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Of Counsel Carl S. Silverman

November 9, 2012

Re: The Virginia Supreme Court Imposes Personal Liability on Managerial and Supervisory Personnel in Wrongful Discharge Cases

In *Van Buren v. Grubb*, issued November 1, 2012, the Supreme Court of Virginia materially changed the law and the legal landscape for employers doing business in Virginia, as the Court there held that individual managers and supervisors can be held liable for wrongful discharge claims brought under Virginia law. In that case, the Court answered “yes” to the following question posed by the U.S. Court of Appeals for the Fourth Circuit:

Does Virginia law recognize a common law tort claim of wrongful discharge in violation of established public policy against an individual who was not the plaintiff’s actual employer but who was the actor in violation of public policy who participated in the wrongful firing of the plaintiff, such as in the capacity of a supervisor or manager?

The Court held that where a supervisor or manager makes the decision to terminate an employee for unlawful reasons, (s)he “can be held personally liable for any proven misconduct” under the “public policy” exception to at-will employment in Virginia.

Here, plaintiff VanBuren, alleged that she had been wrongfully discharged in violation of Virginia public policy by her supervisor, because she allegedly refused to engage in adultery and “open and gross lewdness and lasciviousness” with him, in violation of Virginia’s criminal code, after he reportedly repeatedly hugged, kissed, and groped her.

The Court found that VanBuren had an actionable claim for wrongful discharge against her employer. The issue was whether plaintiff could also bring a wrongful discharge claim against her supervisor, the individual who fired her based on her alleged refusal to have an adulterous affair with him.

In answering that question in the affirmative, the Supreme Court gave lip service to the “presumption” of at-will employment in Virginia. The Court observed that presumption of at-will employment has only a few very narrow exceptions, including “discharge based on the employee’s refusal to engage in a criminal act,” which is deemed to be contrary to Virginia public policy. The Court further explained that “where...tortious reasons arise from the unlawful actions of the actor effecting the discharge, he or she should share in the liability.”

While the Virginia Supreme Court recognized that its holding could result in supervisors being reluctant to discharge at-will employees for fear of being sued, the Court dismissed these anticipated concerns, stating: “....that the extremely narrow nature of wrongful discharge actions...and the requirements that the defending employees’ personal actions to be shown to have violated the relevant public policy provides sufficient protection from the overuse of wrongful discharge claims.” The Court further justified its decision by stating that it furthered Virginia’s goal of deterring wrongful discharge.

The Take-Away:

- 1) The “public policy” violations that were considered “criminal” in *Van Buren* are typical of the types of misconduct that are routinely raised in sex harassment claims. For that reason - - and contrary to the Court’s observation in *Van Buren* - - that decision will likely have broad application and a substantial impact on Virginia employers.
- 2) The *Van Buren* decision incentivizes the plaintiff’s bar. It will likely enhance damage awards in wrongful termination cases.
- 3) Since supervisors and managers are now clearly subject to personal liability for their involvement in wrongful termination decisions, they should carefully consider the propriety of terminating an employee’s employment, or recommending termination.
- 4) Employers are advised to carefully review proposed termination actions to assure that they are lawful and not motivated by any impermissible factor or even the appearance of impropriety.
- 5) Supervisors and managers should be trained in “best practices” regarding termination decisions, and to identify, avoid, not tolerate, and prohibit discrimination, harassment, and any other unlawful conduct in the workplace.

While the *Van Buren* decision is ground-breaking, it is illustrative of an increasing pro-plaintiff orientation by Virginia courts in the employment law area.

Feel free to call if you have any questions about this decision or suggested compliance activities.

- Bert

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