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# LOCKHART v. COMMONWEALTH EDUCATION SYSTEMS
## 439 S.E.2d 328 (1994)
## Virginia Supreme Court

### FACTS

In two separate cases, employees alleged they had been fired because of their race and sex, respectively. Lawanda Lockhart, a black woman, was the director of admissions at Commonwealth College (Commonwealth). Lockhart alleged that she was first demoted, then fired on account of her refusal to participate in the discriminatory practices and polices of the institution.

Specifically, Lockhart claimed that the college had engaged in discriminatory policies and practices against African-Americans in admission and employment. She claimed that the president of Commonwealth's Richmond campus (where she worked) had attempted to force her to fire, solely on the basis of race, black employees who failed to meet production goals while retaining white employees who had failed to meet those same goals. Lockhart further alleged that on at least two occasions she witnessed derogatory remarks being made about African-Americans by high-level officials of Commonwealth, in particular the College's registrar who made racially offensive remarks while meeting with prospective students.

Lockhart refused to participate in these policies and reported the violations to her superiors. In response, the College officials demoted her. After Lockhart contacted the National Association for the Advancement of Colored People (NAACP) and a private attorney, who in turn contacted representatives of Commonwealth, she was given an unsatisfactory performance evaluation and discharged "amid claims her performance was inadequate even though white co-workers, with markedly less productivity, were retained."[1]

Lockhart sued in state court, and the trial court sustained Commonwealth's demurrer on the ground that Virginia does not recognize a cause of action for wrongful discharge of employment.[2] The Virginia Court of Appeals affirmed and the Virginia Supreme Court granted *certiorari*.

In the second case, Nancy L. Wright approached Wayne B. Donelly, president of Donelly and Company, in June, 1991, concerning a possible position with his company. She was hired as an administrative assistant by Donelly in July of 1991, and began work on July 22 of that year. On Wright's first day of work, Wright alleged that Donelly approached her from behind and kissed her cheek. Wright claimed that on the following day Donelly "physically seized her, grabbed her and hugged her without her consent."[3] Wright then informed Donelly that she did not intend to be subjected to this treatment and that she could not work under these conditions. Donelly told Wright that they would "work things out."[4] On July 24, 1991, Donelly made "repeated abusive, inappropriate, and harassing remarks" to her and then ordered her from the establishment.[5]

Wright sued, alleging that her discharge was unlawful because it violated the public policy of Virginia as articulated in the Virginia Human Rights Act Code 2.1-714 through 2.1-725. The trial court sustained a demurrer filed by Donelly on the basis that no cause of action for wrongful discharge was recognized for gender discrimination. The Virginia Court of Appeals affirmed the trial court and on appeal the Virginia Supreme Court consolidated this case with the *Lockhart* case.

### HOLDING

In a six to three decision, the Virginia Supreme Court reversed the Court of Appeals. Justice Hassell, writing for the majority, held that the narrow public policy exception to the "employment-at-will" doctrine of *Bowman v. State Bank of Keysville*[6] should be expanded to include discharge for race and gender.[7] The Court, how-

[1] *Lockhart v. Commonwealth Educ. Systems Corp.*, 439 S.E.2d 328, 329 (1994).

[2] Virginia Human Rights Act, 2.1-725 (1950) reads: "Nothing in this chapter creates, nor shall it be construed to create, an independent or private cause of action to enforce its provisions. Nor shall the policies or provisions of this chapter be construed to allow tort actions to be instituted instead of or in addition to the current statutory actions for unlawful discrimination."

[3] *Lockhart*, 439 S.E. 2d at 329.

[4] *Id.*

[5] *Id.* at 330.

[6] 331 S.E.2d 797 (1985).

[7] *Lockhart*, 439 S.E.2d at 331.

ever, explicitly denied reliance upon the Virginia Human Rights Act to create a new cause of action.[8]

ANALYSIS/APPLICATION

The Virginia Supreme Court affirmed Virginia's commitment to the "employment-at-will" doctrine.[9] This rule, however, is subject to narrow policy exceptions.

In *Bowman*, the defendant bank argued that plaintiffs Bowman and Bridges were at-will employees. As such, the Bank had the right to terminate them at any time for any reason. The Court found an exception to the rule, holding that the retaliatory discharge of stockholder-employees who opposed the violation of security regulations by their employers was a violation of public policy.[10]

In *Miller v. SEVAMP*,[11] the plaintiff employee argued that she was discharged in retaliation for the plaintiff's appearance in a fellow employee's grievance hearing and relied upon SEVAMP's Personnel and Administrative Procedures Manual as providing her with protection from at-will termination. While the Court recognized an exception to the at-will employment doctrine where a discharge violates public "policy . . . designed to protect property rights, personal freedoms, health safety or welfare of the people,"[12] the Court found that the exception in *Bowman* did not include private rights.

Building upon *Bowman* and *SEVAMP*, the *Lockhart* Court stated that the personal freedom to pursue employment free of race or gender discrimination was of far greater importance than the freedom of a stockholder to exercise the right to vote stock free of duress and intimidation.[13] "The General Assembly," the Court added, "has declared this Commonwealth's strong public policy against employment discrimination based upon race or gender."[14] The Court cited the Virginia Human Rights Act in support of this proposition,[15] but denied creating a new cause of action based upon the Act. Instead, the Court declared that it was relying "solely" upon the narrow exception of *Bowman*.[16]

The Court rejected Commonwealth's argument that Lockhart had no claim under the *Bowman* exception because there were federal remedies available to her. "It is not uncommon," the Court noted, "that injuries resulting from one set of operative facts may give rise to several remedies, including common law tort remedies as well as federal statutory remedies."[17] Further, the Court denied that Lockhart was required to exhaust administrative remedies under Title VII before filing a state tort action.[18]

Justices Compton, Carrico, and Stephenson dissented, urging that under 2.1-725 of the Virginia Human Rights Act no new causes of action may be created.[19] Despite the majority's disclaimer to the contrary, the dissent stated that the majority had "obviously" created a cause of action to enforce provisions of the Virginia Human Rights Act.[20] The creation of this new cause of action resulted in an unwarranted encroachment upon the employment-at-will doctrine, "rigidly adhered to by this Court until now."[21]

After *Lockhart*, an employee may sustain a cause of action for improper discharge based upon either racial or gender discrimination. The employee must show that the termination was against the public policy of Virginia, although the Court does hint that public policy based on a federal statute could be the basis for such an action.[22] The Court has not, how-

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[8] *Id.* at 331.

[9] *Id.* at 330. 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. *Id.*

[10] *Bowman*, 331 S.E.2d at 800. Code 13.1-32, now Code 13.1-662, confers on each shareholder one vote. This stautory provision contemplates that the right to vote shall be exercised free of duress and intimidation imposed on individual stockholders by corporate management. Because the right conferred by statute is in furtherance of an established public policy, the employer may not lawfully use the threat of discharge of an at-will employee as a device to control the otherwise unfettered discretion of the shareholder to vote freely his or her stock in the corporation. *Id.* at 801.

[11] 362 S.E.2d 915 (1987).

[12] *Bowman*, 331 S.E.2d 797, (1985).

[13] *Lockhart*, 439 S.E.2d at 332.

[14] *Id.*

[15] Virginia Human Rights Act, Code 2.1-715. (It is the policy of the Commonwealth of Virginia: 1. To safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, age, marital status or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment . . . .)

[16] *Lockhart*, 439 S.E.2d at 331.

[17] *Id.*

[18] *Id.* at 332.

[19] *See supra* note 1.

[20] *Id.* at 332.

[21] *Id.*

[22] *Id.*

ever, specified what evidence at trial will provide a plaintiff with a prima facie case since this decision was rendered on a demurrer.

*Lockhart* appears to be a major departure from the framework created in *Bowman* and *SEVAMP*. In the previous cases, the Court acted in a conservative manner, protecting the rights of all individuals by focusing upon some statute or public law that protected some broad ideal and, alternatively, requiring that a public right be vindicated. In *Lockhart*, however, the Court has acted without any statutory mandate at all. As will be shown, the Court appears to have created a common law cause of action for wrongful discharge based upon a broad "public policy" claim,[23] which is an uncharacteristic step for a court as conservative as the Virginia Supreme Court to take.

Although the Court emphasizes that the exceptions to Virginia's employment-at-will doctrine are narrow, its focus upon "public policy" as an exception has the potential to become a major breach in the at-will employment doctrine. The Court defines public policy as "the policy underlying laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general."[24] In *Bowman* and *SEVAMP*, the Court tied the exception to the at-will employment doctrine to a specific statute.[25] In *Lockhart*, however, because the Court has defined public policy as a policy underlying a diverse group of laws, it has operationalized a "narrow" exception in a very expansive fashion and created a common law right of action. Presumably then, an employee who is discharged in violation of the policy underlying public safety laws or property statutes would have a cause of action under this exception. Further, laws which protect "the welfare of the people in general" may be stretched by an expansive court to include nearly every law in Virginia. A plaintiff could possibly utilize any law that arguably protects "the welfare of the people in general" and survive a motion to dismiss.

The Court seems to have taken a contradictory course in carving out exceptions to the at-will employment doctrine. In *SEVAMP*, the Court stated, "We . . . think it wise to leave to the deliberate processes of the General Assembly any substantial alteration of the doctrine."[26] The Court followed its reasoning in *Bowman* that required the plaintiff to find some statute that represented the public policy the defendant employer had violated.[27] In *Lockhart*, however, the Court has embraced an exception to the at-will employment doctrine without utilizing any statute promulgated by the General Assembly. By doing so, the Court has created a situation in which judges and not the Legislature will define the contours of this "public policy" exception.

If the Court did not intend to define "public policy" in such a broad manner, then the dissent has correctly asserted that the majority has created a cause of action against the express will of the Legislature.[28] Although the Court attempts to place the cause of action under the broad rubric of "public policy," the opinion relies heavily upon the language of the Virginia Human Rights Act in reaching its conclusion, implicitly identifying the public policy ideals mentioned in that statute as those relevant to the case. The Court states that Ms. Wright pleaded a viable cause of action despite the fact that she cited Code 2.1-725.[29] Therefore, if the Court has intended to limit public policy to policy established by existing law, then it has simply read out the plain language of 2.1-725 of the Act in order to carve this exception.

If the *Lockhart* exception proves to be very broad, it will create practical problems for employers. *Lockhart* will force employers to clearly state their reasons for terminating employees. Although forcing an employer to clearly articulate the reasons that an employee is terminated could be beneficial in the short run, employers may fall into a pattern of utilizing "safe" excuses so that the benefit of disclosure is forfeited in the long run.

*Lockhart* could also present evidentiary problems for employers. In order to be completely insulated from an attack by the employee for wrongful discharge based upon this public policy exception, the employer may be forced to document evidence of its compliance with the public policies underlying the broad range of topics the Court listed. The primary manner in which employers will achieve

[23] *See* Frank C. Morris, Jr., "Litigation Challenges to Layoffs and Corporate Downsizing," American Law Institute, April 28, 1994.

[24] *Lockhart*, 439 S.E.2d at 331 (quoting *Mill v. SEVAMP*, 362 S.E.2d at 918.).

[25] In *Bowman* the Court relied on Code 13.1-32 [now Code 13.1-662]. *Bowman*, 331 S.E.2d at 800. In *SEVAMP*, the Court found that the plaintiff's failure to argue a violation of "public policy established by existing laws for the protection of the public generally" did not fall within the *Bowman* exception. *SEVAMP*, 362 S.E.2d at 919.

[26] *SEVAMP*, 362 S.E.2d at 919.

[27] *See supra*, note 24.

[28] *See supra*, note 2.

[29] *See supra*, note 2.

compliance will be by providing evidence of the employee's inadequacy.[30] For businesses that conduct evaluations of its employees on a regular basis, documentation will not present any obstacle. However, for very small, businesses with no formal evaluation process, *Lockhart* may impose an additional responsibility and expense. Otherwise, the business will be open to a suit for wrongful discharge.

The Court has not stated why it included the long review of the fact patterns of the two cases. On first blush it seems that the Court was furnishing practitioners with a "blueprint" of facts to allege. However, after recounting the facts in great detail in the early portion of the opinion, the Court makes no mention of them in reaching its decision. The Court assumes that facts as alleged are sufficient, but does not state which facts are crucial to a plaintiff in stating a cause of action under the exception. Instead, the Court focuses upon the Virginia Human Rights Act as proof of the Legislature's intent and says no more. Therefore, it may be that the Court included the facts simply because of their egregious nature. Outrageous facts such as those in *Lockhart* tend to justify and hide the expansive language of the decision, not to mention the fact that they tend to draw attention away from the fact that the Court has created a cause of action under the Virginia Human Rights Act, rather than to offer plaintiffs a "blueprint."

[30] This detailed documentation may actually hurt employees in the long run by damaging their chances of finding other employment by highlighting their deficiencies.

## CONCLUSION

Practitioners will want to watch the Court's future opinions on this issue closely. Although the court probably saw the creation of a common law right of action for wrongful discharge as being in the best interests of the Commonwealth, a court as traditionally conservative as the Virginia Supreme Court may rethink some of the broad language found in the *Lockhart* opinion. Moreover, at this time, the Court has done nothing more than to allow the case to survive a motion to dismiss. The Court has not specified how the case will be presented at trial or what facts are critical to a plaintiff's success. The Court may limit the scope of the public policy exception to so-called "suspect classes" such as gender, race, religion or national origin. The Court may also refine its holding in *Lockhart* to require that plaintiff cite a particular statute in pleading a viable cause of action. As the Court has defined "public policy" at this time, though, the exception has the potential to become extremely broad.

Summary and Analysis Prepared by:
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