

## EMPLOYMENT LAW

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## INTRODUCTION

Virginia has historically been regarded as an employer-friendly jurisdiction. However, in recent years, the Fourth Circuit Court of Appeals has issued an increasing number of opinions that tend to favor employees. With a state legislature largely reluctant to interfere in the employer-employee relationship, developments in employment law generally occur via Fourth Circuit jurisprudence. Given the predominance of federal employment law in Virginia, the following discussion regarding developments in this practice area focuses less on state statutes and courts, and more on decisions handed down from the federal bench.

This Article provides an update on recent developments in employment law in Virginia.<sup>1</sup> It does not attempt to capture every change in the law, but instead focuses on significant developments in this arena. Part I of the Article discusses noteworthy shifts in Fourth Circuit jurisprudence regarding: the Equal Pay Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Fair Labor Standards Act. Part II of the Article contains a brief update on state-specific statutory and case law developments regarding military leave, data privacy, employee access to personnel records, and Virginia's unique flavor of wrongful termination—*Bowman* claims.

## I. DEVELOPMENTS IN FOURTH CIRCUIT JURISPRUDENCE

A. *Pay Equity and the Equal Pay Act*

Pay equity is a central issue affecting women's rights in the workplace and has become a point of particular focus for state lawmakers,<sup>2</sup> the United States Congress,<sup>3</sup> and the Equal Employment Opportunity Commission ("EEOC"), which now requires some EEO-1 filers to report pay data for all employees by sex, race, and ethnicity, as discussed in more detail further on in this Article.<sup>4</sup> In

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1. The Article encompasses developments occurring between approximately 2015 and 2019.

2. See, e.g., WOMEN'S BUREAU, U.S. DEPT OF LABOR, *Pay Transparency and Equal Pay Protections*, [https://dol.gov/wb/EqualPay/equalpay\\_txt.htm](https://dol.gov/wb/EqualPay/equalpay_txt.htm) [<https://perma.cc/YT95-A8E5>] (summarizing state laws around pay transparency and equal pay).

3. Paycheck Fairness Act, H.R. 7, 116th Cong. (as passed by House of Representatives, Mar. 27, 2019).

4. See *infra* Part I.A.3.

Virginia, Democrat members of the General Assembly have proposed pay equity legislation for the last five sessions running.<sup>5</sup> But, like the majority of employment laws in Virginia, the Commonwealth currently adheres to federal standards under the Equal Pay Act (“EPA”).<sup>6</sup>

To prevail on an EPA claim, a plaintiff must demonstrate that her<sup>7</sup> employer paid her “different wages . . . for equal work in [a] job[] which require[d] equal skill, effort and responsibility and which [was] performed under similar working conditions.”<sup>8</sup> The “equal work” component of a prima facie case requires work “*substantially equal* in skill, effort and responsibility.”<sup>9</sup> Although jobs need not be identical, they should be “virtually identical.”<sup>10</sup> Merely identifying other male employees with similar titles or the same general responsibilities is insufficient to state a claim.<sup>11</sup> The requirement that a plaintiff must compare her pay with that of another employee performing *substantially equal* work distinguishes the EPA from Title VII of the Civil Rights Act (“Title VII”). The EPA “creates a sort of ‘strict liability’ for discrimination on the basis of sex” when such a comparison can be made, whereas Title VII requires a showing of “discriminatory intent.”<sup>12</sup> Accordingly, although the EPA eliminates the need to demonstrate intent, establishing a prima facie case entails a heightened comparator analysis—an issue the Fourth Circuit recently addressed in the context of higher education in *Spencer v. Virginia State University*.<sup>13</sup>

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5. See S.B. 1636, Va. Gen. Assembly (Reg. Sess. 2019); H.B. 1089, Va. Gen. Assembly (Reg. Sess. 2018); S.B. 1080, Va. Gen. Assembly (Reg. Sess. 2017); S.B. 221, Va. Gen. Assembly (Reg. Sess. 2016); S.B. 772, Va. Gen. Assembly (Reg. Sess. 2015).

6. See Equal Pay Act of 1963 § 1, 29 U.S.C. § 206(d) (2012); VA. CODE ANN. § 40.1-28.6 (Repl. Vol. 2013).

7. Both men and women are protected from discriminatory pay practices under the EPA, but for the purposes of this section of the Article, we use female pronouns throughout.

8. *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 343 (4th Cir. 1994).

9. *Strag v. Bd. of Trs.*, 55 F.3d 943, 950 (4th Cir. 1995) (emphasis added).

10. *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 333 (4th Cir. 2004) (quoting *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973)).

11. See *Noel-Batiste v. Va. State Univ.*, No. 3:12cv00826-HEH, 2013 U.S. Dist. LEXIS, 16875, at \*17 (E.D. Va. Feb. 6, 2013) (“It is insufficient that Plaintiff and other male [employees] have similar titles and similar generalized responsibilities; the skills, effort and responsibility must be substantially equal.”).

12. *Hassman v. Valley Motors, Inc.*, 790 F. Supp. 564, 569 (D. Md. 1992) (quoting *Brewster v. Barnes*, 788 F.2d 985, 993 n.13 (4th Cir. 1986)).

13. 919 F.3d 199, 203 (4th Cir. 2019); see discussion *infra* Part I.A.2.

If a plaintiff establishes a prima facie case, then the burden shifts to the employer to show that any pay differential resulted from a permissible exception: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”<sup>14</sup> If the employer can establish one of these affirmative defenses, then the burden falls on the plaintiff to rebut the employer’s evidence.<sup>15</sup> It is this fourth “catch-all” affirmative defense that has drawn the ire of the plaintiff’s bar and come under scrutiny by state legislatures that have passed their own versions of the EPA.<sup>16</sup> Indeed, proposed amendments to the Virginia Equal Pay Act,<sup>17</sup> which did not pass committee during the 2019 session, narrow the catch-all defense by requiring the employer to show that the factor is: (1) job related; (2) consistent with business necessity; and (3) “not based on or derived from a protected class-based differential in compensation.”<sup>18</sup> Employers would lose the defense if the employee can prove the existence of an alternative practice that would meet the same business purpose.<sup>19</sup> Although these amendments did not pass, Virginia nevertheless saw a significant narrowing of an employer’s ability to assert affirmative defenses at summary judgment in a recent case decided by the Fourth Circuit, *EEOC v. Maryland Insurance Administration*.<sup>20</sup>

### 1. *EEOC v. Maryland Insurance Administration*

In January 2018, the Fourth Circuit articulated a new summary judgment standard for EPA cases, stating that the “burden of ultimate persuasion” is on the employer such that once an employee establishes a prima facie case of pay discrimination, the employer must prove that the pay disparity was based on a factor other than sex “so convincingly that a rational jury could not have reached a

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14. 29 U.S.C. § 206(d)(1) (2012).

15. See *Strag v. Bd. of Trs.*, 55 F.3d 943, 948 (4th Cir. 1995).

16. See, e.g., CAL. LAB. CODE § 1197.5 (West 2019); N.J. STAT. ANN. § 10:5-12 (West 2019); N.Y. LAB. LAW § 194 (Consol. 2019) (effective Oct. 8, 2019).

17. S.B. 1636, Va. Gen. Assembly (Reg. Sess. 2019). Notably, this bill would have expanded the definition of “protected class” under the Virginia Equal Pay Act to include “persons distinguished by race, color, religion, sex, sexual orientation, gender identity or expression, political affiliation, national origin, marital status, veteran status, disability, or age.” *Id.*

18. *Id.*

19. *Id.*

20. U.S. Equal Emp’t Opportunity Comm’n v. Md. Ins. Admin., 879 F.3d 114, 121 (4th Cir. 2018).

*contrary conclusion.*”<sup>21</sup> In other words, a merely plausible explanation for the pay disparity is insufficient if the employer does not carry its burden to prove that the proffered reason does “in fact explain the wage disparity.”<sup>22</sup> In so holding, the Fourth Circuit joined the Third and Tenth Circuits.<sup>23</sup>

The EEOC brought this action on behalf of three female fraud investigators who alleged that male fraud investigators were paid more for performing equal work.<sup>24</sup> The district court granted summary judgment, holding that the four male fraud investigators identified by the EEOC were not proper comparators, and even if they were, the pay disparity was due to the comparators’ credentials and prior work experience, not their sex.<sup>25</sup>

The comparators’ credentials and prior work experience were—in the district court’s opinion—legitimate factors other than sex that explained the pay differential.<sup>26</sup> Indeed, the Maryland Insurance Administration (“MIA”) had a defined salary schedule consisting of twenty separate steps, and new hires’ step placement was based on prior work experience, relevant professional designations, licenses and certifications, and prior years of service in state employment.<sup>27</sup> MIA presented evidence that the male comparators were placed at higher steps due to their relevant experience, certifications, and years of prior service.<sup>28</sup>

The Fourth Circuit, however, held that MIA could not “shield itself from liability under the EPA solely because [it] uses the state’s Standard Salary Schedule and awards credit for prior state employment or a lateral transfer within the state employment system.”<sup>29</sup> While the salary schedule may have been facially neutral, the court noted that “MIA exercise[d] discretion each time it assign[ed] a new hire to a specific step and salary range based on its

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21. *Id.* (emphasis added).

22. *Id.* (emphasis omitted).

23. *Id.* (citing *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1312 (10th Cir. 2006); *Stanziale v. Jargowsky*, 200 F.3d 101, 107–08 (3d Cir. 2000)).

24. *Id.* at 117–18.

25. *See* U.S. Equal Emp’t Opportunity Comm’n v. Md. Ins. Admin., No. 15-1091, 2016 U.S. Dist. LEXIS 142701, at \*1–2 (D. Md. Oct. 14, 2016), *vacated and remanded*, 879 F.3d 114, 124 (4th Cir. 2018).

26. *Id.*

27. *Md. Ins. Admin.*, 879 F.3d at 116–17.

28. *See id.* at 118–19.

29. *Id.* at 122–23.

review of the hire's qualifications and experience."<sup>30</sup> In sum, although MIA offered a facially gender-neutral reason "other than sex" for the pay disparity, the court held that the job-related distinctions between the female fraud investigators and alleged comparators, including prior state employment, must "*in fact*" motivate the pay decision such that no reasonable jury could reach a contrary conclusion.<sup>31</sup> Such a standard is a high bar for any defendant to clear on summary judgment and a prime example of how the Fourth Circuit is trending in a more plaintiff-friendly direction.

## 2. *Spencer v. Virginia State University*

Decided in March 2019, *Spencer v. Virginia State University* is the most recent in a series of higher education EPA claims filed in the Fourth Circuit.<sup>32</sup> *Spencer* followed the Fourth Circuit's decision in *Maryland Insurance*, and it appears the court viewed it as an opportunity to take a step back from the hardline summary judgment standard articulated in that case. In a unanimous decision, the court reinforced the plaintiff's burden of establishing a prima facie case of wage discrimination and identified at least one "factor other than sex" that would warrant summary judgment, affirming the district court's grant of summary judgment in favor of defendant Virginia State University ("VSU").<sup>33</sup>

Zoe Spencer, a sociology professor at VSU, alleged that the university violated the EPA and Title VII by paying her less than two male professors: Michael Shackelford and Cortez Dial.<sup>34</sup> Both Shackelford and Dial were former administrators.<sup>35</sup> Spencer earned approximately \$70,000 per year, while Shackelford and Dial earned over \$100,000 per year.<sup>36</sup> Spencer attributed the pay differential to her sex, but the Fourth Circuit determined that a number of other factors rendered Shackelford and Dial improper comparators. The court's analysis in this regard reinforced the "demanding threshold requirement" that "requires a comparator to

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30. *Id.* at 123.

31. *Id.*

32. *See, e.g.*, *Earl v. Norfolk State Univ.*, No. 2:13cv148, 2016 U.S. Dist. LEXIS 35171, at \*2–3 (E.D. Va. Mar. 17, 2016); *Noel-Batiste v. Va. State Univ.*, No. 3:12cv00826-HEH, 2013 U.S. Dist. LEXIS 16875, at \*1, \*7–8 (E.D. Va. Feb. 6, 2013).

33. *Spencer v. Va. State Univ.*, 919 F.3d 199, 202, 208–09 (4th Cir. 2019).

34. *Id.* at 202.

35. *Id.*

36. *Id.*

have performed work ‘virtually identical’ (or the apparent synonym, ‘substantially equal’) to the plaintiff’s in skill, effort, and responsibility.”<sup>37</sup> The court explained that “[i]n alleging this necessary equality, a plaintiff may not rely on broad generalization at a high level of abstraction,” and went on to scrutinize the differences between the professorial duties and responsibilities of Spencer, Shackelford, and Dial.<sup>38</sup>

Spencer argued that all VSU professors, regardless of department or college, “perform equal work because they all perform the same essential tasks: preparing syllabi and lessons, instructing students, tracking student progress, managing the classroom, providing feedback, and inputting grades.”<sup>39</sup> In her view, these essential tasks required the same skills, such as “studying, preparing, presenting, discussing, and so forth.”<sup>40</sup> The court disagreed, aptly observing that the same tasks are shared by “middle-school teachers and law-school professors, pre-algebra teachers and biomedical-engineering professors.”<sup>41</sup>

As a starting point, the court noted that Spencer was a sociology professor in the Department of Sociology, Social Work, and Criminal Justice, while Shackelford and Dial taught in different departments.<sup>42</sup> Shackelford was a professor in the Department of Doctoral Studies.<sup>43</sup> And Dial served as a professor in Mass Communications.<sup>44</sup> The Fourth Circuit has long recognized that “differences between academic departments generally involve differences in skill and responsibility,”<sup>45</sup> but has not entirely foreclosed the possibility that a professor-plaintiff could establish sufficient evidence to show that work in one department is

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37. *Id.* at 203–04 (citing *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 332–33 (4th Cir. 2004)).

38. *Id.* at 204 (citing *Wheatley*, 390 F.3d at 332–33).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 202.

43. *Spencer v. Va. State Univ.*, No. 3:16cv989-HEH, 2018 U.S. Dist. LEXIS 15773, at \*11 (E.D. Va. Jan. 30, 2018), *aff’d*, 919 F.3d 199 (4th Cir. 2019).

44. *Id.* at \*9.

45. *Spencer*, 919 F.3d at 205 (citing *Strag v. Bd. of Trs.*, 55 F.3d 943, 950 (4th Cir. 1995); *Soble v. Univ. of Md.*, 778 F.2d 164, 167 (4th Cir. 1985)); *see also* *Earl v. Norfolk State Univ.*, No. 2:13cv148, 2016 U.S. Dist. LEXIS 35171, at \*14–15 (E.D. Va. Mar. 17, 2016) (“[R]are would be the case where a university professor can demonstrate that a professor from a different department is a valid EPA comparator . . .”).

substantially equal to work in another.<sup>46</sup> Spencer, however, failed to overcome the tall task of demonstrating equality of work between professors in different departments.<sup>47</sup> Among some of the more significant differences between Spencer, Shackelford, and Dial, the court highlighted the fact that the three professors taught different class levels; Spencer taught mostly undergraduate level courses, while the two men taught mostly graduate students.<sup>48</sup> Additionally, unlike Spencer, Shackelford supervised doctoral dissertations.<sup>49</sup> Overall, the record showed that Shackelford and Dial generally worked more hours than Spencer, despite Spencer's attempt to demonstrate that she actually did more work than her comparators.<sup>50</sup>

Notably, the court found this particular argument—that Spencer performed more work due to research and publishing responsibilities that Shackelford and Dial did not share—“paradoxical[]” inasmuch as she was only “piling on differences.”<sup>51</sup> In a remarkable departure from other circuit courts, the Fourth Circuit held in a footnote, “[p]iling on differences—even those suggesting that Spencer did *better* or *more* work—does nothing to prove equality of work.”<sup>52</sup> The court conclusively stated that Spencer had not adduced any evidence to demonstrate that she and her comparators performed equal work, and therefore failed to establish a *prima facie* case under the EPA.<sup>53</sup>

The court further held that even if the comparators were sufficient to state a *prima facie* case, the university proffered an un rebutted “factor other than sex” that *did in fact* explain the wage disparity.<sup>54</sup> VSU utilized a reduction in administrator salaries of nine-

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46. See *Spencer*, 919 F.3d at 204–05 (“While comparisons might be drawn between some departments, any such comparison requires the plaintiff to articulate with specificity why the work performed and skills needed by a professor in one department are virtually identical—and not just generally related or of comparable worth—to those in another.”).

47. See *id.* at 204–06.

48. *Id.* at 205.

49. *Id.*

50. *Id.*

51. *Id.* at 205, n.2.

52. Compare *id.*, with *Blackman v. Fla. Dep’t of Bus. & Prof’l Regulation*, 599 F. App’x 907, 918 (11th Cir. 2015) (“If an employer could circumvent the protections of the EPA by merely piling more work onto its female employees than its male employees, the EPA would be meaningless.”), and *Riordan v. Kempiners*, 831 F.2d 690, 699 (7th Cir. 1987) (“[A]n employer cannot avoid the [EPA] by the simple expedient of loading extra duties onto its female employees—unless it pays them more.”).

53. *Spencer*, 919 F.3d at 203, 206.

54. *Id.* at 206.

twelfths (or seventy-five percent) for all administrators transitioning to faculty positions, regardless of sex.<sup>55</sup> Although Spencer attempted to argue that the policy was erroneously applied, the court stated, “such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity.”<sup>56</sup>

This case served as an opportunity for the Fourth Circuit to reinforce the high standard for establishing equality of work under the EPA and to take a step back from *Maryland Insurance*. The *Maryland Insurance* case ostensibly made summary judgment less attainable by setting a more stringent standard for establishing an affirmative defense. However, in *Spencer*, the Fourth Circuit made it a point to temper its previous analysis, stating,

The Equal Pay Act is a powerful tool, permitting an employee to prevail on a wage discrimination claim with no evidence of intentional discrimination. But this tool must be tempered by adherence to its provisions. Doing so requires that the work performed by the plaintiff and her comparators be *equal* and that the wage disparity not be based on a factor other than sex.<sup>57</sup>

Spencer failed on both counts.

### 3. EEO-1 Pay Data Collection

Of particular note in the world of pay equity, the EEOC began collecting pay data for the first time in March 2018 in an effort to improve investigations of pay discrimination.<sup>58</sup> For decades, the EEOC has required private employers with 100 or more employees and certain federal contractors with fifty or more employees to file the Employer Information Report EEO-1 (“EEO-1”).<sup>59</sup> Component 1 of the EEO-1 requires covered employers to report aggregate data about employees’ ethnicity, race, and sex by job category.<sup>60</sup> In 2014,

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55. *Id.*

56. *Id.*

57. *Id.* at 207.

58. See Press Release, Equal Emp’t Opportunity Comm’n, EEOC to Collect Summary Pay Data (Sept. 29, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm> [<https://perma.cc/FF3A-PHKG>].

59. See 29 C.F.R. § 1602.7 (1967); 41 C.F.R. § 60-1.7 (1978).

60. Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5113 (Jan. 21, 2016).

the Obama administration directed the Secretary of Labor to develop a pay data collection program.<sup>61</sup> Two years later, in 2016, after the Office of Management and Budget (“OMB”) approved the program, the EEOC announced that it would begin collecting summary pay data from EEO-1 filers beginning in March 2018.<sup>62</sup> In its press release, the EEOC stated the purpose of the data collection program was to “improve investigations of possible pay discrimination, which remains a contributing factor to persistent wage gaps.”<sup>63</sup> In August 2017, however, following the election of President Donald Trump, the OMB “initiat[ed] a review and immediate stay of the effectiveness of the pay data collection aspects of the EEO-1 form”—effectively staying the collection of pay data indefinitely.<sup>64</sup>

On March 4, 2019, Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia issued an order vacating the stay of the pay data component (“Component 2”) of the EEO-1.<sup>65</sup> Judge Chutkan held that the OMB’s decision to stay implementation of Component 2 was invalid on two grounds: (1) it violated OMB regulations; and (2) it was arbitrary and capricious because the decision “lacked the reasoned explanation that the [Administrative Procedure Act] requires.”<sup>66</sup> The court vacated the OMB’s stay and further ordered that the OMB’s previous approval of the revised EEO-1 form, including Component 2, shall be in effect.<sup>67</sup> Judge Chutkan’s order was not clear on whether she intended the EEOC to immediately begin collecting pay data (EEO-1 reports were due in less than ninety days—May 31, 2019), or whether the change would take effect with a later EEO-1 filing cycle.

On April 25, 2019, Judge Chutkan provided more clarity, ruling that covered employers must submit Component 2 pay data by September 30, 2019.<sup>68</sup> Subsequently, on May 3, 2019, the EEOC

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61. Memorandum from the White House to the Sec’y of Labor (Apr. 8, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2014/04/08/presidential-memorandum-advancing-pay-equality-through-compensation-data> [<https://perma.cc/FF3A-PHKG>].

62. Press Release, Equal Emp’t Opportunity Comm’n, *supra* note 58.

63. *Id.*

64. *What You Should Know: Statement of Acting Chair Victoria A. Lipnic About OMB Decision on EEO-1 Pay Data Collection*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm> [<https://perma.cc/RQU7-45SZ>].

65. *See Nat’l Women’s Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 93 (D.D.C. 2019).

66. *See id.* at 90.

67. *Id.* at 93.

68. Order at 2, *Nat’l Women’s Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d

issued a notice advising EEO-1 filers to begin preparing pay data for calendar years 2017 and 2018 for submission by the court-ordered deadline.<sup>69</sup> The notice further stated that the EEOC would begin collecting pay data in mid-July of 2019.<sup>70</sup>

Now, Virginia employers and federal contractors with 100 or more employees<sup>71</sup> must report pay data by sex, race, and ethnicity, as well as job category. For each job category and protected class, employers must sort and tabulate income by “pay band,” of which there are twelve.<sup>72</sup> In addition, employers must calculate and report total hours worked by all employees in each pay band.<sup>73</sup> For exempt employees, filers may report forty hours per week for full-time employees, twenty hours per week for part-time employees, or the actual number of hours worked by such employees.<sup>74</sup>

In sum, the flurry of activity spurred by Judge Chutkan’s March 4, 2019 Order has set in motion the EEOC’s first full-scale collection of pay data from covered employers.

### B. *Title VII of the Civil Rights Act*

Title VII prohibits discrimination because of—or on the basis of—“race, color, religion, sex, or national origin.”<sup>75</sup> There are two ways to plead a claim of Title VII discrimination: “*either* with direct evidence *or* through the ‘prima facie’ method (also called ‘burden shifting’ or the *McDonnell Douglas* framework).”<sup>76</sup> Under the “direct” method, a plaintiff must provide: “(1) direct or indirect evidence of intentional discrimination (2) against plaintiff for belonging to a protected class, which motivated (3) an adverse employment action.”<sup>77</sup> Indirect evidence is routinely considered “to be tantamount to circumstantial evidence.”<sup>78</sup> To utilize the burden-

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66 (D.D.C. Apr. 25, 2019) (No. 17-CV-2458), Document 71.

69. EEO-1 Pay Data Collection for 2017, 84 Fed. Reg. 18,974 (May 3, 2019).

70. *Id.*

71. See Agency Information Collection Activities, 81 Fed. Reg. 45,479, 45,484 (July 14, 2016).

72. *Frequently Asked Questions (FAQs)*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://eeocomp2.norc.org/faq> [<https://perma.cc/G2G8-WB8Z>].

73. *Id.*

74. *Id.*

75. 42 U.S.C. § 2000e-2(a)(1) (2012).

76. *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807, 817 (E.D. Va. 2016).

77. *Id.*

78. *Id.* (quoting *Lee v. Wade*, No. 3:15CV37, 2015 U.S. Dist. 115660, at \*3 (E.D. Va. Aug. 31, 2015)).

shifting framework established in *McDonnell Douglas Corporation v. Green*,<sup>79</sup> a plaintiff first establishes a prima facie case by demonstrating: “(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class.”<sup>80</sup>

## 1. Exhausting Administrative Remedies

Traditionally, courts in the Fourth Circuit have treated as jurisdictional the requirement that a plaintiff file a charge of discrimination with the EEOC before filing a federal lawsuit.<sup>81</sup> If jurisdictional in nature, a failure-to-exhaust defense could be raised at any point during litigation.<sup>82</sup> In *Fort Bend County v. Davis*, the Supreme Court of the United States unanimously agreed that the requirement of filing a charge with the EEOC, while still a mandatory processing rule, is procedural in nature and, thus, not jurisdictional.<sup>83</sup> The Court did not specify precisely how early a failure-to-exhaust defense must be raised, but indicated that the requirement is “properly ranked among the array of claim-processing rules that must be timely raised to come into play.”<sup>84</sup> This recent development represents a change in how courts will analyze failure-to-exhaust defenses moving forward, and it remains to be seen how jurisdictions will determine when the defense is timely raised. But for practitioners, the message is clear: raise such a defense at the earliest possible opportunity.

## 2. LGBTQ Protections

Since 2015, the American LGBTQ community has enjoyed the right to marry,<sup>85</sup> but they are not necessarily protected from discrimination in the workplace. Although the EEOC treats sexual orientation and gender identity as protected classes under Title

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79. 411 U.S. 792, 802 (1973).

80. See, e.g., *Hinton*, 185 F. Supp. 3d at 817–18 (quoting *Goode v. Cent. Va. Legal Aid Soc’y, Inc.*, 807 F.3d 619, 626 (4th Cir. 2015)).

81. See *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1848 (2019) (citing *Jones v. Calvert Group, Ltd.*, 551 F. 3d 297, 300 (4th Cir. 2009)).

82. See *id.* at 1849–50.

83. *Id.* at 1845, 1850–51.

84. *Id.* at 1846.

85. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

VII,<sup>86</sup> federal courts differ on the question of whether the term “sex” under Title VII encompasses these characteristics.<sup>87</sup>

On April 22, 2019, the Supreme Court granted certiorari in two companion cases, *Bostock v. Clayton County* and *Altitude Express, Inc. v. Zarda*, to decide whether Title VII provides protection against discrimination based on an individual’s sexual orientation.<sup>88</sup> The Court also granted certiorari in *R.G. and G.R. Harris Funeral Homes, Inc. v. E.E.O.C.* to determine whether Title VII prohibits discrimination against transgender individuals based on (1) their status as transgender; or (2) sex stereotyping under *Price Waterhouse*.<sup>89</sup> These decisions will affect how Virginia treats both sexual orientation and transgender status under Title VII. Until those decisions are released, the cases discussed below govern treatment of LGBTQ discrimination in Virginia.

a. *Hinton v. Virginia Union University*

As recently reaffirmed by the Eastern District of Virginia in *Hinton v. Virginia Union University*, the Fourth Circuit does not recognize sexual orientation as a protected class.<sup>90</sup> Terry Hinton, an openly gay man, was a longtime administrative assistant at Virginia Union University (“VUU”).<sup>91</sup> In 2013, VUU declined to raise Hinton’s pay after Hinton pointed out that he was paid less than four female administrative assistants with comparable duties and lengths of service.<sup>92</sup> Later in 2013, after Dr. Latrelle Green became Hinton’s direct supervisor, Hinton was twice reprimanded for, and

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86. *What You Should Know About EEOC and the Enforcement Provisions for LGBT Workers*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) [<https://perma.cc/RF76-VM36>].

87. Compare *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 Fed. App’x 964, 964 (11th Cir. 2018) (per curiam) (confirming that there is no cause of action for discrimination on the basis of sexual orientation under Title VII), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 17-1618), with *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (holding that Title VII protects against discrimination on the basis of sexual orientation), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019).

88. *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (granting petition for writ of certiorari); *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (granting petition for writ of certiorari).

89. *R.G. & G.R. Harris Funeral Homes, Inc., v. Equal Emp’t Opportunity Comm’n*, 139 S. Ct. 1599 (2019) (granting petition for writ of certiorari); see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 258 (1989).

90. 185 F. Supp. 3d 807, 814–15 (E.D. Va. 2016).

91. *Id.* at 812.

92. *Id.*

asked to cease, engaging in “drama and recurring gossip.”<sup>93</sup> Soon after the second reprimand, Green put a letter containing multiple examples of alleged “unprofessional misconduct” in Hinton’s personnel file.<sup>94</sup> When Hinton later requested to take classes at nearby Virginia Commonwealth University, which other VUU employees had previously done, Green denied Hinton’s request.<sup>95</sup> Nearly two years later, when Green was no longer Hinton’s supervisor, Green allegedly told Hinton that the President of VUU had told her to give him his reprimand letter “because he had a problem with Hinton’s sexual orientation.”<sup>96</sup>

Hinton urged the district court to depart from the Fourth Circuit’s position that no cause of action exists for discrimination on the basis of sexual orientation, articulated in *Wrightson v. Pizza Hut of America, Inc.*,<sup>97</sup> because the relevant portion of the opinion was dicta and “the case actually turned on issues of same-sex sexual harassment.”<sup>98</sup> The court held that the Fourth Circuit’s stance on sexual orientation under Title VII, while it began as dicta in *Wrightson*, is substantively treated as the rule in the Fourth Circuit.<sup>99</sup> The court further explained that *Wrightson* remains the rule in the circuit notwithstanding the July 2015 EEOC policy that Title VII prohibits discrimination on the basis of sexual orientation.<sup>100</sup>

b. *Grimm v. Gloucester County School Board*

In an education case brought under Title IX and on remand from the Supreme Court of the United States, the Eastern District of Virginia held that discrimination on the basis of transgender status constitutes gender stereotyping and is per se actionable sex discrimination under both Title VII and Title IX.<sup>101</sup> Gavin Grimm, a

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93. *Id.*

94. *Id.*

95. *Id.* at 812–13.

96. *Id.* at 813.

97. 99 F.3d 138, 143 (4th Cir. 1996).

98. *Hinton*, 185 F. Supp. 3d at 815.

99. *Id.* See *Murray v. N.C. Dep’t of Pub. Safety*, 611 Fed. App’x 166, 166 (4th Cir. 2015) (per curiam); *Wrightson*, 99 F.3d at 143.

100. See *Hinton*, 185 F. Supp. 3d at 815, 817 (explaining that EEOC rulings have “the power to persuade” but protecting on the basis of sexual orientation is ultimately within the purview of Congress).

101. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 738, 746–47 (E.D. Va. 2018).

transgender man who had started the transition process at the end of his freshman year of high school, met with the Principal of Gloucester High School, along with his mother, to explain that he would be attending school as a boy.<sup>102</sup> Grimm provided a treatment documentation letter from his medical providers that indicated he should “be treated as a male in all respects—including restroom use.”<sup>103</sup> After initially using the isolated and inconveniently located restroom in the nurse’s office, Grimm sought permission to use the boys’ restroom—which the Principal approved.<sup>104</sup>

While Grimm experienced no incidents for nearly two months, adults in the community eventually learned of his use of the boys’ restroom and demanded the Gloucester County School Board put an end to the accommodation.<sup>105</sup> After weeks of negotiation, the Board passed a policy to restrict restroom usage to a student’s biological sex.<sup>106</sup> Grimm soon stopped using the restroom at school, which caused him to develop “a painful urinary tract infection” and led to “difficulty concentrating in class because of his physical discomfort.”<sup>107</sup> Grimm sued the School Board under Title IX alleging that the Board’s policy discriminated on the basis of sex.<sup>108</sup>

Courts “may ‘look to case law interpreting Title VII’ . . . which prohibits employment discrimination on the basis of . . . sex—for guidance in evaluating a claim brought under Title IX.”<sup>109</sup> In *Grimm*, the court examined the *Price Waterhouse* holding that “Title VII barred discrimination not only based on the plaintiff’s gender, but based on ‘sex stereotyping’ because the plaintiff had failed to act in accordance with gender stereotypes associated with women.”<sup>110</sup> Following the District of Maryland, the Eastern District of Virginia concluded that “discrimination on the basis of transgender status constitutes gender stereotyping because ‘by definition, transgender persons do not conform to gender stereotypes.’”<sup>111</sup> The Court further concluded “that based on the gender-

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102. *Id.* at 736–37.

103. *Id.* at 736.

104. *Id.* at 737.

105. *Id.*

106. *Id.* at 737–38.

107. *Id.* at 738.

108. *Id.*

109. *Id.* at 144 (citing G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016)).

110. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989)).

111. *Id.* at 745 (citing *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018)).

stereotyping theory from *Price Waterhouse*, claims of discrimination on the basis of transgender status are per se sex discrimination under Title VII or other federal civil rights laws.”<sup>112</sup> Finding gender stereotyping actionable under Title VII, the court extended the rule to Title IX, denied the motion to dismiss, and allowed Grimm’s claim to move forward.<sup>113</sup>

### 3. Sex Discrimination

The social media #MeToo movement has brought sexual harassment to the forefront of discussion in our workplaces, legislatures, and federal agencies.<sup>114</sup> Between October 2017 and October 2018, #MeToo was used an average of 55,319 times a day on Twitter alone.<sup>115</sup> Forty-four percent of the United States Congress addressed sexual misconduct on their official Facebook accounts between October 1 and December 30, 2017.<sup>116</sup> The number of EEOC charges alleging sexual harassment increased by 13.6% between 2017 and 2018, following a downward trend in such charges from 2010 to 2017.<sup>117</sup> In 2018, charges of discrimination containing allegations of sexual harassment were the highest since 2011.<sup>118</sup> Despite the swift social and political implications, the full extent of the movement’s legal impact is yet to be determined.

#### a. *Parker v. Reema Consulting Services, Inc.*

In *Parker v. Reema Consulting Services, Inc.*, a recent “water-cooler” case, the Fourth Circuit recognized that an employer who participates in circulating a false rumor, sexual in nature, may be liable under Title VII.<sup>119</sup> Soon after Evangeline Parker was promoted for a sixth time, male employees circulated a rumor that she

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112. *Id.* at 746.

113. *Id.* at 746, 748, 752.

114. See Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RESEARCH CTR. (Oct. 22, 2018), <https://pewresearch.org/fact-tank/2018/10/11/how/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [<https://perma.cc/K98B-HEEM>]; *Charges Alleging Sexual Harassment FY 2010–FY 2018*, EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) [<https://perma.cc/9Q4S-MTBA>] [hereinafter *Sexual Harassment Charges*].

115. Anderson & Toor, *supra* note 114.

116. *Id.*

117. See *Sexual Harassment Charges*, *supra* note 114.

118. *Id.*

119. 915 F.3d 297, 299–300, 305 (4th Cir. 2019), *petition for cert. filed*, 87 U.S.L.W. 3457

obtained the promotion because she had engaged in a sexual relationship with a higher ranking manager.<sup>120</sup> The day after the highest-ranking manager at the facility, Larry Moppins, discussed the false rumor at a meeting (one in which Parker did not participate), Moppins met with Parker.<sup>121</sup> During the meeting, Moppins blamed Parker for “bringing the situation to the workplace” and told her that he “could no longer recommend her for promotions or higher-level tasks because of the rumor,” nor would he “allow her to advance any further.”<sup>122</sup>

After another meeting with Moppins where he “lost his temper and began screaming” at her, Parker filed a sexual harassment complaint with human resources.<sup>123</sup> Several weeks later, Moppins “simultaneously issued [Parker] two written warnings and then fired her.”<sup>124</sup>

While Reema argued that employment action was taken because of the “rumored conduct in sleeping with her boss to obtain [a] promotion,” the Fourth Circuit concluded that the allegations sufficiently alleged discrimination on the basis of sex because male employees started and circulated the false rumor which furthered “traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior.”<sup>125</sup> Acknowledging that these stereotypes “stubbornly persist in our society” and “may cause superiors and coworkers to treat women in the workplace differently from men,” the court held that Parker had sufficiently pled gender-based harassment.<sup>126</sup> The court further concluded that “the dichotomy that [Reema], as well as the district court, purports to create between harassment ‘based on gender’ and harassment based on ‘conduct’ is not meaningful in this case because the *conduct* is also alleged to be gender-based.”<sup>127</sup>

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(U.S. May 9, 2019) (No. 18-1442).

120. *Id.* at 300.

121. *Id.*

122. *Id.*

123. *Id.* at 300–01.

124. *Id.* at 301.

125. *Id.* at 302–03.

126. *Id.* at 303 (quoting *Spain v. Gallegos*, 26 F.3d 439, 448 (3d Cir. 1994)).

127. *Id.* at 304.

b. *Ray v. International Paper Company*

Overturing the district court's grant of summary judgment in favor of the employer, the Fourth Circuit decided that the alleged withholding of voluntary overtime hours could constitute a "tangible employment action" under Title VII.<sup>128</sup> Around one year after International Paper hired Tamika Ray, her supervisor, Johnnie McDowell, started asking Ray for sexual favors, offered to pay her for those favors, and grabbed her thigh.<sup>129</sup> Even though Ray "repeatedly refus[ed] his advances and ask[ed] him to stop," McDowell continued the behaviors.<sup>130</sup> More than ten years after Ray began working at International Paper, she reported McDowell's continued conduct to other company supervisors.<sup>131</sup> After learning that Ray had reported the conduct, McDowell informed Ray "that she could no longer perform 'voluntary' overtime work before the beginning of her regular work shifts."<sup>132</sup>

In a sexual harassment case, "[w]hen a supervisor is the harasser and the harassment culminates in a tangible employment action, the employer is strictly liable."<sup>133</sup> Because McDowell's decision to withhold voluntary overtime hours "negatively affected her income," the court concluded that Ray presented evidence of a tangible employment action sufficient to survive summary judgment.<sup>134</sup>

c. *Bauer v. Lynch*

In a case challenging the physical fitness test utilized by the Federal Bureau of Investigation ("FBI"), the Fourth Circuit adopted the rule that "an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each."<sup>135</sup> After a new

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128. *Ray v. Int'l Paper Co.*, 909 F.3d 661, 668, 671 (4th Cir. 2018).

129. *Id.* at 665.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 667 (quoting *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013)).

134. *Id.* at 668.

135. *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016).

agent trainee, Jay Bauer, fell one push-up shy of the thirty required push-ups for male trainees, Bauer filed a sex-based discrimination suit under Title VII because the FBI required female trainees to complete only fourteen push-ups.<sup>136</sup> The FBI designed the trainee test requirements based on a study of trainees and their reasoning that, due to physiological differences, “equally fit men and women would perform differently in the same events.”<sup>137</sup> The test utilized a “gender-normed framework” that had “the complementary benefits of allowing the measurement of equivalent fitness levels between men and women while also mitigating the negative impact that would otherwise result from requiring female Trainees to satisfy the male-oriented standards.”<sup>138</sup>

The court acknowledged that “physical fitness standards suitable for men may not always be suitable for women, and accommodations addressing physiological differences . . . are not necessarily unlawful.”<sup>139</sup> Since men and women “demonstrate their fitness differently,” the test for whether or not physical fitness standards discriminate on the basis of sex “depends on whether they require men and women to demonstrate different levels of fitness.”<sup>140</sup> The Fourth Circuit vacated the district court’s decision to award summary judgment to Bauer “on the basis of an erroneous legal standard” and remanded the case.<sup>141</sup> Because the FBI’s test imposed equivalent burdens on both men and women in assessing physical fitness, the Eastern District of Virginia granted summary judgment to the FBI on remand.<sup>142</sup>

#### 4. Title VII Retaliation

In *Hernandez v. Fairfax County*, the Fourth Circuit held that the *proportionality* of a disciplinary reprimand to an incident of employee misconduct can factor in determining whether the employer was retaliating against the employee for an earlier sexual harassment complaint.<sup>143</sup> Magaly Hernandez worked for more than ten

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136. *Id.* at 342.

137. *Id.* at 343.

138. *Id.*

139. *Id.* at 350.

140. *Id.* at 351.

141. *Id.* at 351–52.

142. *See* Bauer v. Sessions, 254 F. Supp. 3d 809, 819 (E.D. Va. 2017).

143. *See* 719 F. App’x 184, 189 (4th Cir. 2018) (per curiam).

years as a female firefighter for Fairfax County, Virginia.<sup>144</sup> Soon after she transferred to a different station, the station captain, Jon Bruley, “engaged in inappropriate conduct toward her, including blocking her path in the hallway, placing his chin on her shoulder, and positioning his body ‘right up against’ her.”<sup>145</sup> Despite Hernandez’s repeated requests for Bruley to stop, he continued making inappropriate sexual comments, which led Hernandez to report Bruley’s behavior to his supervisor, Cheri Zosh.<sup>146</sup> Bruley stopped making inappropriate comments after Zosh confronted him, but he “began monitoring and tracking [Hernandez’s] activities and movements at work” for several months, which prompted Hernandez to file a formal complaint with Fairfax County.<sup>147</sup> Once Hernandez was transferred to a different fire station, “she was involved in a verbal confrontation with a male firefighter during a basketball game at the station.”<sup>148</sup> After an investigation, the County issued Hernandez “a written reprimand for workplace violence and unbecoming conduct.”<sup>149</sup>

The Fourth Circuit found that Hernandez had engaged in protected activity by making an initial report to Zosh regarding Bruley’s conduct towards her and by filing an official complaint with the County before she was transferred.<sup>150</sup> After the “brief, non-physical altercation” at the basketball event, the County’s written reprimand disqualified Hernandez from any promotions for at least one year.<sup>151</sup> The court held that the reprimand could constitute an adverse employment action because of the disproportionality between the severity of the reprimand and the minor nature of the altercation.<sup>152</sup> Based on the fact that only four months had passed between Hernandez’s official complaint and the County’s investigation of the basketball incident, together with the relative severity of the reprimand, the court held that a jury could conclude that the County had retaliated against Hernandez.<sup>153</sup> The

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144. *Id.* at 185–86.

145. *Id.* at 186.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 189.

151. *Id.*

152. *Id.*

153. *Id.*

Fourth Circuit, therefore, reversed summary judgment and remanded to the district court for further proceedings.<sup>154</sup>

## 5. Title VII Joint Employer Liability

The Fourth Circuit expressly defined joint employer liability under Title VII in *Butler v. Drive Automotive Industries of America, Inc.*<sup>155</sup> Recognizing “the reality of changes in modern employment,” the court adopted the hybrid test, because it “best captures the fact-specific nature of Title VII cases.”<sup>156</sup> While acknowledging that the common law element of control “remains the ‘principal guidepost’ in the analysis,” the court articulated nine factors for courts to consider when determining whether there is a joint employer relationship:

- (1) authority to hire and fire the individual;
- (2) day-to-day supervision of the individual, including employee discipline;
- (3) whether the putative employer furnishes the equipment used and the place of work;
- (4) possession of and responsibility over the individual’s employment records, including payroll, insurance, and taxes;
- (5) the length of time during which the individual has worked for the putative employer;
- (6) whether the putative employer provides the individual with formal or informal training;
- (7) whether the individual’s duties are akin to a regular employee’s duties;
- (8) whether the individual is assigned solely to the putative employer; and
- (9) whether the individual and putative employer intended to enter into an employment relationship.<sup>157</sup>

The court specified that the first, second, and third factors are the most important, although “no one factor is determinative.”<sup>158</sup> The factors are not inflexible, as courts within the circuit are able to “modify the factors to the specific industry context” and should

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154. *Id.* at 190.

155. 793 F.3d 404, 408 (4th Cir. 2015).

156. *Id.* at 410, 413.

157. *Id.* at 414.

158. *Id.* at 414–15 (quoting *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256, 260 (4th Cir. 1997)).

consider each factor in relation to the particular employment relationship at issue.<sup>159</sup>

### C. *The Americans with Disabilities Act*

With education around mental health issues on the rise, recent Fourth Circuit decisions have considered the extent to which alleged disabilities related to mental health are covered under the Americans with Disabilities Act (“ADA”). In addition, as a matter of first impression, the Eastern District of Virginia recently held that compensatory and punitive damages are not available forms of relief for ADA retaliation claims.

#### 1. Mental Health

##### a. *Jacobs v. North Carolina Administrative Office of the Courts*

In 2015, the Fourth Circuit held that a social anxiety disorder may qualify as a disability under the ADA.<sup>160</sup> Christina Jacobs alleged that she suffered from social anxiety and requested, as an accommodation for the alleged disability, to be reassigned from her front counter job to a role that involved “less direct interpersonal interaction.”<sup>161</sup> After Jacobs disclosed her disability on two separate occasions and officially requested an accommodation, she was terminated “because she was not ‘getting it’” and the employer did not have a place for her services.<sup>162</sup>

While the district court found that Jacobs, as a matter of law, was not disabled, the Fourth Circuit disagreed.<sup>163</sup> Although Jacobs had previously attended outings with coworkers and attempted to perform her front counter job duties, these facts did not establish that she was not “substantially limited” in interacting with others.<sup>164</sup> The court deemed that “[a] person need not live as a hermit in order to be ‘substantially limited’ in interacting with others,”

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159. *Id.* at 414–15.

160. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 570 (4th Cir. 2015).

161. *Id.* at 565.

162. *Id.* at 566–67.

163. *Id.* at 570.

164. *Id.* at 574.

and overturned the district court's grant of summary judgment to the employer.<sup>165</sup>

b. *Maubach v. City of Fairfax*

Another recent Fourth Circuit decision emphasized the importance of the employee participating in the interactive process.<sup>166</sup> Stefanie Maubach, who suffered from panic attacks, requested permission to bring her emotional support dog, Mr. B, into the workplace as she performed her dispatcher duties.<sup>167</sup> Her employer, the City of Fairfax, allowed her to bring Mr. B to work on a trial basis.<sup>168</sup> After her supervisor experienced allergy issues caused by Mr. B, Maubach refused the City's request that she bring a hypoallergenic dog in place of Mr. B.<sup>169</sup> She also refused to change shifts so that she would not have to leave her dispatcher post uncovered when she needed to take Mr. B out for a walk.<sup>170</sup> Ultimately, the court ruled against Maubach because she failed to participate in the interactive process in good faith.<sup>171</sup> Where "an employee causes the interactive process to break down by insisting on a particular accommodation, an employer cannot be held liable under the ADA."<sup>172</sup>

c. *Hannah P. v. Coats*

The Fourth Circuit also clarified that an employer is permitted to consider an employee's attendance issues when making employment decisions, even where the employee's attendance issues stem from an alleged disability—in this case, depression.<sup>173</sup> Hannah was diagnosed with depression only a few months into her five-year term with the Office of the Director of National Intelligence.<sup>174</sup> She

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165. *Id.* at 573, 582.

166. *Maubach v. City of Fairfax*, No. 1:17-cv-921, 2018 U.S. Dist. LEXIS 73815, at \*12–14 (E.D. Va. Apr. 30, 2018).

167. *Id.* at \*3–4.

168. *Id.* at \*4.

169. *Id.* at \*5, 9–10.

170. *Id.* at \*5–6, 8.

171. *Id.* at \*19.

172. *Id.* at \*17.

173. *Hannah P. v. Coats*, 916 F.3d 327, 344 (4th Cir. 2019).

174. *Id.* at 333.

did not immediately request any accommodations, but she did notify at least two supervisors of her condition.<sup>175</sup> Two years after Hannah started working, her schedule was “erratic,” she came into work very late, she was “unreachable” for hours, and she had “numerous unplanned absences.”<sup>176</sup> After meeting with a supervisor to make an attendance plan “to reconcile Hannah’s depression with [the employer’s] staffing needs,” Hannah continued to have issues that did not comport with the attendance plan and negatively impacted her co-workers’ and supervisors’ workloads.<sup>177</sup>

The employer rejected Hannah’s application for a permanent position because her “recent performance [was] not consistent with a potentially good employee.”<sup>178</sup> Despite intracompany memoranda discussing Hannah’s medical condition, the court found that the attendance issues were not pretext for discrimination because the focus of the employer’s decision was on the frequency of the attendance issues and its impact on Hannah’s performance.<sup>179</sup>

## 2. ADA Retaliation

On a question of first impression, the Eastern District of Virginia held that compensatory and punitive damages are not available forms of relief for ADA retaliation claims.<sup>180</sup> The Fourth Circuit had twice held that compensatory and punitive damages were not available, but neither decision was binding precedent.<sup>181</sup> Because compensatory and punitive damages are unavailable, plaintiffs are not entitled to a jury trial and can seek only equitable relief.<sup>182</sup>

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175. *Id.*

176. *Id.* at 334.

177. *Id.* at 334–35.

178. *Id.* at 343.

179. *Id.*

180. *Akbar-Hussain v. ACCA, Inc.*, No. 1:16cv1323 (JCC/IDD), 2017 U.S. Dist. LEXIS 6472, at \*11–13 (E.D. Va. Jan. 17, 2017).

181. *Id.* at \*11 (citing *Rhoads v. Fed. Deposit Ins. Corp.*, 94 Fed. App’x 187, 188 (4th Cir. 2004) (per curiam); *Bowles v. Carolina Cargo, Inc.*, 100 Fed. App’x 889, 890 (4th Cir. 2004) (per curiam)).

182. *See id.* at \*13.

#### D. *The Fair Labor Standards Act*

In April 2017, the Fourth Circuit established a new test for joint employer liability under the Fair Labor Standards Act (“FLSA”).<sup>183</sup> The standard articulated in *Salinas v. Commercial Interiors, Inc.* is unique among the circuits, and a challenging one for employers to overcome. Unlike the test under Title VII, discussed *supra*, the *Salinas* test focuses on the relationship between the putative joint employers, rather than the relationship between the worker and each company.

The plaintiffs in *Salinas* were drywall installers employed by J.I. General Contractors, Inc., a subcontractor, providing services to a general contractor, Commercial Interiors, Inc.<sup>184</sup> Plaintiffs filed claims for unpaid wages and overtime against both J.I. General Contractors and Commercial Interiors.<sup>185</sup> The District of Maryland held that Commercial Interiors was not a joint employer and dismissed it from the case.<sup>186</sup> On appeal, the Fourth Circuit overturned the decision, holding that

joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker’s employment and (2) the two or more persons’ or entities’ combined influence over the terms and conditions of the worker’s employment render the worker an employee as opposed to an independent contractor.<sup>187</sup>

Under the first part of the test, the court enumerated six, non-exhaustive factors:

- (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker’s employment;
- (3) The degree of permanency and duration of the relationship between the putative joint employers;

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183. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 140 (4th Cir. 2017).

184. *Id.* at 129.

185. *Id.* at 131.

186. *Id.* at 132.

187. *Id.* at 151.

(4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

(5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently of or in connection with one another; and

(6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.<sup>188</sup>

Applying these factors, the court found that Commercial Interiors and J.I. General Contractors “were not completely disassociated”—that the relationship was one of “one employment”—and next considered whether the plaintiffs were employees or subcontractors.<sup>189</sup> The court held that the plaintiffs were “economically dependent on Commercial and J.I. in the aggregate” and were therefore employees of both companies.<sup>190</sup>

The most striking element of this new test is the focus on the relationship between the putative joint employers, instead of the relationship between the worker and each company individually. Rejecting common law agency principles, the court instead held that the “combined influence over the terms and conditions of a worker’s employment may give rise to liability under the FLSA if the entities are ‘not completely disassociated’ with regard to the worker’s employment.”<sup>191</sup> Therefore, any degree of cooperation between the putative joint employers—even if one of the companies does not exercise direct control over the worker—may be enough to establish joint employer liability.<sup>192</sup>

## II. STATE LAW UPDATE

As discussed, *supra*, Virginia employment laws generally mirror federal law. To the extent the Commonwealth supplements federal law, the distinctions are relatively minor, but in recent years there have been a handful of noteworthy developments on topics such as

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188. *Id.* at 141–42.

189. *Id.* at 150.

190. *Id.* at 150–51.

191. *Id.* at 137–38.

192. *Id.* at 150–51.

military leave, data privacy, employee access to personnel files, and wrongful termination claims.

#### A. *Military Leave*

On March 9, 2018, the Virginia General Assembly amended the state's military leave laws to provide protections for members of the Civil Air Patrol and all persons employed in Virginia who serve in the National Guards of other states.<sup>193</sup> Previously, only *residents* of Virginia who served in the National Guards of other states were afforded leave and reemployment rights.<sup>194</sup>

#### B. *The Virginia Data Breach Notification Act*

Effective July 1, 2017, Virginia expanded employers' notification obligations under the Virginia Data Breach Notification Act.<sup>195</sup> Employers and payroll service providers must notify the state's attorney general, without unreasonable delay, when a covered employer discovers unauthorized access and acquisition of unencrypted or unredacted computerized data containing a taxpayer identification number, in combination with that taxpayer's income tax withholding.<sup>196</sup>

Covered employers must report a breach if it: (1) compromises the confidentiality of the data; and (2) causes identity theft or fraud, or the employer reasonably believes it has caused or will cause such harm.<sup>197</sup> Covered employers must notify the attorney general even if the breach does not otherwise trigger the statute's notification obligations to affected individuals.<sup>198</sup>

#### C. *Personnel Files*

Historically, Virginia employers were under no obligation to produce personnel files or employment records to employees or former

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193. Act of Mar. 9, 2018, ch. 216, 2018 Va. Acts \_\_, \_\_ (codified as amended at VA. CODE ANN. §§ 44-93.2 to -93.4 (Cum. Supp. 2019)).

194. *See* VA. CODE ANN. §§ 44-93.2 to -93.4 (Repl. Vol. 2013).

195. *See id.*

196. *Id.*

197. *Id.*

198. *See id.*

employees, absent a subpoena. But as of July 1, 2019, all employers in Virginia must, upon written request,

furnish a copy of all records or papers retained by the employer in any format, reflecting (i) the employee's dates of employment with the employer; (ii) the employee's wages or salary during the employment; (iii) the employee's job description and job title during the employment; and (iv) any injuries sustained by the employee during the course of the employment with the employer.<sup>199</sup>

Employers have thirty days to respond to the request.<sup>200</sup> A willful failure to respond may render the employer liable for all expenses incurred by the employee in trying to obtain the records, including attorneys' fees and court costs.<sup>201</sup>

The statute contains one narrow exception: if the employer has a written statement from the employee's treating physician or clinical psychologist that providing the employee with his or her employment records may endanger the life or safety of the employee or of another person, then the employer must provide the records to the employee's attorney or authorized insurer, rather than directly to the employee.<sup>202</sup>

#### D. Bowman *Claims*

Since its inception in *Bowman v. State Bank of Keysville*,<sup>203</sup> Virginia's common law cause of action for wrongful termination has lacked a clearly defined scope. Recent guidance from the Supreme Court of Virginia, such as in *Francis v. National Accrediting Commission of Career Arts & Sciences, Inc.*,<sup>204</sup> has added some clarity to an area of Virginia employment law lacking in predictable black letter law.

Virginia adheres to the employment at-will doctrine.<sup>205</sup> Under that doctrine, either the employee or the employer may end their employment relationship for any reason or no reason.<sup>206</sup> In *Bowman*, the Supreme Court of Virginia recognized an exception and

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199. VA. CODE ANN. § 8.01-413.1(B) (Cum. Supp. 2019).

200. *Id.*

201. *Id.* § 8.01-413.1(D) (Cum. Supp. 2019).

202. *Id.* § 8.01-413.1(E) (Cum. Supp. 2019).

203. *See* 229 Va. 534, 535, 540, 331 S.E.2d 797, 798, 801 (1985).

204. *See* 293 Va. 167, 174, 796 S.E.2d 188, 192 (2017).

205. *Id.* at 171, 796 S.E.2d at 190.

206. *Johnston v. William E. Wood & Assocs., Inc.*, 292 Va. 222, 225, 787 S.E.2d 103, 105

created a common law cause of action in those instances where the termination of an employee violates Virginia law.<sup>207</sup> In the decades that followed *Bowman*, the court offered occasional guidance on what constitutes actionable wrongful termination.<sup>208</sup> The result is a patchwork of cases attempting to define several distinct scenarios that may form the basis of a *Bowman* claim. In *Francis*, the court's discussion clarifies the state of the law for those navigating the wrongful termination landscape.<sup>209</sup>

Noemie Francis was terminated after she obtained a preliminary protective order against a co-worker.<sup>210</sup> Following her termination, Francis filed suit alleging wrongful discharge in violation of public policy under *Bowman*.<sup>211</sup> The trial court sustained the employer's demurrer and the Supreme Court of Virginia affirmed.<sup>212</sup> In doing so, the court articulated the three "scenarios" available to *Bowman* plaintiffs.<sup>213</sup> Although the three scenarios are not new concepts, the court's summary of viable *Bowman* claims provides a road map for those litigating these types of cases.<sup>214</sup> The court noted that the exception to the employment at-will doctrine is "narrow" and limited to only three circumstances:

- (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.
- (3) When the discharge was based on the employee's refusal to engage in a criminal act.<sup>215</sup>

The third scenario was not at issue, and the court ultimately held that Francis did not state a claim for wrongful termination under scenarios one or two because her termination did not itself

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(2016) (quotation marks omitted).

207. *Bowman*, 229 Va. at 540, 331 S.E.2d at 801.

208. *See, e.g.*, *Mitchem v. Counts*, 259 Va. 179, 187–91, 523 S.E.2d 246, 250–53 (2000) (explaining that terminating an employee for refusing to engage in criminal activity is grounds for a wrongful termination suit); *Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 125–26, 480 S.E.2d 502, 504–05 (1997) (holding that terminations which violate a statutory public policy give rise to a wrongful termination suit).

209. *See Francis*, 293 Va. at 172–73, 796 S.E.2d at 190–91.

210. *Id.* at 170, 796 S.E.2d at 189–90.

211. *Id.* at 171, 796 S.E.2d at 190.

212. *Id.* at 171, 175, 796 S.E.2d at 190, 192.

213. *Id.* at 172–73, 796 S.E.2d at 190–91.

214. *See id.* at 173–75, 796 S.E.2d at 191–92.

215. *Id.* at 172–73, 796 S.E.2d at 190–91 (quotation marks omitted).

violate the public policy stated in the protective order statutes, which is to protect the health and safety of the petitioner or any family or household member of the petitioner.<sup>216</sup> The court reasoned that the termination did not prevent Francis “from exercising her statutory rights under the Protective Order Statutes” nor did it violate the express statutory public policy of protecting her public safety.<sup>217</sup>

The precise limitations of the “public policy” exceptions remain somewhat open, but the court appears resistant to claims of wrongful termination where the statute does not clearly contemplate some form of relief for retaliation or expressly recognize a right exercised by the terminated employee that directly results in her termination.<sup>218</sup>

### CONCLUSION

The employment law landscape in Virginia has changed in recent years, largely due to shifts in the Fourth Circuit’s interpretation of federal law. Because most employment laws in Virginia mirror federal law, the more significant developments in this practice area occur via the federal bench. Notwithstanding that reality, the Virginia legislature has tinkered at the margins of laws regarding military leave, data privacy, and access to personnel records. In addition, the Supreme Court of Virginia recently clarified the standard for wrongful termination claims. Even if state law remains somewhat static, federal employment laws will continue to evolve as courts in Virginia interpret and apply those laws in this jurisdiction.

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216. *Id.* at 173–75, 796 S.E.2d at 191–92.

217. *Id.* at 174–75, 796 S.E.2d at 191–92.

218. *See id.* at 173–75, 796 S.E.2d at 191–92.