2.2-3006, the only grounds for an appeal to the circuit court is that the decision was contradictory to law; an assertion that the decision was not consistent with policy is not grounds for appeal.

<sup>13</sup> In dicta in *Andrews v. Richmond Redevelopment & Housing Authority*, 292 Va. 79, 787 S.E.2d 96 (2016), the Supreme Court stated that if a housing authority has opted to participate in the locality's grievance procedure, then the authority relinquishes to the locality the right to render the ultimate interpretation of the authority's personnel policies. Thus, the chief administrative officer of the locality, not the authority's executive director, would determine if the decision was consistent with policy.

<sup>14</sup> In *Angle*, the challenge was brought by a deputy sheriff. The Court did not address the issue of whether the deputy sheriff should have been given access to the grievance procedure. In *Jenkins v. Weatherholtz*, 719 F. Supp. 468 (W.D. Va. 1989), the court reiterated prior rulings that deputy sheriffs have no property interest in their continued employment and are therefore, not entitled to constitutional due process protections.

When the panel or hearing officer reverses the termination of an employee and orders reinstatement, the employee must be returned to the exact same position. See *Zicca v. City of Hampton*, 240 Va. 468, 397 S.E.2d 882 (1990) (the reinstatement to the same position for one day and then transfer to a different job at the same rate of pay was contrary to the decision of the hearing panel). The one-day reinstatement was, in the opinion of the Court, merely a "subterfuge" to "circumvent the panel's binding decision." *Id.* The assignment of a grievant to a position comparable in pay but not comparable with regard to duties, responsibilities, and opportunities for professional training and advancement failed to make the grievant whole, and was thus a failure to implement the hearing officer's decision. *Va. Dep't of Corrections v. Estep*, 281 Va. 660, 710 S.E.2d 95 (2011).

If, however, an employee is reinstated, the employer may transfer or reassign duties, as long as such actions were not done for a retaliatory purpose. See *Va. Dep't of Taxation v. Daughtry*, 250 Va. 542, 463 S.E.2d 847 (1995) and *Gustafson v. Va. Dep't of Health*, 61 Va. Cir. 544 (Loudoun Cnty. 1999).<sup>15</sup>

The decision of a grievance panel or hearing officer is "final and binding." Va. Code §§ 15.2-1507(A)(10)(a)(6) and 15.2-1507(A)(10)(b)(7). Unsuccessful grievants have on occasion turned to the federal courts in an effort to circumvent grievance panel decisions. Under federal law, courts are required to give a state court or administrative decision preclusive effect if the litigant had a full and fair opportunity to litigate his claims. Federal courts have given preclusive effect to grievance decisions in actions brought under 42 U.S.C. § 1983. *Layne v. Campbell Cnty. Dep't of Social Services*, 939 F.2d 217 (4th Cir. 1991). However, federal courts have not given preclusive effect to the conclusions of the panel in cases brought under Title VII of the Civil Rights Act of 1964. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009); *Harris v. City of Virginia Beach*, 110 F.3d 59 (4th Cir. 1997); *Rao v. Cnty. of Fairfax*, 108 F.3d 42 (4th Cir. 1997).

### 7-1.09 The Role of the Local Government Attorney

The local government employee grievance procedure statute expressly prohibits the county, city, or town attorney and the Commonwealth Attorney from deciding the question of grievability. Va. Code § 15.2-1507(A)(9)(a). On the other hand, at least one circuit court has held that the statute does not prohibit the chief administrative officer of the locality, who determines the issues of grievability of the employee's complaint and his or her right to access the grievance procedure, from seeking legal advice on the issue of grievability, or the local government attorney from providing it. *McClung v. City of Roanoke*, 50 Va. Cir. 269 (City of Roanoke 1999).

At the hearing, each party is entitled to be represented by legal counsel. Va. Code § 15.2-1507(A)(10)(a)(5). The locality may also be represented by an attorney at the final management stage, but only if the employee is represented by legal counsel. Va. Code § 15.2-1507(A)(8)(c).

Generally, there is no conflict of interest for a local government attorney to represent an agency or department in a grievance hearing, while another attorney from the same office advises the panel on the adoption of personnel rules. *Legal Ethics Opinion #1683* (Sept. 23, 1996). Although it may be the better practice to not have one member of a local government attorney's office appear before the panel in a partisan capacity while

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<sup>15</sup> As noted in fn. 5, because of comparable language in both statutes, the courts will look to decisions under both statutes. The potentially draconian rule in *Zicca*, a local government case, was softened in subsequent cases by the Supreme Court, an example being *Daughtry*, a state employment case. A key distinction between *Zicca* and *Daughtry* is that in the latter, the employer articulated specific concrete reasons for putting the employee in a comparable, but different position.

another member of the same office sits with and advises the panel, the Supreme Court of Virginia held in an unreported opinion that such representation does not violate due process absent a sufficient showing of bias or improper conduct. *City of Roanoke v. Early*, Rec. No. 850948 (Va. June 17, 1988) (unpubl.), reversing 4 Va. Cir. 284 (City of Roanoke 1985); see *Hladys v. Commonwealth*, 235 Va. 145, 366 S.E.2d 98 (1988) (Attorney General's office may serve in both adjudicative and prosecutorial functions in the absence of a showing of bias or improper conduct); see also *Breitling v. Solenberger*, 585 F. Supp. 289 (W.D. Va. 1984) (teacher not denied due process when same attorney who represented superintendent's case for dismissal acted as advisor to school board itself).

### **7-1.10 Personnel System; Uniform Pay Plan and Position Classification Plan**

In addition to requiring a grievance procedure, Va. Code § 15.2-1506 requires governing bodies of localities to establish a personnel system, including a uniform pay plan and a position classification plan. None of these terms is expressly defined in Va. Code § 15.2-1506. Position classification generally refers to the grouping of positions performing similar duties and having the same or similar qualifications into a job class. In some cases, there may also be class series in which the classes distinguish between increasingly significant duties and responsibilities. A uniform pay plan generally assigns a pay range to each job class, and the salaries paid to employees are determined by rules, rather than by individual decisions. One familiar example is a grade and step system.

City and town (and in some cases county) charters, as well as the statutes applicable to the different forms of city and county governments, may impose additional requirements. For example, the urban executive county form of government requires that the governing body establish a schedule of compensation for employees that provides equitable compensation and recognition of length of service and merit. Va. Code § 15.2-845. In reviewing a locality's personnel policies, local government counsel should review all such applicable provisions to ensure compliance.

### **7-1.11 Public Safety Employees Procedural Guarantees Acts**

The General Assembly provides public safety employees with procedural rights as an alternative to those provided in the grievance procedure. Under the Law Enforcement Officer's Procedural Guarantee Act, Va. Code § 9.1-500 et seq., a law enforcement officer (the police chief and sheriff's departments are excluded) who may be subject to dismissal, demotion, suspension, or transfer for punitive reasons is entitled to certain minimum procedural rights with respect to the investigation of charges and resulting hearing. Among the rights afforded the officer are the right to be provided written charges, and the right to respond to such charges. The officer must also be informed, in writing, of the right to proceed under the grievance procedure in lieu of proceeding to the hearing provided under the Act. Va. Code § 9.1-502(A)(4). See *In re Grievance of Williams*, 62 Va. Cir. 383 (Arlington Cnty. 2003) (notice of the right to grieve must be provided).

There are two significant distinctions between the two hearings. The first distinction is the composition of the hearing panel (*cf.* Va. Code §§ 9.1-504(B) and § 15.2-1507(A)(10)(a)(1)). The second is that grievance panel decisions are binding, while panel decisions under Va. Code § 9.1-504(D) are only advisory. Absent evidence that the chief of police acted in an arbitrary or capricious manner in rejecting the recommendation of the panel, the decision does not violate due process rights. *Kersey v. Shipley*, 673 F.2d 730 (4th Cir. 1982). There is no right to a pre-termination hearing. The Act is designed to minimize arbitrary governmental decision-making and when the rights provided under the

Act are afforded to a law enforcement officer, the constitutional due process protections are met.<sup>16</sup>

A law enforcement officer must elect between using the Act or the locality's grievance procedure; choosing one forecloses the other. See Va. Code §§ 15.2-1507(A)(3)(a)(7); 9.1-502(B); *Supinger v. Va.*, No. 6:15cv17 (W.D. Va. July 20, 2016), *aff'd*, No. 16-1932 (4th Cir. Oct. 25, 2017).

Under the Firefighters and Emergency Medical Technicians Procedural Guarantees Act, Va. Code § 9.1-300 et seq., procedural guarantees are provided for firefighters and emergency medical services personnel who are employed by a fire, emergency medical services agency, or public safety department. The procedural guarantees relate exclusively to the conducting of an interrogation that could lead to dismissal, demotion, or suspension for punitive reasons. Va. Code § 9.1-301. There is no procedural right to a hearing under this Act. The employee may have an "observer" of his choice present during the interrogation, but the observer may not participate or represent the employee and may not be involved in the investigation. The observer must also be a current or retired member of the department.

The application of these provisions is mandatory when the appropriate circumstances are present. Va. Code § 9.1-301 ("The provisions of this section shall apply whenever a firefighter or emergency medical services personnel are subjected to an interrogation that could lead to dismissal, demotion, or suspension for punitive reasons.")

## 7-2 NEGLIGENCE HIRING, SUPERVISION, AND RETENTION

### 7-2.01 Background

Tort actions<sup>17</sup> in which an employer is alleged to be responsible for the acts of its employees have received a great deal of attention in the Virginia courts. Outgrowths of the doctrine of respondeat superior, claims of negligent hiring, negligent retention, and negligent supervision are becoming more commonplace and have been actively litigated in Virginia's courts. One case in which the Supreme Court of Virginia analyzed employer liability is *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 831 S.E.2d 460 (2019). In this case, the plaintiffs pled multiple theories of employer liability arising from a church employee's sexual abuse of a minor. On appeal from the trial court's grant of demurrer, the appellate court held that only the negligence claims that were based upon a special-relationship duty of the church to protect the minor from abuse by the church employee and the respondeat superior claims were legally sufficient.

Under the doctrine of "respondeat superior"—literally, "let the master answer"—an employer is liable for the tortious acts of its employee if the employee was performing his employer's business and acting within the scope of his employment when the tortious acts were committed. See *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 831 S.E.2d 460 (2019); *Kensington Assocs. v. West*, 234 Va. 430, 362 S.E.2d 900 (1987). The tort is only recognized against the employer, and not against individual supervisors

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<sup>16</sup> The implications in *Kersey* were expressly overruled in *Riccio v. County of Fairfax*, 907 F.2d 1459 (4th Cir. 1990). The court held that a violation of a state procedural statute (Law Enforcement Officers Procedural Guarantee Act) does not necessarily violate federal constitutional standards. *Id.* (due process is to be measured against a federal standard and is not defined by a state created procedure); see also *Va. Dep't of Alcoholic Bev. Control v. Tyson*, 63 Va. App. 417, 758 S.E.2d 89 (2014) (procedural due process not violated when state grievance statute followed).

<sup>17</sup> In addition to the torts of negligent hiring, supervision, and retention, defamation actions are increasingly being brought in an employment termination context. For an excellent overview of this area of the law, which is beyond the scope of this chapter, see the conference handouts from the [2017 LGA fall conference](#), available on the LGA [website](#).

or managers. *Matthews v. Fairfax Trucking Inc.*, No. 1:14cv1219 (E.D. Va. Apr. 13, 2015). The Supreme Court of Virginia has issued several decisions involving the doctrine. See *Giant, Inc. v. Enger*, 257 Va. 513, 515 S.E.2d 111 (1999) (reversing jury verdict in favor of an elderly customer hit by a supermarket clerk and explaining that the test for employer liability is not whether the tortious act itself is a transaction within the ordinary course of the employer's business but whether the service itself, in which the tortious act was done, was within the ordinary course of such business); *Gina Chin & Assocs. v. First Union Bank*, 260 Va. 533, 537 S.E.2d 573 (2000) (applying *Giant* and observing in a forgery case that the employee's improper motive is a relevant factor usually to be determined by the jury); *Majorana v. Crown Central Petroleum Corp.*, 260 Va. 521, 539 S.E.2d 426 (2000) (a presumption of liability arises if the employer-employee relationship is established at the time of the tort, and the issue will be for the jury in most instances). Following these cases and utilizing a totality of the circumstances test, federal district courts in Virginia have concluded that an employee's embezzlement was within the scope of employment, *Gulf Underwriters Insurance Co. v. KSI Services, Inc.*, 416 F. Supp. 2d 417 (E.D. Va. 2006), *aff'd*, No. 06-1362 (4th Cir. May 1, 2007), and refused to dismiss a sheriff at the motion to dismiss stage for an alleged sexual assault of a detainee by a deputy during transport, *Oakes v. Patterson*, No. 7:13cv552 (W.D. Va. Apr. 17, 2014); *cf. Clehm v. BAE Sys. Ordnance Sys. Inc.*, 291 F. Supp. 3d 775 (W.D. Va. 2017) (no respondeat superior liability for assault on co-worker when only work relation was that it occurred on the employer's premises), *aff'd*, 786 Fed. Appx. 391 (4th Cir. 2019). The Fourth Circuit, relying on Virginia Supreme Court cases, held that a janitor who attacked a student was acting outside of the scope of his employment and thus, there was no respondeat superior liability. *Blair v. Defender Servs.*, 386 F.3d 623 (4th Cir. 2004).<sup>18</sup>

The Supreme Court of Virginia opined in *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391 (1988) that "negligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others." Negligent retention is distinct from a negligent hiring or a negligent supervision claim. In the negligent retention context, the plaintiff argues that the employer knew of the offender's prior bad acts but kept the offender in his position anyway, thus unreasonably exposing others to harm. By comparison, negligent supervision claims allege that the employer negligently monitored the offender's activities. See *id.*

Courts are split as to whether physical injury is a necessary element of negligent hiring and negligent retention claims. *Ingleston v. Burlington Med. Supplies Inc.*, 141 F. Supp. 3d 579 (E.D. Va. 2015) (serious and significant physical harm required); *Jones v. Kroger LP*, 80 F. Supp. 3d 709 (W.D. Va. 2015) (emotional injuries do not support a negligent hiring or retention claim); *Yasser v. Coleman*, No. 1:12cv560 (E.D. Va. Aug. 6, 2013) (physical injury required in a negligent retention claim; no negligent hiring claim when injury is financial); *Investors Title Ins. Co. v. Lawson*, 68 Va. Cir. 337 (Henry Cnty. 2005) (physical injury required). *Contra, Flanary v. Roanoke Valley SPCA*, 53 Va. Cir. 134 (City of Roanoke 2000) (physical injury not required in a negligent retention claim); *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429 (Fairfax Cnty. 1998) (negligent hiring does not require physical injury).

### 7-2.02 Negligent Hiring

The tort of negligent hiring has been recognized for some time in Virginia. See, e.g., *Southeast Apartments Mgmt., Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999); see also *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429 (Fairfax Cnty. 1998) (noting that the tort

<sup>18</sup> Virginia follows the minority rule, allowing claims of respondeat superior and claims of negligent hiring to be brought in the same action. *Fairshter v. Am. Nat'l Red Cross*, 322 F. Supp. 2d 646 (E.D. Va. 2004).



of negligent hiring has a long history in the Commonwealth dating back at least to 1903). Liability for negligent hiring “is based on the principle that one who conducts an activity through employees is subject to liability for harm resulting from the employer’s conduct if the employer is negligent in the hiring of an improper person in work involving an unreasonable risk of harm to others.” *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604 (2019) (quoting *Jackman*). A circuit court has held that this cause of action can only be asserted by non-employees. *Fisher v. A.W. Temple, Inc.*, No. LL-870 (City of Richmond Cir. Ct. Aug. 4, 2000). A negligent hiring cause of action is an exception to the general rule that an entity who hires an independent contractor is not liable to third parties for injuries resulting from the contractor’s negligence. *Jones v. C.H. Robinson Worldwide Inc.*, 558 F. Supp. 2d 630 (W.D. Va. 2008).

In *Southeast Apartments Management, Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999), a tenant allegedly molested by the apartment’s maintenance supervisor sued the owner of the building for the alleged negligent hiring and retention of the employee. The Court noted that while Virginia recognized the tort of negligent hiring, there had been nothing to put the employer on notice that its hiring of the maintenance supervisor might lead to a sexual assault on a tenant, and the tenant had therefore failed to state a prima facie case of negligent hiring as a matter of law. None of the information gathered in connection with the employee’s application indicated that he might have “a propensity to molest women”; his recommendations had been favorable, and his application did not suggest a problem. Furthermore, the Court found that reasonable care did not require the employer to investigate an employee’s criminal record, and dismissed as inconsequential the tenant’s argument that a criminal records check would have disclosed several bad checks written years earlier.

As summed up by the Court in *Jackman*, liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities that should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others. The absence of proof by the employer of a “reasonable investigation” of the employee, however, does not raise a presumption that either no investigation was conducted or that, if conducted, it would have revealed that the employee posed a threat of injury to others. Rather, the plaintiff must show that an employee’s propensity to cause injury to others was either known or should have been discovered by reasonable investigation. See also *Matthews v. Fairfax Trucking Inc.*, No. 1:14cv1219 (E.D. Va. Apr. 13, 2015); *Huffman v. Wynn*, No. 5:05cv00074 (W.D. Va. May 10, 2006); *Rollins v. Branch Banking & Trust Co.*, 56 Va. Cir. 147 (City of Roanoke 2001).

However, in *Blair v. Defender Services*, 386 F.3d 623 (4th Cir. 2004), the Fourth Circuit found that a material dispute existed as to whether a janitorial service had reasonably investigated the employee’s background. The defendant provided janitorial services to Virginia Tech and was obligated by its contract with the university to conduct criminal background checks of its employees. The janitorial service did not conduct such a check. Although the employee did not have a criminal conviction, he had been subject to a protective order in another county eleven months prior to attacking the plaintiff. The Fourth Circuit remanded the case, concluding that a genuine issue of material fact existed concerning whether the employer should have discovered the employee’s propensities for violence.

While the Supreme Court assumed in *Interim Personnel v. Messer*, 263 Va. 435, 559 S.E.2d 704 (2002) that a reasonable investigation would have revealed that an employee was a habitual offender without a valid driver’s license, it held as a matter of law that the resulting behavior of the employee was not foreseeable. The employee had

stolen the truck he occasionally used on the job and gone on an off-hours "frolic" that resulted in an accident caused by his drunk driving.

Note that a claim for negligent hiring is not viable if the tortfeasor was no longer employed by the defendant at the time of the commission of the tort. *Doe v. Baker*, 299 Va. 628, 857 S.E.2d 573 (2021) (recognizing end of employment as "logical and practical boundary for employer liability").

See also *Kohr v. Hostetter*, 85 Va. Cir. 195 (Rockingham Cnty. 2012); *Fulcher v. Va. Elec. & Power Co.*, 60 Va. Cir. 199 (City of Norfolk 2002); *Stansfield v. Goodyear Tire Co.*, 50 Va. Cir. 318 (Loudoun Cnty. 1999); *Goforth v. Office Max*, 48 Va. Cir. 463 (City of Norfolk 1999); *Berry v. Scott & Stringfellow*, 45 Va. Cir. 240 (City of Norfolk 1998); *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429 (Fairfax Cnty. 1998).

### 7-2.03 Negligent Retention

A claim for negligent retention exists "for harm resulting from the employer's negligence in retaining a dangerous employee who the employer knew or should have known was dangerous and likely to harm [others]." *A.H. ex rel. v. Church of God In Christ, Inc.*, 297 Va. 604 (2019) (quoting *Southeast Apartments Mgmt., Inc. v. Jackman*, 257 Va. 256, 513 S.E.2d 395 (1999)). Prior to the Supreme Court of Virginia's decision in *Jackman*, courts in Virginia were split on the issue of the viability of the tort of negligent retention. See, e.g., *Tremel v. Reid*, 45 Va. Cir. 364 (Albemarle Cnty. 1998).

Regarding the negligent retention claim, the *Jackman* court mentioned the employer's suspicion that the employee had an alcohol or drug abuse problem, the employer's observations concerning the employee's "romantic" interest in women living in the apartment complex, and the fact that other employees avoided him because he was "obnoxious." However, the Court determined that these facts were not indications that the employee was "a dangerous employee and one likely to commit sexual assaults." Accordingly, while the Court acknowledged that the negligent retention claim was available, it held that the plaintiff had failed to prove such a claim.

In *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 831 S.E.2d 460 (2019), the Court held that tort of negligent retention requires "a showing that the risk of future harm was so grave that discharging the dangerous employee would have been the only reasonable response." In *Church of God*, the employers knew of a sexual abuse allegation against an employee; however, an allegation alone, without any awareness of a resolution by police or social services, was not enough to trigger a duty to terminate.

A federal district court held that for there to be a claim of negligent retention, the employee's conduct must give rise to an underlying wrong that is actionable in its own right. *Sutphin v. United American Ins., Co.*, 154 F. Supp. 2d 906 (W.D. Va. 2000) (verbal sexual harassment is not a separate cause of action in Virginia). In opining on the tort of negligent retention, the court in *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429 (Fairfax Cnty. 1998) noted that for liability to be imposed, the employer must "negligently retain or fail to fire or remove an employee after learning of the employee's incompetence, negligence, or unfitness for a position." See also *Glover v. Oppleman*, 178 F. Supp. 2d 622 (W.D. Va. 2001) (the employer must have notice of the alleged behavior); *Berry v. Scott & Stringfellow*, 45 Va. Cir. 240 (City of Norfolk 1998). Sovereign immunity may be asserted as a bar to a negligent retention claim. *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002).

Circuit courts have disagreed as to whether this cause of action can be asserted by employees. *Fisher v. A.W. Temple, Inc.*, No. LL-870 (City of Richmond Cir. Ct., Aug. 4, 2000) (can only be asserted by non-employees). *Contra, Hazzis v. Modjadidi*, 69 Va. Cir.

385 (City of Norfolk 2005); *Flanary v. Roanoke Valley SPCA*, 53 Va. Cir. 134 (City of Roanoke 2000) and *Berry v. Scott & Stringfellow*, 45 Va. Cir. 240 (City of Norfolk 1998) (can be asserted by employees).

As with negligent hiring, a claim of negligent retention is not viable if the tortfeasor was no longer employed by the defendant at the time of the commission of the tort. *Doe v. Baker*, 299 Va. 628, 857 S.E.2d 573 (2021).

### 7-2.04 Negligent Supervision

The Supreme Court of Virginia has declined to recognize the tort of negligent supervision, and does not impose a duty of reasonable care upon an employer in the supervision of its employees. *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 831 S.E.2d 460 (2019); *Huffman v. Wynn*, No. 5:05cv00074 (W.D. Va. May 10, 2006); *Muse v. Schleiden*, 349 F. Supp. 2d 990 (E.D. Va. 2004); *Dowdy v. C&P Telephone*, 235 Va. 55, 365 S.E.2d 751 (1988); see also *Millman v. Snyder*, 65 Va. Cir. 62 (Fairfax Cnty. 2004); *Wood v. Lowe's Home Centers, Inc.*, 63 Va. Cir. 461 (City of Roanoke 2003); *Gray v. Rhoads*, 55 Va. Cir. 362 (City of Charlottesville 2001) (no cause of action for negligent training or supervision of police officers), *rev'd and remanded on different grounds*, 268 Va. 81, 597 S.E.2d 93 (2004); *Permison v. Vastera, Inc.*, 51 Va. Cir. 409 (Loudoun Cnty. 2000) (no cause of action for negligent supervision); *Courtney v. Ross Stores, Inc.*, 45 Va. Cir. 429 (Fairfax Cnty. 1998) ('In Virginia there is no duty of reasonable care imposed upon an employer in the supervision of its employees under these circumstances, and we will not create one here.') (quoting *Chesapeake Potomac Telephone Co. of Virginia v. Dowdy*, 235 Va. 55, 365 S.E.2d 751 (1988)).

However, Norfolk circuit court judges have distinguished this line of cases and stated that the Virginia Supreme Court has not ruled out negligent supervision and training claims under all circumstances. These courts have held that ordinary care and skill may require a duty of supervision when an employer directs an employee to engage in dangerous activity. With regard to negligent training, a heightened pleading standard is required, showing that the employee can be deemed reasonably unable to understand the risk involved. See *Bush v. Serco Inc.*, 92 Va. Cir. 164 (City of Norfolk 2015); *Hernandez v. Lowe's Home Ctrs.*, 83 Va. Cir. 210 (City of Norfolk 2011); see also *MCI Commc'ns Servs., Inc. v. MasTec Inc.*, No. 3:17-cv-00009 (W.D. Va. May 24, 2017) (no cause of action in Virginia for negligent supervision or training); *Parker v. Wendy's Int'l Inc.*, 41 F. Supp. 3d 487 (E.D. Va. 2014) (collecting cases but finding cause of action not pled even if it exists).

Improper training and supervision may also be pled as constitutional claims under 42 U.S.C. § 1983. See Chapter 19, 42 U.S.C. § 1983, section [19-4.04](#).

### 7-2.05 Third-Party Claims

In *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 831 S.E.2d 460 (2019), the Virginia Supreme Court held that there is no duty on the part of the employer to control his employee so as to prevent the employee from harming third parties. The Court stated that the interests of third parties are protected under Virginia law by the torts of negligent hiring and retention.

### 7-2.06 Defenses

The defense of sovereign immunity should be asserted by the locality against any tort claim made against it, including but not limited to negligent employment claims. In *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002), the Supreme Court held the operation of a police department was a governmental function and the decision to retain or terminate employees was discretionary and therefore protected by the doctrine of sovereign immunity.

In *Flanary v. Roanoke Valley SPCA*, 53 Va. Cir. 134 (City of Roanoke 2000), the circuit court held that negligent retention claims were not abrogated by the Virginia Human Rights Act (VHRA) even when the underlying behavior was a violation of the discriminatory practices outlawed by the VHRA.

## 7-3 EMPLOYMENT-AT-WILL AND EXCEPTIONS

### 7-3.01 Background—The Presumption of Employment-at-Will

Virginia, like most states, traditionally has adhered to the principle of employment-at-will. *Johnston v. William E. Woods & Assocs.*, 292 Va. 222, 787 S.E.2d 103 (2016); *Hoffman Specialty Co. v. Pelouze*, 158 Va. 586, 164 S.E. 397 (1932); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 53 S.E.2d 804 (1949). The Supreme Court of Virginia has explained that:

Virginia strongly adheres to the common law employment-at-will doctrine. We have repeatedly stated: "Virginia adheres to the common law rule that when the intended duration of a contract for the rendition of services cannot be determined by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will . . . ."

*Lawrence Chrysler Plymouth v. Brooks*, 251 Va. 94, 465 S.E.2d 806 (1996) (quoting *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 439 S.E.2d 328 (1994)).

In Virginia, where no specific time period is fixed for the duration of employment, there is a presumption that employment is at-will, terminable at any time by either party for any reason, upon reasonable notice, *Bailey v. County of Loudoun*, 288 Va. 159, 762 S.E.2d 763 (2014), and with or without cause. *Brooks, supra*; *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985). "Reasonable notice" in this context simply means effective notice that the employment relationship has ended; no advance notice is required. *Johnston v. William E. Woods & Assocs.*, 292 Va. 222, 787 S.E.2d 103 (2016).

The employment-at-will doctrine ordinarily precludes terminated at-will employees from asserting common law causes of action for wrongful discharge or wrongful termination of employment. *Id.* There are two recognized exceptions to the employment at-will doctrine: contractual claims and claims grounded in public policy.<sup>19</sup>

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<sup>19</sup> There also may be statutory prohibitions against wrongful termination, such as the Virginia Fraud Against Taxpayers Act, Va. Code § 8.01-216.1 et seq. The Act provides that

[a]ny employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is . . . discriminated against in the terms and conditions of employment because of lawful acts done . . . in furtherance of an action under this [Act] . . . . Relief shall include reinstatement with the same seniority status that employee . . . would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees.

Va. Code § 8.01-216.8. Construing this statute and basing its construction on federal employment law, the Virginia Supreme Court held that reinstatement and front pay are equitable remedies and that an award of liquidated damages may justify the denial of front pay. However, back pay, liquidated damages, and attorney's fees were awarded. *Lewis v. City of Alexandria*, 287 Va. 474, 756 S.E.2d 465 (2014).

**7-3.02 The Contract Exception to the Employment-at-Will Doctrine**

Oral employment contracts are generally unenforceable under the Statute of Frauds. See, e.g., *Falls v. Virginia State Bar*, 240 Va. 416, 397 S.E.2d 671 (1990). The Statute of Frauds states that “[u]nless a promise, contract, agreement, [or] representation . . . is in writing and signed by the party to be charged or his agent, no action shall be brought . . . [u]pon any agreement that is not to be performed within a year.” Va. Code § 11-2. However, some courts have distinguished *Falls* as applying to a contract that could not be performed within one year. Stating that with at-will employment there is no requirement that the employer hire, or the employee work, for any length of time, courts have held an oral employment contract can be outside the statute of frauds. *TradeStaff & Co. v. Nogiec*, 77 Va. Cir. 77 (City of Chesapeake 2008); *Lester v. TMG Inc.*, 896 F. Supp. 2d 482 (E.D. Va. 2012).

The Virginia Supreme Court has recognized that an employment manual could constitute an implied contract of employment. *Progress Printing Co. v. Nichols*, 244 Va. 337, 421 S.E.2d 428 (1992). A personnel manual could constitute a written employment agreement if it is not carefully drafted. In *Bailey v. County of Loudoun*, 288 Va. 159, 762 S.E.2d 763 (2014), the Court apparently assumed that certain provisions of a Human Resources Handbook created contractual rights, although it found that the employment practice at issue did not violate the Handbook’s provisions. In *Pierce v. Foreign Mission Board of the Southern Baptist Convention*, 28 Va. Cir. 168 (Richmond City 1992), the circuit court held that the Statute of Frauds was satisfied where the personnel manual contained the typewritten name of the corporate officer. The court noted that “any mark, symbol, sign, or other ‘thing’ can be a signature if the person making the mark or other thing intends that it be so.” (Compare with *Falls*, where the Court held that the employer’s logo on the personnel manual was insufficient to qualify as a signature.)

In *County of Giles v. Wines*, 262 Va. 68, 546 S.E.2d 721 (2001), the Court held, in a 4-3 majority opinion, that a county personnel policy that stated an employee *may* be terminated for cause did not rebut the strong presumption that employment was at-will. See also *Moore v. Historic Jackson Ward Ass’n*, 61 Va. Cir. 149 (City of Richmond 2003).

**7-3.03 The Public Policy Exception to the Employment-at-Will Doctrine**

In *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985), the Virginia Supreme Court recognized a “narrow exception” to the employment-at-will doctrine. The *Bowman* exception allows at-will employees to state claims for wrongful discharge if they can identify a public policy that was violated by the termination of their employment. In addition to the employer, a manager or supervisor who participated in the wrongful discharge may be individually liable. *VanBuren v. Grubb*, 284 Va. 584, 733 S.E.2d 919 (2012). In *Miller v. SEVAMP, Inc.*, 234 Va. 462, 362 S.E.2d 915 (1987), the Supreme Court emphasized the limited nature of its holding in *Bowman*, explaining that “*Bowman* recognized an exception to the employment-at-will doctrine limited to discharges which violate *public* policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general.” *Id.* (emphasis added). Thus, the Court rejected a plaintiff’s retaliatory discharge claim because her discharge in retaliation for her exercise of rights under her employer’s personnel policies implicated only *private* rights and “would have no impact upon any *public* policy established by existing laws for the protection of the public generally.” *Id.* (emphasis added); see also *Ligon v. Cnty. of Goochland*, 279 Va. 312, 689 S.E.2d 666 (2010). In *Wells v. Enterprise Leasing Co. of Norfolk/Richmond, LLC*, 500 F. Supp. 3d 478 (E.D. Va. 2020), the court held that a former human resources manager for a rental car agency failed to state a claim when he alleged that he was fired for refusing to provide his employer with information about a family member’s COVID-19 test results. The court found that the employee’s wrongful discharge did not fall under any of the three exceptions to at-will employment under *Bowman*.



The General Assembly subsequently passed a general whistleblower protection act, codified at Va. Code § 40.1-27.3, that prohibits an employer from discharging, disciplining, threatening, discriminating against, penalizing, or taking other retaliatory action against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment when an employee engages in whistleblowing conduct. Specifically, the employee is protected when he or she reports a violation of state or federal law; is requested by a governmental body or law-enforcement official to participate in an investigation; refuses to engage in criminal activity; refuses an employer's order to perform an illegal act and informs the employer that the order is being refused for that reason; or provides information as part of an investigation into an alleged violation by the employer of state or federal law. Va. Code § 40.1-27.3(A). The statute also created a civil right of action for violation of the law. Within one year of the prohibited retaliation, the employee may sue for injunctive relief, reinstatement, and/or compensation for lost wages and benefits, and may be awarded reasonable attorney fees. Va. Code § 40.1-27.3(B).

In *Moschetti v. Office of the Inspector General*, No. 3:22-cv-24-HEH (E.D. Va. Aug. 11, 2022), the court held that a violation of the whistleblower statute cannot support a separate *Bowman* claim. It also held that the Commonwealth and its agencies are immune from liability under the whistleblower statute because it contains no express waiver of sovereign immunity. *Id.* Likewise, a claim under § 40.1-27.3 could not stand against the plaintiff's supervisor because he was not an "employer" as defined by the statute. *Id.*

Separately, Virginia law also prohibits retaliation against employees who report or cooperate with an investigation of suspected worker misclassification. Va. Code § 40.1-33.1. In such cases the employer may be liable for lost wages and civil penalties. *Id.*

### 7-3.03(a) The Virginia Values Act

In 2020, the General Assembly passed the Virginia Values Act, amending the VHRA and other statutes to significantly alter the Commonwealth's employment law. The Act expanded the scope of protected classes, and imposes new liabilities and requirements for nearly all Virginia employers. Previously, the EEOC and federal court had been the primary avenues of relief for plaintiffs in Virginia; with these significant changes, aggrieved employees have private rights of action in state courts. The law applies to local government and its departments, offices, boards, commissions, agencies, and instrumentalities. Va. Code § 15.2-1500.1(B).

Prior to the adoption of the Virginia Values Act in 2020, the VHRA stated that it is the policy of the Commonwealth to safeguard all individuals from unlawful discrimination because of race, color, religion,<sup>20</sup> national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, education, and real estate transactions. All of these protected classes, except persons with disabilities, are also protected from employment discrimination. The Virginia Values Act added "sexual orientation"<sup>21</sup> and "gender identity"<sup>22</sup> to the list of protected categories. Va. Code § 2.2-3900(B). The VHRA was also amended to prohibit discrimination based on a

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<sup>20</sup> "Religion" includes any outward expression of religious faith, including adherence to religious dressing and grooming practices and the carrying or display of religious items or symbols. Va. Code § 2.2-2901.1(A).

<sup>21</sup> The Act defines "sexual orientation" as "a person's actual or perceived heterosexuality, bisexuality, or homosexuality." Va. Code § 2.2-3901(C).

<sup>22</sup> "Gender identity" means "the gender-related identity, appearance, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." Va. Code § 2.2-3901(B).

person's military status,<sup>23</sup> and clarified that lactation is included within the protected "related medical conditions" of pregnancy and childbirth. Va. Code § 2.2-3901(A), (E). It also expanded the existing prohibition of racial discrimination to bar discrimination "because of or on the basis of traits historically associated with race, including hair texture, hair type, and protective hairstyles such as braids, locks, and twists." Va. Code § 2.2-3901(D).

Under the VHRA, it is an unlawful employment practice for an employer to "[f]ail to hire, discharge, or otherwise discriminate against any individual with respect to such individual's compensation, terms, conditions, or privileges of employment because of" one of the protected categories. Va. Code § 2.2-3905(B)(1)(a). Likewise, an employer may not use one of the protected categories "as a motivating factor for any employment practice, even though other factors also motivate the practice." Va. Code § 2.2-3905(B)(6).

In 2021, the VHRA was amended to extend employment discrimination protection to those with disabilities. Va. Code § 2.2-3905.1. The law requires employers with more than five employees to "make reasonable accommodation to the known physical and mental impairments of an otherwise qualified person with a disability, if necessary to assist such person in performing a particular job, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer." Va. Code § 2.2-3905.1(B)(1). Employers must post information regarding the employees' rights to reasonable accommodations for disabilities, and provide this information to new employees within ten days of an employee's providing notice to the employer of a disability. Va. Code § 2.2-3905.1(C). The amended act prohibits employers from taking any adverse action against an employee who requests or uses an accommodation, and from denying employment or promotion opportunities to an otherwise qualified applicant or employee because the employer would be required to make reasonable accommodation to the applicant or employee. Va. Code § 2.2-3905.1(B).

The law also requires employers to make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions; such accommodations include, among others, more frequent or longer bathroom breaks, access to a private location other than a bathroom for the expression of breast milk, a modified work schedule, and leave to recover from childbirth. Va. Code § 2.2-3909(A). Accommodations that would impose an undue hardship on the employer are excepted. Va. Code § 2.2-3909(B). Employees have a right of action for the employer's failure to make reasonable accommodations related to pregnancy or childbirth. Va. Code § 2.2-3909(E).

Significantly, the amendments also created a private right of action for discriminatory discharge, and repealed the VHRA's previous limits on compensatory damages and attorney's fees. See Va. Code § 2.2-3908 (providing for the award of "reasonable attorney fees and costs" and replacing repealed Va. Code § 2.2-3903 (precluding award of compensatory or punitive damages and limiting attorney's fees to 25 percent of backpay award)).

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<sup>23</sup> In 2021, the term "status as a veteran" was broadened to "military status," which includes active or reserve members of the uniformed forces, veterans, and their dependents. Va. Code § 15.2-1500.1.

**7-3.03(b) Policies Not Reflected in VHRA as Source of Public Policy<sup>24</sup>**

In 2000, the Virginia Supreme Court reversed a trial court ruling on a wrongful termination claim and found in favor of the plaintiff. *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000). The Court addressed two issues: (1) whether the VHRA bars a common law action for wrongful discharge based on a violation of public policy not reflected in the VHRA, when the conduct alleged also violates a public policy reflected in the VHRA; and (2) whether a violation of the public policies embodied in criminal statutes may support such a common law action. The majority concluded that Va. Code § 2.2-2639(D)<sup>25</sup> abrogated the common law wrongful-discharge claim only to the extent that such claims are based on public policies reflected in the VHRA. In doing so, the majority rejected the contention that the claim was precluded because the alleged conduct also violated the public policy in the VHRA against gender discrimination.

The Court also held that laws that do not expressly state a public policy but were enacted to protect the property rights, personal freedoms, health, safety, or welfare of the general public may support a wrongful-discharge claim if they further an underlying, established public policy that is violated by the discharge from employment. In order to rely upon such a statute, a plaintiff must be a member of the class of persons the specific policy was designed to protect.

In *Rowan v. Tractor Supply Company*, 263 Va. 209, 559 S.E.2d 709 (2002), the Court articulated three circumstances in which an at-will employee may establish that his discharge violated public policy:

1. where an employer fired an employee for exercising a statutorily created right;
2. when the public policy is "explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy;" or
3. "where the discharge was based on the employee's refusal to engage in a criminal act."<sup>26</sup>

See *Dunn v. Millirons*, 176 F. Supp. 3d 591 (W.D. Va. 2016), *aff'd*, 675 F. App'x. 314 (4th Cir. 2017), for an opinion extensively discussing all three circumstances.

Under circumstances 1 and 2, it is important to discern what right was conferred on an employee by statute, and then determine whether the employer's termination of employment violated the public policy underlying that right. Thus, the Virginia Supreme Court held that an employee who claimed that she was terminated for exercising her right to obtain a protective order against a fellow employee did not state a *Bowman* claim because the termination itself did not violate the stated public policy of the protective order statute: to protect the "health and safety" of the person seeking the order. *Francis v. Nat'l Accrediting Comm'n*, 293 Va. 167, 796 S.E.2d 188 (2017).

Because the statute criminalizing fornication between consenting adults in private has been declared unconstitutional as applied to that activity, it cannot be the basis for a *Bowman* exception when an employee is terminated for refusing to accede to sexual demands. *Robinson v. Salvation Army*, 292 Va. 666, 791 S.E.2d 577 (2016). Note that

<sup>24</sup> In light of the sweeping new protections of the Virginia Values Act, the extent to which courts will rely upon the legal precedents regarding *Bowman* claims is unclear.

<sup>25</sup> Later codified as Va. Code § 2.2-3903 and repealed in 2020.

<sup>26</sup> Again, as described above, this public policy has been codified at Va. Code § 40.1-27.3.

the Court stated in dicta that that the statutes criminalizing adultery and lewd and lascivious cohabitation were still “valid criminal act[s].” *See also O’Mara v. Va. Dep’t of Corrections*, No. 2:16cv489 (E.D. Va. May 5, 2017) (holding post-*Robinson* that a *Bowman* claim can still be based on discharge for refusing to engage in adultery); *Ingleson v. Burlington Med. Supplies Inc.*, 141 F. Supp. 3d 579 (E.D. Va. 2015) (Virginia’s public policy is violated when an employee is discharged for refusal to aid and abet adultery).

*See also Weidman v. Exxon Mobil Corp.*, 776 F.3d 214 (4th Cir. 2015) (a non-criminal code statute that carries criminal penalties may be the basis for a *Bowman* claim); *Sewell v. Macado’s, Inc.*, No. 7:04cv00268, (W.D. Va. Oct. 4, 2004) (criminal statute did not create any specific statutory right or set forth any specific public policy); *Swain v. Adventa Hospice Inc.*, No. 7:03cv00505 (W.D. Va. Dec. 12, 2003) (a criminal statute provides a public policy source for a *Bowman* claim only where an employer discharges an employee for refusing to perform a criminal act); *Brown v. Wal-Mart Stores, Inc.*, 52 Va. Cir. 480 (Spotsylvania Cnty. 2000) (same).

### **7-3.03(c) Public Policy Claims Must Be Grounded in the Policies Underlying State Statutes**

A challenging issue is determining if there exists a “public policy” necessary to support wrongful discharge and what that policy is. County and city ordinances, the Virginia Constitution, and even federal statutes have all been argued to be a basis for the “public policy” of the Commonwealth of Virginia. The Supreme Court provided guidance on this issue in *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 465 S.E.2d 806 (1996). In that case, an employee alleged that he was fired because he refused to perform certain repairs on an automobile; however, to have repaired the automobile in the manner the employer requested would have constituted a violation of the common law “duties of the dealership,” such violation being against the public policy of the Commonwealth. Public policy claims must be grounded in an expression of policy embodied in a Virginia statute. In *Dray v. New Market Poultry Products, Inc.*, 258 Va. 187, 518 S.E.2d 312 (1999), the Court held that the statute must articulate a specific public policy intended to benefit a class of individuals to which the plaintiff belongs. Termination must result from the employee’s exercise of an expressly imposed statutory right or duty. *Id.*; *see also Lucker v. Cole Vision Corp.*, No. 7:05cv00126 (W.D. Va. Oct. 26, 2005) (retailer not within class of individuals consumer protection law intended to protect).

To illustrate the above, in *Jordan v. Town of Front Royal*, No. 5:07CV00101 (W.D. Va. June 16, 2008), the court held that Va. Code § 15.2-1107, which provides that a “municipal corporation *may provide* for the organization . . . of all departments” (emphasis added), and Va. Code § 15.2-2200, which states “[t]his chapter is intended to *encourage localities* to improve the public health, safety, convenience and welfare of their citizens” (emphasis added), do not delineate explicitly stated public policies. The court explained that “[i]f broad generalizations in Virginia statutes furthered public policy . . . the exception to the at-will employment doctrine would swallow the rule entirely.” *Id.* Thus, the court refused to find that the plaintiff was wrongfully discharged in violation of Virginia’s public policy because the plaintiff relied upon such generally worded statutes. Conversely, in *Altizer v. Town of Cedar Bluff*, No. 1:14cv00007 (W.D. Va. June 5, 2014), the court held at the motion to dismiss stage that an alleged violation of Va. Code § 15.2-1512.4, which protects government employees from retaliation for expressing an opinion to local officials on matters of public concern, may support a *Bowman* wrongful discharge claim by a town clerk who raised the issue of the town’s inappropriate use of employees’ paycheck deductions which were to be deposited in their deferred compensation accounts. On summary judgment, however, the court found that the locality had not violated Va. Code § 15.2-1512.4, as the employee’s termination was not because of speech on a matter of public concern. *Altizer v. Town of Cedar Bluff*, 104 F. Supp. 3d 760 (W.D. Va. 2015), *aff’d*, 621 Fed. Appx. 248 (4th Cir. 2015); *see also Roop*

*v. Whitt*, 289 Va. 274, 768 S.E.2d 692 (2015) (Va. Code § 15.2-1512.4 asserted as basis for *Bowman* claim but Virginia Supreme Court found that statute only applied to local government employees and plaintiff deputy sheriff was not a local government employee).

### 7-3.03(d) Burden of Proof and Damages

Traditional state law burdens of proof are applied in evaluating the sufficiency of public policy discharge claims. See *Jordan v. Clay's Rest Home*, 253 Va. 185, 483 S.E.2d 203 (1997) (rejecting federal burden shifting scheme). A plaintiff is not required to prove that the employer's improper motive was the sole cause of the wrongful termination. *Shaw v. Titan Corp.*, 255 Va. 535, 498 S.E.2d 696 (1998). The *Shaw* court also held that a plaintiff may recover punitive damages if he pleads and proves an intentional tort. See also *Isle of Wight Cnty. v. Nogiec*, 281 Va. 140, 704 S.E.2d 83 (2011) (absent some tort, damages for humiliation or injury to feelings are not recoverable in an action for breach of contract) (citing *Sea-Land Service, Inc. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647 (1982)). Note that in general, the Virginia Supreme Court has held that a plaintiff's work history and quality of past job performance are admissible evidence probative of claimed damages for future lost income or future lost earning capacity. *Egan v. Butler*, 290 Va. 62, 772 S.E.2d 765 (2015).

Courts will apply a "but-for" causation standard to a retaliation claim under the Virginia Fraud Against Taxpayers Act. *Whitaker v. City of Hopewell*, No. 3:19-cv-923 (E.D. Va. Dec. 9, 2020). In *Whitaker*, the city's former Director of Finance alleged that the city had fired him for reporting another employee's misuse of funds to the City Manager and City Council. The trial court granted the city's motion for summary judgment based on the former employee's failure to produce evidence that the city's reasons for firing him were a pretext.

## 7-4 THE BOWMAN DOCTRINE AND PUBLIC EMPLOYEES

The large majority of wrongful-discharge cases reported since 1985 have been brought by employees in the private sector. Claims against public employers have usually surfaced as supplemental state law claims in federal civil rights actions. See, e.g., *Dunn v. Millirons*, 176 F. Supp. 3d 591 (W.D. Va. 2016), *aff'd*, No. 16-1492 (4th Cir. Feb. 1, 2017); *Altizer v. Town of Cedar Bluff*, 104 F. Supp.3d 760 (W.D. Va.), *aff'd*, 621 Fed. Appx. 248 (4th Cir. 2015); *Williams v. City of Hampton*, No. 4:95cv57 (E.D. Va. Mar. 18, 1996); *Childress v. City of Richmond*, 907 F. Supp. 934 (E.D. Va. 1995), *aff'd on other grounds*, 134 F.3d 1205 (4th Cir. 1998) (en banc).

It is perhaps ironic that public employees would have the benefit of such a claim, since the *Bowman* doctrine was recognized as only a "narrow exception" to the harshness of the rules normally applicable to employees-at-will. Nonprobationary public employees, however, generally are not employees-at-will. They generally have a protected property interest in continued employment and are subject to discharge only for cause. Remedies already available for the public employee include not only Title VII of the Civil Rights Act of 1964 but also the state-mandated grievance procedure, a variety of constitutional tort actions, and possibly even a breach-of-contract action. See, e.g., *Isle of Wight Cnty. v. Nogiec*, 281 Va. 140, 704 S.E.2d 83 (2011) (unsuccessful suit by public employee for breach of severance agreement when damages not proven with reasonable certainty).

Most circuit courts considering the issue have found that the grievance procedure is not an exclusive remedy for employees of localities. However, a defense that can be asserted against a public employee's wrongful-termination claim is the preclusive effect of a grievance proceeding upholding the employee's termination. This approach was successful in the case of *Muterspaugh v. City of Portsmouth*, 54 Va. Cir. 588 (City of Portsmouth 2001).



## 7-5 AT-WILL EMPLOYMENT AND DUE PROCESS

Although the General Assembly mandated that each local government must establish a grievance procedure that affords an employee a procedure to resolve employment disputes, including challenges to dismissals, both the state and federal courts have held that these procedural guarantees do not defeat the at-will employment relationship. See *County of Giles v. Wines*, 262 Va. 68, 546 S.E.2d 721 (2001); *Willey v. Cnty. of Roanoke*, No. 7:02CV00901 (W.D. Va. July 21, 2005) and 70 Va. Cir. 307 (Roanoke Cnty. 2006). These cases are informative regarding which provisions should be incorporated into an employee handbook or personnel policies in order to preserve the at-will relationship.<sup>27</sup>

## 7-6 ORGANIZATIONAL RIGHTS OF PUBLIC EMPLOYEES

### 7-6.01 Scope

Efforts to organize public employees at all levels of government have continued for many years. Public employees have also sought to assert themselves in the public forums of local government and to be recognized as a political force. In response to such efforts, the General Assembly, courts, and local governing bodies have been compelled to address the sometimes conflicting public policy considerations inherent in the relationship between a governmental entity and its employees. The following discussion describes the legal problems, risks, and solutions currently involved in local government relations with its employees.<sup>28</sup>

### 7-6.02 The Distinction Between the Commercial Employer and the Public Employer<sup>29</sup>

Private sector concepts often are not transferable to the public sector, but the terminology of commercial labor relations inexorably has crept into public sector cases. For example, in the private sector a "labor organization" is clearly defined in the Labor-Management Relations Act, yet no such regulation exists in the public sector. As a result, quality and responsibility of public employee "organizations" and "associations" are difficult to ensure. The "recognition" of a labor organization in the private sector for purposes of exclusive employee representation is regulated very carefully by federal law. The absence of these procedural controls on the recognition process in the public sector leaves the system open to possible abuse. "Collective bargaining" in the private sector can be effective primarily because, as a last resort, the employees have the right to strike. It is unclear whether, in the public sector where no right to strike exists, collective bargaining can be effective. Recently, however, there has been a sea change in the Commonwealth regarding collective bargaining in the public sector, and some of these previously uncharted waters will be explored.

<sup>27</sup> Local governments are encouraged to examine the anti-discrimination policies in personnel handbooks to ensure that the protections afforded by the Virginia Values Act are incorporated.

<sup>28</sup> Generally, the rights of public employees and government employers with regard to collective bargaining and strikes are set forth in Va. Code §§ 40.1-55 through 40.1-58.1.

<sup>29</sup> See also *Harris v. Quinn*, 573 U.S. 616, 134 S. Ct. 2618 (2014) (recognizing the category of "partial-public employees"; e.g., home health aides who are employed by the consumer but paid by the state and authorized by statute to join a public employees' union). For this category of employees, an agency-shop rule whereby non-members were required to pay a fee to the unions (to prevent "free-riding") violated the non-union members' First Amendment rights. The Supreme Court held that union agency fees were unconstitutional in all cases as violative of the First Amendment. *Janus v. Am. Fed. of State, Cnty., and Mun. Employees*, 585 U.S. \_\_\_, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782 (1977)).

**7-6.03 Collective Bargaining in the Public Sector in Virginia****7-6.03(a) State Statute**

In 1977, the Supreme Court of Virginia, interpreting Va. Code § 15.2-4517 (since recodified as Va. Code § 33.2-1917), held that the General Assembly's creation of a right to collective bargaining in the narrow field of public transportation did not indicate legislative intent to authorize collective bargaining for all public employees. *Commonwealth v. Cnty. Board of Arlington Cnty.*, 217 Va. 558, 232 S.E.2d 30. In 1993 the General Assembly codified the Court's holding in Va. Code §§ 40.1-57.2 and 40.1-57.3. These provisions prohibited officers, agents, and governing bodies of the state and its political subdivisions from recognizing labor unions or employee associations as bargaining agents for public employees, or from bargaining collectively with labor unions or employee associations concerning matters related to employment.

However, in 2020, the General Assembly empowered localities to enact a resolution or ordinance to recognize "any labor union or other employee association as a bargaining agent of any public officers or employees" and to collectively bargain with those representatives. Va. Code § 40.1-57.2(A). School board employees are "public officers or employees" for purposes of the statute. *Id.* Constitutional officers and their employees are not covered by the statute and may not engage in collective bargaining. Va. Code § 40.1-57.2(D). If collective bargaining is authorized by ordinance or resolution, the locality may bargain "with respect to any matter relating to . . . employment or service." Va. Code § 40.1-57.2(A). The ordinance or resolution must provide procedures for the certification and decertification of exclusive bargaining representatives, including reasonable public notice and opportunity for labor organizations to intervene. *Id.* Public employees still may not participate in strikes, even if collective bargaining is authorized in the relevant locality. Va. Code § 40.1-55(B) (stating that the prohibition against strikes applies to "any employee of any county, city, or town or local school board without regard to any local ordinance or resolution adopted pursuant to § 40.57.2"). The collective bargaining statute is silent regarding many of the implementation details; therefore, the Dillon Rule applies, and "localities choosing to authorize collective bargaining have a scope of discretion, which must be reasonably exercised." 2021 Op. Va. Att'y Gen. 105. *See also* 2021 Op. Va. Att'y Gen. 122 (no authority to enforce multi-year collective bargaining agreement that requires payments in future years).

If a locality does not enact a resolution or ordinance regarding collective bargaining, a majority of the locality's employees "in a unit considered by such employees to be appropriate for the purpose of collective bargaining," may certify to the locality their desire to be represented by an exclusive bargaining agent and to collectively bargain with the locality. Va. Code § 40.1-57.2(C). The locality then has 120 days to hold a vote regarding whether to adopt an ordinance or resolution to permit collective bargaining by those public employees and any other public employees deemed appropriate by the governing body. *Id.* The locality is not required to authorize collective bargaining. *Id.* Moreover, no resolution or ordinance that authorizes collective bargaining may include provisions "that restrict the governing body's authority to establish its budget or to appropriate funds." Va. Code § 40.1-57.2(B).

**7-6.03(b) Public Transportation**

Virginia Code § 33.2-1917 provides that public transportation employees may be granted collective bargaining rights. The employees also have the right to submit their labor disputes to final and binding arbitration by an impartial board of arbitration acceptable to all parties.

**7-6.04 The Right to Join a Union****7-6.04(a) The "Right to Work" Statutes**

Under the Virginia right to work statutes, Va. Code § 40.1-58 et seq., individuals shall not be denied or abridged employment because of membership or non-membership in any union

or labor organization. Public employees are expressly covered by the Virginia right to work legislation. See Va. Code § 40.1-58.1.

#### **7-6.04(b) The “Right to Join” is Not Affected**

There is no real effect on employees who want to organize. Federal law plainly supports an employee’s right to join a union of his or her choice. See, e.g., *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969). The right to join is of constitutional proportion and must be carefully protected. However, the specific employee protections common in the private sector are largely undefined in the absence of any regulatory agency.

Furthermore, authorities created as part of an interstate compact are covered by federal law and are exempt from coverage under the Virginia right-to-work statute. *Malone v. Washington Metropolitan Area Transit Authority, et al.*, No. 85-0419 (E.D. Va. Nov. 26, 1985). However, if an authority is governed by state law, the statute may apply.

The Virginia Attorney General has recognized that the Metropolitan Washington Airports Authority was authorized to make and maintain agreements with employee organizations under the terms of the federal and state legislation that created the Authority. Under the Authority’s lease, however, its powers are governed by Virginia law. The Attorney General stated that Virginia’s right-to-work law therefore would apply to Authority employees. 1986-87 Op. Va. Att’y Gen. 227.

#### **7-6.04(c) Supervisors May Also Join Unions**

Virginia Code § 40.1-61 makes no distinctions between supervisory and non-supervisory employees. In *Norfolk Airport Authority v. Nordwall*, 246 Va. 391, 436 S.E.2d 436 (1993), the Supreme Court of Virginia held that a supervisory employee of a political subdivision could not be fired for joining a union because it would violate Virginia’s right-to-work law. The Court noted that although Section 151 of the National Labor Relations Act excludes supervisory employees from the protection of the Act, regulation of state and local employees is left entirely to the state.

#### **7-6.04(d) No Right to Be Heard**

In *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 99 S. Ct. 1826 (1979), the United States Supreme Court determined that the First Amendment allows individuals to speak or advocate ideas but *does not compel anyone to listen to that speech*. The Court held that the First Amendment does not impose an affirmative obligation on the government “to listen, to respond, or . . . to recognize the [public employee labor organization] and bargain with it.” *Id.* In its final analysis, the Court concluded that a public employer could simply ignore the union.

Thus, formal “recognition” can be avoided. Caution requires this to be more a passive action than an active response. Note the equal protection issues discussed below.

#### **7-6.04(e) Equal Access to Public Forums**

After the Supreme Court’s holding in *Smith*, the Fourth Circuit reviewed the right of public employees to speak and be heard. See *Henrico Prof. Firefighters Ass’n v. Bd. of Sup’vrs of Henrico Cnty.*, 649 F.2d 237 (4th Cir. 1981). The Henrico County Board of Supervisors regularly provided opportunities for representatives of organizations to address it on matters of local concern but denied this opportunity to those who sought to speak on behalf of groups of public employees. In particular, the president of the Henrico Professional Firefighters Association requested to speak before the board in his representative capacity and was denied.

The board’s policy of excluding presentations by employee representatives was challenged and was held to be a denial of the Association’s right to equal protection of the

law under the Fourteenth Amendment in the exercise of its First Amendment freedoms of speech, association, and petition. The abridgement of the Association's fundamental First and Fourteenth Amendment rights required the board of supervisors to advance a compelling justification for its denial of the Firefighters Association's opportunity to speak. The court noted that *Smith* held only that a labor organization does not have a First Amendment right to negotiate with the public employer. In this case, the Association sought only to speak. The court held that the board could not give disparate treatment to the Firefighters Association once it opened its doors to others in their representative capacity.<sup>30</sup> Finally, the court held that it does not matter whether the topic upon which the Association wishes to speak is merely of local import and involves economic rather than social or political issues. All such speech is constitutionally protected.<sup>31</sup>

In *Hickory Firefighters Association, Local 2653 v. City of Hickory*, 656 F.2d 917 (4th Cir. 1981), the court specifically held that the working conditions of firefighters are of public concern, and the Association's protected interest in presenting its views in a public forum did not violate North Carolina's law against labor negotiations in the public sector. The court rejected the city's argument that its grievance procedure supplanted the need to consume the city council's time on employment matters, stating that once the forum is made public, the employee association must be afforded equal access to it. The right to such speech, the court noted, is not unfettered, and picketing in particular may be restricted on the basis of "local safety and welfare."

Government employees therefore have a protected right to discuss conditions of employment in a government forum open to the public. There must be a "compelling justification" to deny a particular person or entity the right to speak. Advocacy is not the legal equivalent of negotiation. See *Local 2016, Int'l Association of Firefighters v. City of Rock Hill*, 660 F.2d 97 (4th Cir. 1981); see also Va. Code § 15.2-1512.4; *Roop v. Whitt*, 289 Va. 274, 768 S.E.2d 692 (2015) (Va. Code § 15.2-1512.4 is only applicable to local government employees; deputy sheriff is not a local government employee). See extensive discussion of employee speech rights in Chapter 19, 42 U.S.C. § 1983, section 19-6.04(b).

#### **7-6.04(f) Virginia Judicial Decisions**

In *Newport News Fire Fighters Ass'n v. City of Newport News*, 339 F. Supp. 13 (E.D. Va. 1972), the court ruled that, since the City of Newport News had changed its rules and regulations in order to allow police officers to join unions, the portion of the case attacking the prior prohibitions of union membership was moot. However, the court implied that, had the regulations forbidding public employees from joining a union still been in effect, they would have been held unconstitutional.

#### **7-6.04(g) Some Limitations May Survive Constitutional Scrutiny**

A slight limitation on the employee's choice of a particular union was sustained by the Fourth Circuit in *York County Fire Fighters Association v. York County*, 589 F.2d 775 (4th Cir. 1978). In *York County Fire Fighters*, three captains of the York County Fire Department and the York County Firefighters Association brought suit seeking to invalidate a resolution of the

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<sup>30</sup> Virginia Code § 2.2-3707 provides that meetings of public bodies, with minor exceptions, will be open to the public.

<sup>31</sup> But see footnote 32 regarding *York County Fire Fighters Association*. See also *Robinson v. Salvation Army*, 292 Va. 666, 791 S.E.2d 577 (2016) (citing the holding of *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 612, 114 S. Ct 2445 (1994)), which rejected 'the broad assertion that all speaker-partial laws are presumed invalid' and overruling *Henrico Professional Firefighters Association* to the extent inconsistent with *Turner*).

York County Board of Supervisors that barred officers in the fire department from membership in the same union to which the rank-and-file employees belonged.

The resolution was found to be a reasonable limitation on the officers' First Amendment rights, in that the limitation was necessary to a substantial and legitimate state interest (ensuring that the officers' loyalties would not be divided between the union and the employer). The court found the limitation to be the least restrictive way of achieving the objective, in that membership in another employee organization, not having rank-and-file employees as members, was permitted.<sup>32</sup>

Thus, while not without limitations (see *Wilton v. Mayor of Baltimore*, 772 F.2d 88 (4th Cir. 1985)), it is clear that the right to join a union is legally protected. Although some restrictions upon this freedom of association may be permissible, any such restriction should be imposed with great care and with particular attention to constitutional equal protection considerations prevalent in the applicable case law. Employers have successfully addressed union organizational efforts by sending an informative letter to employees pointing out the futility of these actions. Great care and legal authorship of such letters are recommended.

### **7-6.05 The Right to Support a Union by Payroll Deduction**

#### **7-6.05(a) There Is No Constitutional Right to "Dues Checkoff"**

The process of "dues checkoff" has no constitutional basis. Many believe it is essential to the viability of any labor union. In the private sector, the dues checkoff procedure is a common practice, a creature of contract, is often hard fought in negotiations, and may be complex in application.

The wholesale refusal by local governments to make payroll deductions for union dues has been upheld by the United States Supreme Court. For example, in *City of Charlotte v. International Association of Firefighters*, 426 U.S. 283, 96 S. Ct. 2036 (1976), the Court determined that there was no violation of the Equal Protection Clause when a city refused to withhold union dues, even though it withheld amounts for charities and other programs. The Court accepted the city's justification for its denial of the dues checkoff, holding that the city reasonably limited its practice of payroll withholding to instances where the withholding option is available to all city employees, not only to those who were members of a particular group. *Accord International Association of Firefighters v. City of Richmond*, 415 F. Supp. 325 (E.D. Va. 1976) (Richmond's refusal to withhold union dues from city firefighters' paychecks did not violate the union's rights under the Equal Protection Clause, or violate the union's First Amendment rights even if the refusal would harm the union's ability to organize); see also *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989); *Decker v. City of Hampton*, Civ. No. 82-109-NW (E.D. Va. 1983) (no equal protection violation despite checkoff being afforded to city teachers by independent school board).

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<sup>32</sup> Two additional points are worth noting with regard to *York County Fire Fighters*. First, the court did not reach the pendent issue of whether Virginia's right-to-work statutes precluded the county's authority to limit union membership. Prior to the court's decision, the Attorney General had advised the York County Board of Supervisors that non-membership in a union or employee association could not be made a condition of employment for officers of the county fire department. 1976-77 Op. Va. Att'y Gen. 140. Second, it is interesting that the judge in *York County Fire Fighters* applied a "substantial interest" test, even though a fundamental constitutional right was involved. In contrast, the judge in *Henrico Professional Firefighters Association v. Board of Supervisors of Henrico County*, 649 F.2d 237 (4th Cir. 1981), required the county to show a "compelling" justification for its abridgement of fundamental rights.



**7-6.05(a)(1) There Is No Constitutional Bar to “Checkoff” by Agreement or Practice**

In *Commonwealth v. City of Richmond*, No. G-507202 (City of Richmond Cir. Ct. 1981), the Commonwealth attacked the City of Richmond ordinance permitting the city to act upon employees’ requests to have union dues “checked off” from the employees’ wages and paid over to the respective union. The Commonwealth sought to enjoin the enforcement of the ordinance on the ground that the city had no authority to pass such an ordinance. The Commonwealth argued that since the various unions demonstrably did not benefit the city, it followed that the city had no implied power to allow checkoff of union dues. The affected unions argued that they needed the checkoff provisions to strengthen themselves properly, and that the First and Fourteenth Amendments granted freedom of association and the attendant right of checkoff. The court affirmed the checkoff by agreement procedure.<sup>33</sup>

**7-6.05(a)(2) Requirement of Non-Union Members to Pay Agency Fees Unconstitutional**

In *Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. \_\_\_, 138 S. Ct. 2448 (2018), the Supreme Court held that a state statute that required non-union members to pay a percentage of union dues to support the collective bargaining aspect of union purposes (as opposed to political or ideological) was a violation of the objecting employee’s First Amendment rights. This decision overruled *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782 (1977).

**7-6.06 No Right to Strike in Virginia**

The Code of Virginia provides that employment may be terminated if the employee acts with two or more employees in concert “for the purpose of obstructing, impeding or suspending any activity or operation of his employing agency or any other governmental agency, strikes or willfully refuses to perform the duties of his employment.” Va. Code § 40.1-55 et seq. Any of these actions will be deemed to be a termination of employment, and the employee cannot be hired by “the Commonwealth, or any county, city, town or other political subdivision of the Commonwealth, or by any department or agency of any of them” for the next twelve months.<sup>34</sup> This is true even if the locality has authorized its employees to engage in collective bargaining pursuant to Va. Code § 40.1-57.2. Va. Code § 40.1-55(B). A similar statute applying to (unionized) federal government employees was upheld in *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971), *aff’d*, 404 U.S. 802, 92 S. Ct. 80 (1971). Note, however, that while strikes in the public sector may be barred, a public employee may not be prohibited from joining a union simply because it advocates the ability to strike, as such a bar would infringe on the protected right of association. *Police Officers’ Guild v. Washington*, 369 F. Supp. 543 (D. D.C. 1973). Even if public employees were to strike in violation of the Virginia statute, wholesale discharge of groups of employees requires the ability to “replace” them or otherwise provide essential services. A real-life example of these potential issues occurred when President Ronald Reagan discharged the air traffic controllers in 1981.

**7-6.07 Conclusion**

In summary, the following practical conclusions may be drawn from the current law of public sector labor relations in Virginia: (1) public employees have the right to join unions; (2)

<sup>33</sup> The right to dues checkoff, if granted at all, should be granted with great care and without undue conditional language. For an example of such excessive constraint, see *Brown v. Alexander*, 718 F.2d 1417 (6th Cir. 1983), wherein a portion of a Tennessee statute providing for dues checkoff only for public employee associations that were wholly independent and unaffiliated with other organizations was held to condition the right to dues checkoff upon an unlawful limitation of the public employees’ freedom of association.

<sup>34</sup> The employee must be notified of his termination and be given the opportunity to appeal the decision of his employer. The employer also has the right, in order to protect the public welfare, to re-employ terminated workers within the twelve-month period. Va. Code §§ 40.1-56 through 40.1-57.1.

public employees or their representatives have the right to address issues of public concern in a public forum but do not have the right to raise personal intra-departmental grievances in a disruptive manner in the workplace; (3) the right of public employees or their representatives to address a governmental entity in a public forum does not entail a concomitant duty on the part of government to respond or even listen—in other words, there is no duty for government to bargain with public employees; (4) just as there is no duty to bargain on the part of government, there is no right to strike on the part of public employees; (5) public employees have the statutory right to grieve and have their grievances adjusted, a right which if exercised properly can function as a safety valve for potential employment problems; and (6) the right to dues checkoff procedure can be established only by agreement, and great caution should be exercised in order to avoid possible equal protection violations.

## **7-7 COVID-19 AND THE WORKPLACE**

The COVID-19 pandemic brought local governments to the busy intersection of science, safety, and politics, and it is beyond the scope of this chapter to discuss all of the legal changes it generated. However, with the caveat that workplace rules and recommendations continue to evolve, we have attempted to list reliable resources that local government counsel may consult to give informed legal advice to governing bodies and school boards.

### **7-7.01 Civil Rights**

The Equal Employment Opportunity Commission [website](#) provides guidance for navigating the myriad queries that employers must answer about COVID-19 vaccines and applicable civil rights law, including guidance on vaccine mandates and vaccine incentives. It also contains a “frequently-asked-questions” document that provides information about COVID mandates in the workplace.

### **7-7.02 Workplace Safety**

The Virginia Department of Labor and Industry administers the programs for Virginia Occupational Safety and Health. Like the federal agency, its rules may be found [online](#). The Centers for Disease Control and Prevention’s [website](#) contains additional, updated guidance.

### **7-7.03 Court Orders**

The Supreme Court of Virginia, and the various circuit courts, entered emergency orders to govern judicial proceedings during the pandemic. The orders of the Supreme Court of Virginia regarding COVID-19 can be found [here](#).

### **7-7.04 Changes to the Virginia Workers’ Compensation Act**

The General Assembly amended the Virginia Workers’ Compensation Act in 2021 and 2022 to include a retroactive presumption that COVID-19 is a covered occupational disease when it causes the death or disability of health care providers, firefighters, law enforcement officers, correctional officers, and regional jail officers and when certain other conditions are met. See Va. Code § 65.2-401.2(B) and this set of answers by the Virginia Workers’ Compensation Commission to [Frequently Asked Questions](#); see also the discussion of this topic in Chapter 8, Workers Compensation, section [8-5.02\(e\)](#).

## **7-8 MISCELLANEOUS**

### **7-8.01 Minimum Wage**

In 2020, Virginia increased the hourly minimum wage for employees of nearly all employers, including “the Commonwealth, any of its agencies, institutions, or political subdivisions, and any public body.” Va. Code § 40.1-28.9. The minimum wage increases gradually, from \$9.50 per hour beginning on May 1, 2021, to \$15.00 per hour (or the federal minimum wage, if higher) on January 1, 2026. Va. Code § 40.1-28.10. The General Assembly must vote again by July 1, 2024, in favor of the final two wage increases for those to become

effective. Acts 2020, cc. 1204, 1242, cl. 3. An employer who violates the minimum wage requirements “shall be liable” for the amount of unpaid wages plus interest at 8 percent per year and may be ordered to pay reasonable attorney’s fees. Va. Code § 40.1-28.12. Moreover, any employer who knowingly fails to pay all wages due an employee “shall” be liable for damages in an amount equal to triple the wages due as well as reasonable attorney’s fees and costs. Va. Code § 40.1-29. There is no pre-litigation exhaustion requirement. *Id.*

### 7-8.02 The Virginia Overtime Wage Act

In 2021, the Virginia Assembly enacted the Virginia Overtime Wage Act, expanding calculations for determining overtime pay, changing the process for bringing suit, and increasing penalties for offending employers. However, the 2022 Assembly reversed most of those changes. In general, as of July 1, 2022, Virginia law incorporates the definitions, calculations, exemptions, and other provisions of the federal Fair Labor Standards Act (FLSA) regarding overtime pay.<sup>35</sup> Va. Code § 40.1-29.2. Thus, employers must compensate employees at least one and one-half times the employee’s regular rate of pay for any hours worked in excess of forty hours in any one workweek. Va. Code § 40.1-29.3(B). However, the Virginia Overtime Wage Act’s private right of action, permitting an employee to sue an employer for overtime wages owed, survives. Va. Code § 40.1-29.3(C). The statute of limitations for bringing a claim for a violation of the Act is two years, or three years for willful violations. Va. Code § 40.1-29.3(D). The 2022 amendments required the Secretary of Labor to convene a work group to review overtime issues and the Virginia Overtime Wage Act, and to submit a report with findings and recommendations to the Governor and legislature. 2022 Va. Acts chs. 461, 462. The work group made [six recommendations](#) regarding damages and penalties, potentially conflicting statutes of limitations, and the agricultural and domestic work exemptions.

### 7-8.03 Misclassification

An individual who has not been properly classified as an employee may bring a civil action for damages against the employer if the employer had knowledge of the misclassification. Va. Code § 40.1-28.7:7(A). The court may award damages in the amount of any wages, salary, employment benefits, reasonable attorney’s fees, and litigation costs. *Id.* The statute creates a presumption that an individual who performs services for a person for remuneration is presumed to be an employee unless it is shown that the individual is an independent contractor as defined by the Internal Revenue Service. Va. Code § 40.1-28.7:7(B).

### 7-8.04 Cannabis Oil and Marijuana

In 2021 the General Assembly added § 40.1-27.4 to the Code of Virginia to protect employees who lawfully use cannabis oil for the treatment or to eliminate the symptoms of a diagnosed condition or disease. The employee must present a written certification by a practitioner to that effect. The employer may not discharge, discipline, or discriminate against such employees for their use of cannabis oil. However, the employer may prohibit the possession of cannabis oil during work hours, and the employer retains the right to take any adverse employment action for any work impairment caused by an employee’s use of cannabis oil.

Virginia legalized the possession by adults aged twenty-one and older of one ounce or less of marijuana for personal use. Va. Code § 4.1-1105.1. The law also permits

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<sup>35</sup> Note, however, *Cornell v. Benedict*, 301 Va. 342, 878 S.E.2d 191 (2022), in which the Virginia Supreme Court held that in the context of suits for unpaid wages under § 40.1-29(J), the General Assembly’s use of the word “entity”—instead of “person,” as in the FLSA—evinced an intent to omit individuals from joint liability for unpaid wages. Thus, members of the Board of Directors of a bankrupt psychotherapy practice were not individually liable for the unpaid wages of its employees.

cultivation of up to four marijuana plants per household for personal use. Va. Code § 4.1-1101. It remains illegal to use marijuana in public, to sell it, possess large quantities of it, or possess it on public school property while school is open. However, other provisions of the law, becoming effective in 2024, allow for the commercial production and retail sale of cannabis, to be regulated by the newly established Virginia Cannabis Control Authority. Va. Code § 4.1-601. Pursuant to the law, any locality within Virginia may, by referendum, prohibit the sale of marijuana within its jurisdiction, but if the referendum fails, the locality may not hold a subsequent referendum on the question. If the referendum passes—and the locality prohibits retail marijuana stores—a referendum on the question may be held again after four years. Localities that permit the retail sale of cannabis may adopt ordinances regarding the hours during which the stores may operate and penalties for violations of the ordinances. Retail cannabis sales will be taxed at 21 percent statewide, and localities may levy an additional sales tax of up to 3 percent.

Even though personal marijuana use has been legalized, standards regarding drug testing by employers have not changed. Currently, the law neither requires nor prohibits workplace drug testing. However, public bodies must still include provisions in every contract over \$10,000 stating that the contractor agrees to provide a drug-free workplace for the contractor's employees and will include such a provision in any subcontract or purchase order over \$10,000. A "drug-free workplace" means a site for the performance of the work done in connection with the contract in which employees are "prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract." Va. Code § 2.2-4312.