The State of Wrongful Discharge and Whistleblower Retaliation Claims in Virginia

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Pushing the Envelope: Emerging Plaintiff’s Theories

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Pushing the Envelope: Emerging Plaintiff's Theories

THE STATE OF WRONGFUL DISCHARGE AND WHISTLEBLOWER RETALIATION CLAIMS IN VIRGINIA

These written materials examine recent developments in (1) the interpretation of Virginia’s wrongful discharge in violation of public policy cause of action, (2) Virginia state whistleblower law, and (3) federal court decisions concerning an assortment of additional whistleblower claims arising with Virginia or the Fourth Circuit.

WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

I. General Background of Virginia’s Wrongful Discharge in Violation of Public Policy Cause of Action.

Strong adherence to the employment-at-will doctrine is a “settled part of the law of Virginia.” See Miller v. SEVAMP, Inc., 234 Va. 462, 468 (Va. 1987). In 1985, however, the Virginia Supreme Court recognized a public policy exception to the at-will employment doctrine. Bowman v. State Bank of Keysville, 331 S.E.2d 797, 801 (Va. 1985).

In Bowman, former employees and shareholders of the State Bank of Keysville brought a wrongful discharge claim against their employer for terminating them in violation of policies clearly established by securities and corporation laws. Id. at 799. The employees’ supervisors explicitly informed the employees that if they did not vote in favor of the merger and the merger was not consummated, they would be terminated. Id. The employees voted for the merger under duress but later submitted a letter to the bank president in protest, asserting that their proxies were “improper, null and void.” Id. The employer terminated these employees several days later. These employees subsequently filed a lawsuit asserting a claim for wrongful discharge. Id. The court determined that by terminating the employee-shareholders, the employer had violated public policy specifically outlined in the Virginia code that provided that stockholders have the right to vote free from duress and intimidation imposed by corporate management. Id. at 801.

In the 25 years since Bowman was decided, the Virginia Supreme Court has gradually refined the wrongful termination cause of action. As the Bowman doctrine currently stands, the Virginia Supreme Court recognizes three factual scenarios where an at-will employee may bring a claim for wrongful discharge in violation of public policy: (1) when “an employer violated a policy enabling the exercise of an employee's statutorily created right”; (2) “when the public policy violated by the employer was 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”; and, (3) when “the discharge was based on the employee's refusal to engage in a criminal act.” Rowan v. Tractor Supply Co., 263 Va. 209, 210-12 (Va.2002)
The following list offers a brief overview the most salient Virginia Supreme Court cases, decided subsequent to Bowman, that bear on the development of the wrongful discharge in violation of public policy cause of action:

- **Miller v. SEVAMP, Inc.,** 234 Va. 462, 468 (Va. 1987): the plaintiff claimed that the defendant terminated her employment because she testified truthfully during a private grievance proceeding. In rejecting her claim, the Virginia Supreme Court held that only a public policy right, and not merely a private policy, can supply the necessary basis for the wrongful discharge cause of action.

- **Lockhart v. Commonwealth Education Systems Corp.,** 247 Va. 98 (Va. 1994): for a short period of time, the Virginia Supreme Court recognized a wrongful discharge cause of action for discriminatory discharge (as opposed to the still-existent retaliatory discharge) based on the plaintiff’s status as a protected class (e.g., race, gender, etc.). In Lockhart, the Virginia Supreme Court identified the Virginia Human Rights Act (“VHRA”) as a source of public policy sufficient to sustain a wrongful termination cause of action. The Court’s holding protected an employee from discharge based on that employee’s status (as protected under the VHRA). Apparently upset with this decision, the Virginia state legislature quickly amended the VHRA to foreclose any tort action based on the public policy expressed in the statute. **See** Va. Code § 2.1-725(D). The Virginia Supreme Court later interpreted these amendments to mean that a plaintiff could no longer maintain a common law claim based on violations of public policy as stated in the VHRA because such a cause of action would circumvent Va. Code § 2.1-725(D)’s requirement that claims for violations of such policies be “exclusively limited” to statutory causes of action. **Doss v. Jamco, Inc.,** 254 Va. 362 (Va. 1997). Courts now routinely dismiss wrongful discharge claims where they find that the plaintiff alleges violations of public policy as stated in the VHRA. **See, e.g., Horner v. Southwest Virginia Regional Jail Authority,** 2009 WL 396090 (W.D.Va. 2009).

- **Lawrence Chrysler Plymouth v. Brooks,** 251 Va. 94 (Va. 1996): the plaintiff, an automobile mechanic, refused to perform certain repairs that involved the allegedly unsafe method of combining two halves of wrecked cars together. The Virginia Supreme Court stated that the plaintiff could not maintain an action for wrongful discharge because he failed to identify any Virginia statute that established a public policy which his employer’s orders to repair would have violated. This decision established the importance of identifying a clear and distinct statutory pronouncement of public policy.

- **Shaw v. Titan Corp.,** 255 Va. 535 (Va. 1998): this case establishes that a plaintiff in a wrongful discharge action must only prove by a preponderance of the evidence that the defendant terminated her employment for an unlawful reason. Shaw also established that a plaintiff can recover punitive damages for a wrongful termination claim.

- The plaintiff in **Dray v. New Market Poultry Products,** 258 Va. 187 (Va. 1999), was a quality control inspector at a chicken processing plant. Dray believed that the plant was not following proper sanitary rules and was distributing adulterated poultry. After learning that Dray informed government inspectors about sanitary concerns, her
employer terminated her employment. Plaintiff brought a wrongful termination claim against New Markey Poultry Products, asserting that her employer violated the public policy underlying the Virginia Meat and Poultry Products Inspection Act, Va. Code § 3.1-884.17 et seq. The Virginia Supreme Court held that plaintiff had not stated a claim for wrongful discharge because the Virginia Meat and Poultry Products Inspection Act was intended to establish an intrastate regulatory mechanism for commerce, not to protect “the public good” generally. Accordingly, the state's public policy regarding inspections of meat and poultry products did not create a protected class of which plaintiff was a member. Some courts have interpreted Dray to stand for the proposition that the Bowman wrongful discharge public policy exception does not encompass a generalized, “whistleblower” retaliatory discharge claim. See Anderson v. ITT Industries Corp., 92 F.Supp.2d 516, 521, fn. 14 (E.D. Va. 2000).

- In Mitchem v. Counts, 259 Va. 179 (Va. 2000), plaintiff brought a claim against her former employer, alleging that he had discharged her because she refused to engage in a sexual relationship with him. Mitchem alleged that she was fired because she refused to perform sexual acts that would violate Va. Code § 18.2-344, prohibiting fornication, and Va. Code § 18.2-345, prohibiting lewd and lascivious cohabitation. The employer contended that criminal statutes could not support plaintiff’s claim because the statutes did not announce public policies in their texts. The Virginia Supreme Court rejected the employer's argument, holding 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.” See id. at 186. Because the criminal statutes against fornication were intended to protect the health, safety and welfare of the general public, the Virginia Supreme Court held that, as a member of the general public, plaintiff was a member of the class of persons the statutes were designed to protect, and accordingly had stated a viable claim for wrongful termination.

- In City of Virginia Beach v. Harris, 259 Va. 220 (Va. 2000), the Virginia Supreme Court held that a police officer was not a member of the class of individuals that a criminal statute's public policy intended to benefit. The police officer argued that his employer and superior officers committed the crime of obstruction of justice when the employer discharged the officer after he attempted to serve warrants on these superiors. The officer argued that the adverse employment action obstructed the officer's enforcement of the law. As in Mitchem (decided on the same day), the Virginia Supreme Court held that criminal statutes have as an underlying policy the protection of the public's safety and welfare. Therefore, it was inappropriate for a police officer to employ the criminal statute to protect himself rather than the public.

- In Rowan v. Tractor Supply Co., 263 Va. 209 (Va. 2002), the Virginia Supreme considered a certified question as to whether a plaintiff could state a Bowman wrongful discharge claim under Virginia’s obstruction of justice statute, Va. Code § 18.2-460, where the plaintiff alleged that she had been terminated for her refusal to yield to her employer's demand that she discontinue pursuing criminal charges of assault and battery.
against a fellow employee. In answering the certified question in the negative, the Virginia Supreme Court noted that the obstruction of justice statute did not confer a right upon the plaintiff to be free from intimidation for pursuing criminal charges against a wrongdoer. Citing Harris, the Court contended that the employer’s discharge of the plaintiff Rowan did not violate a right granted to her, but rather violated a criminal statute enacted to ensure that the administration of justice is not subverted. Because the Court determined that Va. Code § 18.2-460 did not create any statutory right or a corresponding public policy that would support a public policy exception to the employment-at-will doctrine, the wrongful discharge cause of action must fail.

II. Recent Federal Court Interpretations of Virginia’s Wrongful Discharge in Violation of Public Policy Cause of Action.

In Pacquette v. Nestle USA, Inc., 2007 WL 1343794, *7 (W.D. Va. 2007), Judge Jackson Kiser found that Virginia’s insulting words statute, Va. Code § 8.01-45 does not contain an explicit statement of public policy and was not designed to protect the welfare of the people in general because it only addresses conduct between individuals. Judge Kiser also determined that federal laws (in this case, ERISA) cannot provide the necessary statement of public policy to support a wrongful termination claim. Id. (citing Oakley v. The May Dep't Stores, Co., 17 F.Supp.2d 533, 536 (E.D.Va.1998)).

In Sewell v. Macado’s, Inc., 2004 WL 2237074 (W.D. Va. 2004), Judge Glen Conrad noted that the Virginia Supreme Court had not yet addressed whether Va. Code § 18.2-465.1 provides the requisite statement of public policy to support a wrongful discharge cause of action. Va. Code § 18.2-465.1 is a criminal statute that makes it is a misdemeanor for an employer to discharge or take adverse action against an employee because that employee is subpoenaed to appear in court. Opining that the recognition of this criminal statute as a sufficient statement of public policy might expand the state’s public policy exception to the employment at-will doctrine, Judge Conrad declined to recognize the criminal statute as such and dismissed the wrongful termination claim. In doing so, Judge Conrad cited to language in an unpublished opinion that “a federal court exercising diversity jurisdiction only is permitted to ‘rule upon the state law as it currently exists and not to surmise or suggest its expansion.’” Id. at X (citing Swain v. Adventa Hospice, Inc., 2003 U.S. Dist. LEXIS 22753 *7 (W.D.Va. Dec. 12, 2003). The Court’s reliance on this language is arguably misplaced, however, because the Fourth Circuit has clearly stated that “[i]n a situation where the state's highest court has spoken neither directly nor indirectly on the particular issue before us, we are called upon to predict how that court would rule if presented with the issue.” Ellis v. Grant Thornton LLP, 530 F.3d 280, 287 (4th Cir. 2008). Judge Conrad’s duty was to carefully examine related precedent, rather than simply deferring on the question because it might expand the public policy exception to the at-will employment doctrine.

In Miller v. Washington Workplace, Inc., 298 F.Supp.2d 364 (E.D. Va. 2004), Judge James Cacheris found that Va. Code 40.1-29 of the Virginia Wage and Payment Act provided a sufficient pronouncement of public policy to support a wrongful termination claim. This statute states that “An employer, upon request of his employee, shall furnish the latter a written statement of the gross wages earned by the employee during any pay period and the amount and

In Swain v. Adventa Hospice, Inc., 2003 WL 22996906 (W.D.Va. 2003), plaintiff alleged that her employer, a hospice care organization, had terminated her employment because she had reduced a patient’s overmedication and in the process saved the patient’s life. Judge Samuel Wilson dismissed plaintiff’s wrongful termination claim because of plaintiff’s failure to allege both that the employer had ordered her to engage in an unlawful act and that her termination resulted from a refusal to accede to that unlawful order. The Court determined that this failure meant that plaintiff had failed to satisfy a necessary element of the Mitchem wrongful discharge exception (where the employee’s discharge was based on the employee's refusal to engage in a criminal act).

In U.S. ex rel Martinez v. Virginia Urology Center, P.C., 2010 WL 3023521, *6 (E.D.Va. Jul. 29, 2010), Judge James Spencer expressed doubt that the VFATA or Va. Code § 54.1-2909, which requires that physicians report professional malpractice or misconduct, could provide a sufficient statement of public policy to support a wrongful termination action. However, the Court did not expressly address this issue because it found that the absence of a clear causal connection between plaintiff’s allegations regarding her opposition to certain practices and her termination.

1. **Plaintiff Must Plead Specific Factual Allegations where Conduct Occurred Outside of Virginia.**

Twigg v. Triple Canopy, Inc., 2010 WL 2245511 (E.D.Va. June 2, 2010) is an important decision for wrongful discharge litigation that involves conduct occurring outside of the state of Virginia. The plaintiff in Twigg served as a private security guard for Triple Canopy in Iraq. When Triple Canopy terminated Twigg’s employment, he brought an action against the defendant alleging that he was fired, inter alia, because he cooperated with the Department of State in its investigation of Triple Canopy's false claims (its unlawful billing and invoicing practices in connection with its federal DoS contract). In granting defendant’s motion to dismiss the wrongful discharge claim, Judge James Cacheris identified three situations in which a plaintiff may bring a wrongful discharge action:

a) when an employee is fired for having exercised a statutorily-protected right; (b) when an employee is fired in violation of a statutory public policy that directly applies to or protects him (i.e. he is a “protected class”); and (c) when an employee plaintiff is fired for refusing to engage in criminal conduct. Rowan v. Tractor Supply Co., 263 Va. 209, 213 (Va.2002).
In Twigg, plaintiff identified the relevant public policies as expressed in Va. Code § 18.2-172, prohibiting forgery, and Va. Code § 18.2-178, prohibiting obtaining money under false pretenses. Plaintiff argued that these criminal statutes impose a duty not to commit the crimes of forgery or obtaining money under false pretenses, (Rowan's second prong) and that the defendant fired plaintiff for refusing to engage in statutorily prohibited conduct (Rowan's third prong). Defendant argued that, because plaintiff was in Iraq at the time of the relevant conduct, “neither could a Virginia criminal statute impose a duty on Plaintiff nor could Plaintiff violate such a statute while [in Iraq].” Twigg at *4.

Judge Cacheris stated that, in order for the wrongful discharge claims to survive a motion to dismiss, plaintiff must show that the Virginia criminal statutes applied to his conduct in Iraq. The Court noted that the plaintiff was not a citizen of Virginia and that the complaint contained no factual allegations that forged documents passed through Virginia or that Triple Canopy maintained bank accounts in Virginia where fraudulently obtained money could be deposited. Judge Cacheris then concluded that (1) plaintiff’s complaint did not contain sufficient allegations regarding conduct that was part of a forgery or the attempt to obtain money by false pretenses crime, (2) plaintiff’s complaint did not contain sufficient allegations that any criminal conduct could be connected to Virginia, (3) plaintiff had not identified case law where either Virginia’s forgery statute or false pretenses statute had been applied extraterritorially, and (4) plaintiff failed to allege some criminal conduct causing an “immediate impact” in Virginia.

III. Issues Relating to Supervisor’s Individual Liability for Wrongful Discharge

The Supreme Court of Virginia has never directly addressed whether an individual supervisor, in addition to the employer, can be held liable under the state’s wrongful discharge in violation of public policy action. Federal courts in Virginia addressing this question have reached opposite conclusions. Counsel should be aware of the arguments that have been successful in regards to imposing, and preventing, personal liability for supervisors and other officers and managers of employers. [Should note that Bowman and City of VA beach have found liability for the managers].


In McFarland v. Va. Ret. Servs. of Chesterfield, L.L.C., 477 F.Supp.2d 727 (E.D.Va. 2007), Magistrate Judge Dennis Dohnal concluded that, while a member, manager, or agent of an LLC cannot be held personally liable for wrongful discharge merely because of their status as such, a wrongful discharge action can proceed against a member, manager, or agent if that individual was directly involved in the decisions to terminate the plaintiff. In reaching his conclusion, Judge Dohnal examined the Virginia Limited Liability Company Act (Va. Code Ann. § 13.1-1000). The plaintiff had alleged that only the Executive Director of the LLC had personally participated in her wrongful discharge in violation of public policy. The remaining individual defendants were named in their capacities as members, managers, or agents of the LLC. Judge Dohnal asserted that, in keeping with Virginia’s LLC Act, these individual defendants – whom plaintiff did not allege were personally involved in her termination – could not be subjected to liability for wrongful termination “‘solely’ by virtue of their positions as
members, managers, or agents of the LLC, even when such liability arises from a tort.” Id. at 738 (emphasis in the original). Judge Dohnal reasoned both Bowman and Lockhart support his conclusion, where the Virginia Supreme Court permitted wrongful discharge actions to proceed against plaintiff’s supervisors involved in the termination decision. Id. at 739. The Court accordingly dismissed the wrongful discharge action against the individual defendants (except for the Executive Director), but granted leave to amend her complaint in the event that the discovery process produced evidence that the dismissed individual defendants played meaningful roles in the decision to terminate plaintiff’s employment.


Not all courts have agreed with the reasoning of McFarland. In VanBuren v. Virginia Highlands Orthopaedic Spine Center, LLC, 2010 WL 2985979 (W.D.Va July 28, 2010), Judge James Turk considered whether supervisors can be held personally liable in wrongful discharge suits. In direct disagreement with McFarland, Judge Turk concluded that “were the Virginia Supreme Court to directly address this issue, it would find that wrongful discharge claims by an employee are cognizable only against the employer and not against supervisors or co-employees in their individual capacity.” Id. at *3. Judge Turk asserted that the Bowman claims were meant to “safeguard employees and not punish supervisors.” Id. at *4. The Court reasoned that, because “[t]he impetus for permitting a wrongful discharge “Bowman” claim was, from the outset, to protect the vulnerable employee, not to sanction or punish any individual wrongdoer,” the Virginia Supreme Court would not impose liability for wrongful discharge against a supervisor. Id. at *4-5. Judge Turk further noted that employers would likely foot the bill for wrongful discharge verdicts as support for his holding. Judge Turk also contended that permitting personal supervisor liability would conflict with Virginia’s Limited Liability Corporation policy and “effectively pierce the corporate veil, would not be appropriate.” Id. at *5. Finally Judge Turk stated that permitting non-employer supervisor liability for wrongful discharge claims could “very well impermissibly broaden the Bowman doctrine beyond the scope that the Virginia Supreme Court would believe prudent.”3 Id. at *6

IV. Whether Virginia Recognizes Constructive Discharge as Supplying the Requisite Adverse Employment Action for a Wrongful Discharge Claim.

The foregoing decisions discuss wrongful termination in violation of public policy in the context of an actual discharge. The Virginia Supreme Court has never directly addressed the issue of whether a plaintiff alleging constructive discharge can maintain a wrongful discharge action. To establish a viable claim of constructive discharge, a plaintiff must plead facts reflecting that the employer “deliberately made [the plaintiff’s] working conditions intolerable in

3 In a less expansive discussion of the issue, Judge Turk previously found that the Virginia Supreme Court would not recognize personal liability for supervisors under the wrongful discharge tort. Lucker v. Cole Vision Corp., 2005 WL 1411655 (W.D.Va. 2005). As he did in VanBuren, Judge Turk looked to the law of North Carolina in arriving at his conclusion.
an effort to induce [the plaintiff] to quit.” Heiko v. Colombo Sav. Bank, F.S.B., 434 F.3d 249, 262 (4th Cir. 2006). A plaintiff must plead: (1) that the employer’s actions were deliberate; and (2) that the working conditions were intolerable. Id.; Taylor v. Virginia Union University, 193 F.3d 219, 237 (4th Cir. 1999). “Whether a plaintiff’s working conditions were intolerable is assessed by the objective standard of whether a reasonable person in the plaintiff’s position would have felt compelled to resign.” Taylor, 193 F.3d at 237.

1. Virginia State Court Decisions on Constructive Discharge.


However, other Virginia circuit courts have reached the opposite conclusion. See, e.g., Jones v. Prof'l Hospitality Res., Inc., 35 Va. Cir. 458 (Va. Cir. 1995) (holding that Virginia does not recognize the tort of wrongful constructive discharge); Wright v. Donnelly, 28 Va. Cir. 185 (Va. Cir. 1992) (same).


When the Virginia Supreme Court has spoken neither directly nor indirectly on a given legal issue, federal courts are called upon to predict how the Virginia Supreme Court would rule on that unsettled issue. Ellis v. Grant Thornton LLP, 530 F.3d 280, 287 (4th Cir. 2008). Federal courts generally have discretion to consider various sources of authority in anticipating the ruling of the state’s highest court. Castillo v. Emergency Medicine Associates, P.A., 372 F.3d 643, 648 (4th Cir. 2004).

“[a]lthough the Supreme Court of Virginia has yet to discuss the application of the constructive discharge doctrine to claims of wrongful termination, other Virginia state and federal courts have held that ‘an employee who can meet the high burden of proving a constructive discharge does have standing to pursue a Bowman wrongful discharge claim.’” Wynne, 2009 WL 3672119 at *3 (quoting Gochenour v. Beasley, 47 Va. Cir. 218, 222 (1998)); see also Hensler v. O’Sullivan Corp., 1995 U.S. Dist. LEXIS 18110, at *13-14 (W. D. Va. Oct. 31, 1995) (holding that Bowman wrongful discharge claim may proceed in case of constructive discharge).

Other federal courts, however, have reached the opposite conclusion. See Lewis v. Va. Baptist Homes, Inc., No. 95-0071-C, 1997 WL 102524, at *4 (W.D. Va. Mar. 6, 1997) (dismisses constructive discharge claim because “Virginia does not recognize an action for constructive discharge under the Virginia Human Rights Act”); Ludwick v. Premier Bank No., Inc., 935 F. Supp. 801, 806 n.1 (W.D. Va. 1996) (refuses to recognize constructive discharge claim under Virginia law); Michael v. Sentara Health Sys., 939 F. Supp. 1220, 1232 (E.D. Va. 1996) The Fourth Circuit sided with these cases when it addressed the issue of constructive discharge in the context of wrongful termination claims. Hairston v. Multi-Channel TV Cable Co., No.95-2363, 1996 WL 119916 (4th Cir. Mar. 19, 1996). In Hairston, the Fourth Circuit affirmed the dismissal of a wrongful discharge action because “no Virginia court has expanded the Lockhart [wrongful discharge] exception to a claim of constructive discharge.” Hairston at *2. The continued viability of Hairston and the foregoing federal cases that have reached the conclusion that constructive discharge is not recognized is questionable, however, given that numerous Virginia state courts have recognized constructive discharge in a variety of settings, including the Lockhart setting, since these cases were decided.
FALSE CLAIMS ACT WHISTLEBLOWER PROTECTIONS

The False Claims Act (“FCA”) is a law intended to provide an incentive to private citizens to file claims on behalf of the Federal Government for making fraudulent claims against the government. 31 U.S.C. §§ 3729 - 3733. Successful claimants under the FCA receive a portion of the recovery, often approximately 15-25%, with the remainder going to the government.

Under the FCA a person is liable for a fine and treble damages if that person:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.


An employee who participates in an FCA action is protected under the act’s whistleblower protection provisions. See 31 U.S.C. § 3730(h). The law protects employees from being “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer” because the employee has sought to stop an employer from engaging in any of the acts that would violate 31 U.S.C. § 3729(a)(1). The Fourth Circuit has held that in order to make out a
A *prima facie* case under 31 U.S.C. § 3730(h), an employee must prove that (1) she took acts in furtherance of a qui tam suit, (2) her employer knew of these acts, and (3) her employer discharged him as a result of these acts. See *Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 866 (4th Cir. 1999). These requirements may be met where an employee investigates potential wrongdoing and threatens a *qui tam* action. *Id.* at 867-68.

Under the FCA, protected activity consists of “lawful acts . . . in furtherance of other efforts to stop [one] or more violations of [the FCA].” 31 U.S.C. § 3730(h)(1). To demonstrate that she was discriminated against “because of” conduct in furtherance of a False Claims Act suit, an employee must show that her employer had knowledge of the protected activity and that her employer’s retaliation was motivated, at least in part, by the employee’s engaging in protected activity. *Hefner*, 495 F.3d at 111. The employee may bring her claim in federal district court.

The remedies available to a successful claimant are generally designed to “make the employee whole.” 31 U.S.C. § 3730(h). Remedies include reinstatement with seniority, double back pay with interest, and special damages including attorneys’ fees. *Id.*

1. **Protected Activity Under 31 U.S.C.A. § 3730(h).**

Courts have generally broadly interpreted what constitutes protected activity in furtherance of an action under the False Claims Act (“FCA”) anti-retaliation provision, 31 U.S.C.A. § 3730(h). The provision specifies that “protected conduct” “includes “lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiating of, testimony for, or assistance in” an FCA suit. 31 U.S.C.A. § 3730(h) does not require the plaintiff to have developed a winning *qui tam* action. See e.g., *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739, (D.C. Cir. 1998).

Protected conduct may include internal reporting and investigation of an employer's false or fraudulent claims. See e.g., *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186-7 (3d Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). However, not all types of investigations give rise to § 3730(h) protections. For example, when investigations of noncompliance are part of the employee’s duties, the mere performance of those duties may not suffice to establish protected conduct under the FCA. See e.g., *U.S. ex rel. Bartlett v. Tyrone Hosp., Inc.*, 234 F.R.D. 113 (W.D. Pa. 2006). Courts have also established that § 3730(h) does not cover situations in which a complaint could not be filed consistent with Rule 11. See *Lang v. Northwestern University*, 472 F.3d 493 (7th Cir. 2006).

As noted above, the Fourth Circuit has held that in order to make out a *prima facie* case under 31 U.S.C. § 3730(h), an employee must prove that (1) she took acts in furtherance of a qui tam suit, (2) her employer knew of these acts, and (3) her employer discharged him as a result of investigation for, initiating of, testimony for, or assistance in.

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4 On May 20, 2009, the False Claims Act was amended to include, among other things, this expansive definition of protected activity.
these acts. See Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861, 866 (4th Cir.1999). These requirements may be met where an employee investigates potential wrongdoing and threatens a qui tam action. Id. at 867-68.

There are some inconsistencies in interpreting the scope of coverage of the FCA retaliation protection provisions. For example, the Fourth Circuit recently noted that “protected activity” under the FCA is to be interpreted broadly: “Courts have interpreted FCA-protected activity broadly to cover not only the filing of a qui tam suit but also a variety of actions aimed at ascertaining whether or not a fraud has been committed that would give rise to a possible FCA suit.” U.S. ex rel. Elms v. Accenture LLP, 2009 WL 2189795, 3 (4th Cir. 2009) (citing United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 739-40 (D.C. Cir. 1998)). However, the Fourth Circuit has also held that simply reporting a concern to a supervisor of a mischarging to the government does not suffice to establish that an employee was acting “in furtherance of” a qui tam action. See Zahodnick v. International Business Machines Corp., 135 F.3d 911, 914 (4th Cir. 1997). Instead, the Fourth Circuit has specified that an employee engages in protected activity only when he makes clear to his employer that there is a reasonable possibility of qui tam litigation. See Eberhardt v. Integrated Design & Const., Inc., 167 F.3d 861 (4th Cir. 1999). The employee may do so by, for example, complaining that the conduct is clearly illegal or that the employer should consult its lawyer with regard to possible fraudulent actions it has undertaken. Id.

In assessing protected activity under the FCA retaliation provision, courts in Virginia focus on whether an employee specifically warns an employer of the possibility of a civil action, as opposed to merely highlighting illegal behavior. See Mann v. Heckler & Koch Defense, Inc., 639 F.Supp. 2d 619, 627 (E.D.Va. 2009) (employee must raise “distinct possibility of litigation”). In a recent decision, Judge James Spencer decided that the employee had failed to state a claim for FCA retaliation because “[w]hile [plaintiff] contends throughout her Complaint that her consistent opposition to ostensibly fraudulent billing practices led to her termination, in this Circuit the protection of § 3730(h) only extends to employees who are found to be developing qui tam claims and who are terminated for that reason.” U.S. ex rel Martinez v. Virginia Urology Center, P.C., 2010 WL 3023521, *6 (E.D.Va. Jul. 29, 2010) (citing Eberhardt at 866).

2. **Pleading Fraud under FCA with Particularity in Fourth Circuit.**

3. **Enforceability of Pre- Qui Tam Filing Release of Claims in Fourth Circuit.**

U.S. v. Purdue Pharma L.P., 600 F.3d 319 (4th Cir. 2010) is an important case for qui tam practitioners confronting the issue of a pre-filing release of claims against the wrongdoer. Adopts the government knowledge rule, joining with the 10th circuit court of appeals. The Fourth Circuit held that “when, as in this case, the government was aware, prior to the filing of
the _qui tam_ action, of the fraudulent conduct represented by the relator's allegations, the public interest has been served and the Release should be enforced.” Id. at 332-33.

**Consumer Products Safety Whistleblower Protection**

In the wake of scandals over lead paint found in toys and other recalls in the last few years, Congress passed the “Consumer Products Safety Reform Act of 2008,” a broad set of amendments to the Consumer Products Safety Act. The Act was signed into law and became effective on August 14, 2008. Section 219 of the Act, which has been unofficially codified as 15 U.S.C.A. § 2087 (West 2008), provides for new whistleblower protections.

A. **Protected Activity**

This statute provides a civil remedy to employees of manufacturers, private labelers, distributors, or retailers of consumer products who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they reasonably believed to be violations of consumer safety laws enforced by the United States Consumer Product Safety Commission (“the Commission”). 15 U.S.C.A. § 2087(a) (West 2008).

1. **Consumer Product Safety Laws**

Under the new Act, an employee has to have a reasonable belief that his or her employer violated consumer product safety laws. The Consumer Products Safety Act (“CPSA”), 15 U.S.C. §§ 2051-2084 (West 2008), created consumer product safety laws and established the Commission, which is charged with protecting the public from unreasonable risks of serious injury or death from consumer products. The CPSA defines the term “consumer product” as any article, or component part thereof, produced or distributed for: (1) sale to a consumer for use in or around a permanent or temporary household, school, or in recreation, and (2) for the personal use in or around a permanent or temporary household, school, or in recreation. 15 U.S.C. § 2052 (West 2008). While the Commission has jurisdiction over more than 15,000 different products under this definition, the CPSA excludes products from the Commission’s jurisdiction whose regulation expressly lies in another federal agency’s jurisdiction, for example food, cosmetics, medical devices, tobacco products, firearms and ammunition, motor vehicles, pesticides, aircrafts, and boats. Id.

Under the CPSA, the Commission has power to develop safety standards and pursue recalls for consumer products that present unreasonable or substantial risks of injury or death to consumers. 15 U.S.C. §§ 2056 and 2061 (West 2008). The Commission also has the power to ban a product if there is no feasible alternative. 15 U.S.C. § 2057 (West 2008). While the Commission’s jurisdiction is very broad, the CPSA (with some exceptions) leaves it up to the Commission to determine precisely what to regulate and/or how to regulate it. 15 U.S.C. § 2056 (West 2008). As such, not all dangers to consumer safety will be violations of the CPSA or the
Commission’s rules, regulations, or orders because the Commission may have only enacted voluntary guidelines or weak regulations. See http://www.cpsc.gov/businfo/regsbyproduct.html (website containing links that provide guidance regarding mandatory and voluntary standards).

The CPSA, however, requires that every manufacturer, distributor, and retailer of a consumer product must immediately inform the Commission if it obtains information that reasonably supports the conclusion that the consumer product: (1) fails to comply with the applicable consumer safety rule; (2) contains a defect that could create a substantial risk of injury to the public; or (3) create an unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b) (West 2008). Failure or refusal to follow this notification requirement expressly violates the CPSA. 15 U.S.C. § 2068(a)(3) (West 2008).

2. **Forms of Protected Activity**

The new Act protects four types of whistleblowing activities. The first form of protected activity is when an employee provides, cause to be provided, or is about to provide or cause to be provided information relating to any violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(1) (West 2008). The employee can provide that information to the employer, the Federal Government, or the attorney general of a state. Id.

The second and third forms of protected activity protect employees who assist in proceedings. An employee is protected under the Act when he or she testified or is about to testify in a proceeding concerning a violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(2) (West 2008). An employee is also protected if he or she assisted or participated, or is about to assist or participate in, such a proceeding. 15 U.S.C.A. § 2087(a)(3) (West 2008).

The fourth form of protected activity under the Act protects internal whistleblowers. An employee is protected under the Act if he or she objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of consumer product safety laws, orders, rules, regulations, standards, or ban enforced by the Commission. 15 U.S.C.A. § 2087(a)(4) (West 2008).

Importantly, the Act protects an employee who engages in one or more of these four forms of protected activity regardless of whether the whistleblowing act was at the employee’s initiative or in the ordinary course of the employee’s duties. 15 U.S.C.A. § 2087(a) (West 2008).

B. **Covered Employers**

The Act prohibits manufacturers, private labelers, distributors, or retailers, from retaliating against an employee who has engaged in protected activities. 15 U.S.C.A. § 2087(a) (West 2008). The CPSA defines manufacturer as “any person who manufactures or imports a consumer product.” 15 U.S.C. § 2052(a)(4) (West 2008). A distributor is defined as “a person to whom a consumer product is delivered or sold for purposes of distribution in commerce,” but excluding manufacturers or retailers. 15 U.S.C. § 2052(a)(5) (West 2008). A retailer is defined
as “a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.” 15 U.S.C. § 2052(a)(6) (West 2008). Lastly, a private labeler is defined as “an owner of a brand or trademark on the label of a consumer product which bears a private label.” 15 U.S.C. § 2052(a)(7)(A) (West 2008). A consumer product bears a private label when (1) the product is labeled with the brand or trademark of a person other than a manufacturer of the product, (2) the person with whose brand or trademark the product has been labeled has authorized it to be so labeled, and (3) the brand or trademark of a manufacturer of such product does not appear on the label. 15 U.S.C. § 2052(a)(7)(B) (West 2008).

C. **Prohibited Retaliation**

The Act prohibits a covered employer from “discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment.” 15 U.S.C.A. § 2087(a) (West 2008).

D. **The Litigation Process**

To qualify for relief under the Act, the employee must file a complaint with the Secretary of Labor no later than 180 days after the date on which the violation occurred. 15 U.S.C.A. § 2087(b)(1) (West 2008). The complaint must identify the person responsible for the retaliatory act or acts. Id.

After a claim has been filed, the Secretary of Labor will then conduct an investigation, if it determines that the employee has stated a prima facie case that his protected conduct was a contributing factor in an unfavorable employment action and the employer has failed to rebut the claim by clear and convincing evidence. 15 U.S.C.A. § 2087(b)(2)(B)(i)-(ii) (West 2008). Otherwise, the Secretary of Labor will dismiss the complaint without an investigation. 15 U.S.C.A. § 2087(b)(2)(B)(i) (West 2008).

To ultimately find in favor of the employee, the Secretary of Labor must determine that the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint and that the employer failed to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected action. 15 U.S.C.A. § 2087(b)(2)(B)(iii)-(iv) (West 2008).

The Secretary is supposed to issue written findings, including ordering any appropriate relief, no later than 60 days after the complaint is filed. 15 U.S.C.A. § 2087(b)(2)(A) (West 2008). Parties have 30 days after “notification of findings” to object to the determination and request a hearing on the record. Id. Reinstatement is not stayed pending the hearing. Id. A final order must issue within 120 days of the hearing. 15 U.S.C.A. § 2087(b)(3)(A) (West 2008). A party may petition for review of a final agency order in the U.S. Court of Appeals in the circuit where the violation occurred or where the complainant resided on the date of the violation. 15 U.S.C.A. § (b)(5)(A) (West 2008).

If the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after issuing a written determination, the complainant may bring
an action for *de novo* review in the U.S. District Court with jurisdiction over the action. 15 U.S.C.A. § 2087(b)(4) (West 2008). The Act appears to give the Secretary of Labor up to 300 days to issue a final decision: if the Secretary of Labor issues the written determination on day 210, then the Act provides for another 90 days to make a final decision. The Act expressly provides a right to a jury trial at the request of either party. *Id.*
E. **Available Remedies**

Under the Act, the Secretary of Labor is directed to provide a broad range of remedies in successful cases, including: affirmative action to abate the violation, reinstatement of the complainant to his or her former position with back pay, and compensatory damages. 15 U.S.C.A. § 2087(b)(3)(B)(i)-(iii) (West 2008). Notably, the Act requires, at the request of the complainant, the Secretary of Labor to assess against the opposing party the aggregate amount of all reasonably incurred costs and expenses, including attorneys’ and expert witness fees. 15 U.S.C.A. § 2087(b)(3)(B)(iii) (West 2008).

If the complainant brings an action in District Court because the Secretary of Labor has failed to issue a final decision within the statutorily required time, the Act allows the district court to grant all relief necessary to make the employee whole, including: reinstatement, back pay with interest, compensatory relief, injunctive relief, and “compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.” 15 U.S.C.A. § 2087(b)(4) (West 2008).

**DEFENSE CONTRACTOR WHISTLEBLOWER PROTECTIONS**

The wars in Afghanistan and Iraq have seen unprecedented levels of private defense contractors in prominent military support and reconstruction roles. This burgeoning niche is in addition to the multibillion dollar defense contracting industry already in existence prior to the most recent military operations. The lure of lucrative government contracts, combined with the lives and taxpayer dollars at stake in the performance of those contracts, necessitates whistleblower protections for defense contractors and their employees. This protection is found in 10 U.S.C. § 2409. There is very little case law interpreting the law’s provisions.

A. **Protected Activity**

Under the defense contractor whistleblower law, an employee of a defense contractor is protected for making disclosures to one of several entities of misconduct by his or her employer. To be protected by the act, the employee must reasonably believe that she has information that evidences: (1) “gross mismanagement of a Department of Defense contract or grant;” (2) “a gross waste of Department of Defense funds;” (3) “a substantial and specific danger to public health or safety;” or (4) “a violation of law related to a Department of Defense contract (including the competition for or negotiation of a contract) or grant.” 10 U.S.C.A. § 2409(a) (2008). Protection of reprisal is available to employees who disclose such information to “a Member of Congress, a representative of a committee of Congress, an Inspector General, the Government Accountability Office, a Department of Defense employee responsible for contract oversight or management, or an authorized official of an agency or the Department of Justice.” Id.
B. **Covered Employers**

The term “contractor” is defined broadly within the statute to mean “a person awarded a contract with an agency.” 10 U.S.C.A. § 2409(e)(4) (2008). Covered agencies include the Department of Defense, the Army, the Navy, the Air Force, the Coast Guard, and the National Aeronautics and Space Administration (NASA). See 10 U.S.C.A. § 2303(a) (2008).

C. **Prohibited Retaliation**

Under the statute, a contractor may not discharge, demote, or otherwise discriminate against an employee for engaging in any of the forms of protected activity described above. 10 U.S.C.A. § 2409(a) (2008).

D. **The Litigation Process**

An employee alleging reprisal for protected activity under the law must file a complaint with the Inspector General (“IG”) of the Department of Defense in most cases or with the IG of NASA if the complaint concerns NASA. 10 U.S.C.A. §2409(b)(1) (2008). Unlike most whistleblower statutes, the defense contractor anti-reprisal law does not contain a statute of limitations for filing a complaint. If it does not find that the complaint is frivolous, the IG has 180 days to investigate it and submit a report to the complainant, the respondent contractor, and the head of the relevant agency with whom the private party contracted. 10 U.S.C.A. §2409(b)(1), (2)(A) (2008). If the agency denies relief or fails to file an order granting relief within 210 days after the filing of the complaint, the complainant may file in federal district court, without regard to the amount in controversy. 10 U.S.C.A. §2409(c)(2) (2008) Either the complainant or the respondent may request a jury trial. Id.

E. **Available Remedies**

Within 30 days after receiving a report from an Inspector General regarding the whistleblower complaint, the head of the relevant agency may determine whether the employee was subjected to reprisal by the contractor and may deny or grant relief. 10 U.S.C.A. §2409(c)(1) (2008). There are several available forms of relief. The broadest is an order that the contractor “take affirmative action to abate the reprisal,” which is a general make-whole provision designed to restore the pre-retaliation status quo. 10 U.S.C.A. §2409(c)(1)(A) (2008). More specifically, the act mentions as possible remedies reinstatement, compensation (including back pay), employment benefits, and a restoration of pre-reprisal conditions of employment. 10 U.S.C.A. §2409(c)(1)(B) (2008). Additionally, a successful claimant may obtain reasonable attorneys’ fees and expenses, including expert witness fees. 10 U.S.C.A. §2409(c)(1)(C) (2008).
OTHER STATUTORY WHISTLEBLOWER PROTECTIONS

The following list includes other statutory whistleblower protections and a brief description of their coverage:

1. **Section 11(e) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660(c):** Protects employees from discharge or discrimination based on instigation of or participation in a proceeding against his or her employer for occupational hazards prohibited by the act. Employees must file with OSHA within 60 days of the retaliation.

2. **The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105:** Provides protection for employees of commercial motor vehicles to report noncompliance with safety regulations. Employees must file a complaint within 180 days.


5. **The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i):** Under the SDWA, any public building – whether constructed before or after the passage of the SDWA – must have lead-free drinking water. Additionally, any new construction – public or private – must have lead-free drinking water. Employees are protected from retaliation for reporting potential violations of the law and must file a complaint within 30 days.

6. **The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367:** Prohibits the release of hazardous levels of pollution into any waters that constitute a natural habitat for living things. An employee who reports any misrepresentations or noncompliance by the employer is protected. The employee must file within 30 days.

7. **The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622:** The TSCA regulates the thousands of industrial chemicals produced or imported into the United States to protect the health and safety of humans and the environment. It sets guidelines for the EPA’s testing, inspection, and tracking of industrial chemicals. TSCA also allows the EPA to ban the manufacture of chemicals it considers to pose an unreasonably high risk. An employee who reports potential violations of TSCA or in any way assists in proceedings or investigations of such violations is protected from employment retaliation. The employee must file within 30 days.

regulates the management of hazardous waste. It also provides funds for and assists in the development of technology and facilities to recover energy and other commodities from waste. An employee is protected for reporting abuses of funding and assistance, violation of waste management requirements, or other potential violations of the Act. The employee must file within 30 days.

9. **The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622**: The Clean Air Act is a comprehensive statute establishing standards for air quality, acceptable pollutants, and related reporting and inspection procedures. The specific provisions of the statute are exhaustive, but whistleblower cases are most often brought when a company misrepresents its emissions levels or fails to comply with reporting and cleanup standards. An employer may not retaliate against an employee who reports any misreporting or noncompliance by the employer. The employee must file within 30 days.

10. **The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610**: CERCLA provides for liability, compensation, and emergency response for hazardous substances that have been released or are threatening to be released into the environment. Employees are protected if they have provided information to the local or federal government, have filed a complaint about their employer under the Act, or have participated in any CERCLA proceeding – for example by testifying or aiding in an investigation – against her or his employer. An employee must file within 30 days.

11. **The Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851**: This ERA established the Nuclear Regulatory Commission. Under the act, an employee is protected for reporting violations of the nuclear safety provisions contained therein. An employee must file within 180 days.

12. **The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121**: Protects employees who provide information to or assist in an investigation by the government or an internal investigation regarding a potential violation of the laws of the Federal Aviation Administration (FAA) or any other federal law or regulation related to air carrier safety. An employee must file within 90 days.

13. **The Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C. § 60129**: Protects employees who provide information to or assist in an investigation of potential violations including violations of pipeline safety standards, inspection and repair requirements, and training requirements for employees performing sensitive tasks. An employee must file within 90 days.

14. **The Federal Rail Safety Act of 1970 (FRSA), 49 U.S.C. § 20109**: Protects employees providing information to or assisting in an investigation by a federal regulatory or law enforcement agency, a member or committee of Congress, or their employer about a potential violation of any laws pertaining to: (1) railroad safety and security or (2) gross fraud, waste, or abuse of funds intended for safety and security. Additionally, an employee is protected for reporting hazardous safety and security
conditions, refusing to work under such conditions, or refusing to authorize the use of any safety- or security-related equipment, track, or railroad structures. An employee must file within 180 days.

15. **The National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142:** The NTSSA is the metropolitan transit system equivalent of the FRSA. It similarly protects employees, contractors, and subcontractors metropolitan transit systems from retaliation for reporting potential violations of laws concerning (1) public transportation safety and security or (2) gross fraud, waste, or abuse of funds intended for safety and security. Additionally, an employee is protected for reporting hazardous safety and security conditions, refusing to work under such conditions, or refusing to authorize the use of any safety- or security-related equipment, track, or railroad structures. Employees must file a complaint within 180 days.