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The Virginia Human Rights Act: Court's Decision Could Hurt Victims of Job Discrimination

Susan Grover

William & Mary Law School, ssgrov@wm.edu

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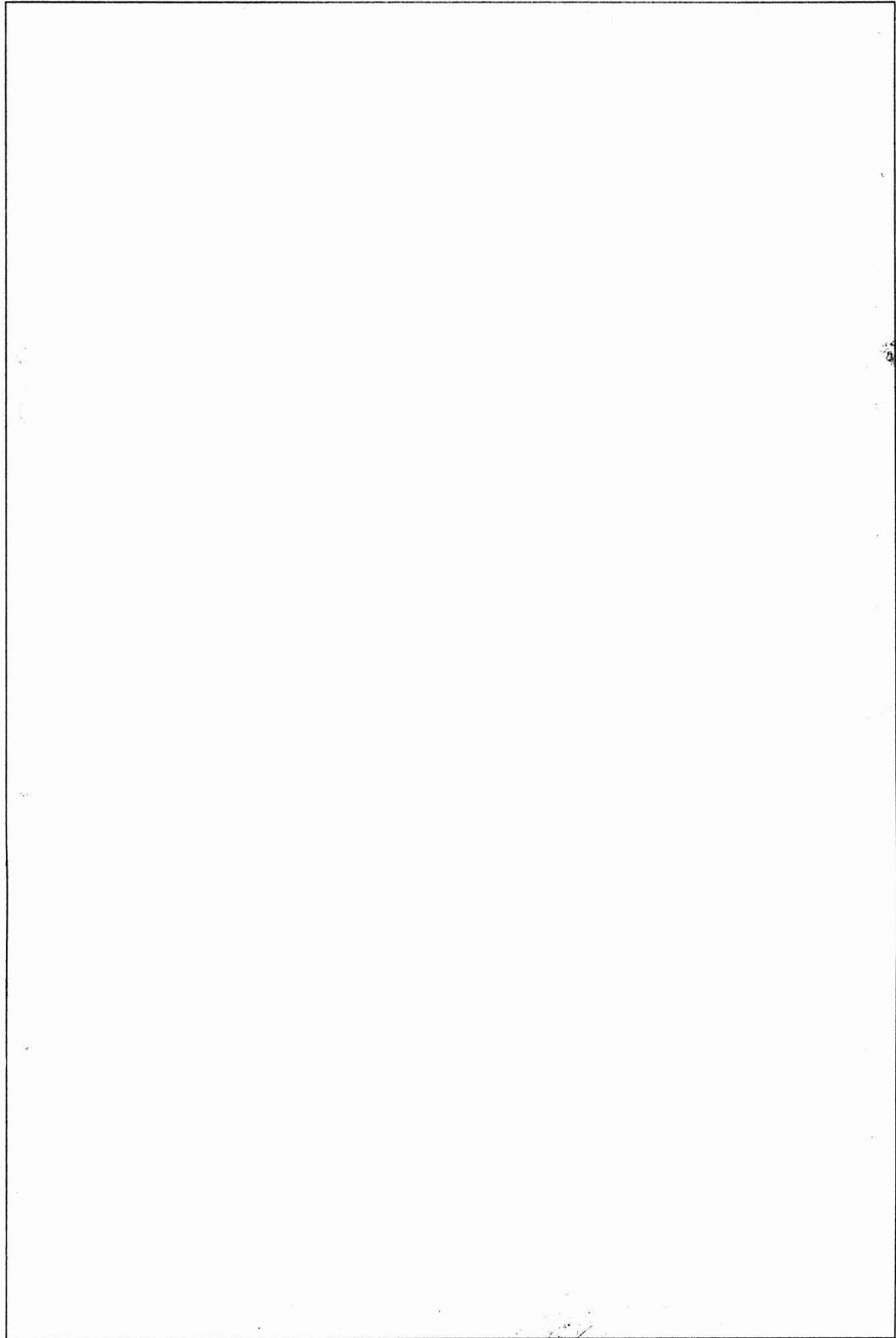
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OUTLOOK

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THE VIRGINIA HUMAN RIGHTS ACT Court's decision could hurt victims of job discrimination

By Susan Grover

Attorney General Mark Earley has recently called for renewed efforts to fight discrimination in Virginia. Heeding his call, Virginians would do well to pay attention to a lawsuit that is currently before the Virginia Supreme Court. The case calls upon the justices to interpret a provision in the Virginia Human Rights Act.

Specifically, the court will decide whether the VHRA prohibits victims of employment discrimination from filing wrongful discharge lawsuits they other-

wise could bring under the laws of Virginia.

It is strange in a time of renewed efforts toward racial reconciliation that a statute of the General Assembly may be interpreted to impose so deliberate a legal impediment on discrimination victims. It is passing strange that the statute argued to require this result was enacted by the General Assembly in order to express Virginia's commitment to protect victims of discrimination on the basis of race, sex and other protected traits.

In the lawsuit now pending before the Supreme Court, the plaintiff, Deborah Connor, alleges a history of sex discrimination extending back over

Grover is an associate professor at the College of William and Mary's Marshall Wythe School of Law.

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19 years of employment with the defendant, National Pest Control Association. Connor asserts in the suit that her supervisors sexually harassed her and treated her less favorably than her male counterparts in a number of ways. When Connor finally complained about the harassment, the lawsuit states, her supervisors retaliated by demoting her, stripping her of her title, changing the locks while she was on pregnancy leave, threatening her with termination, and ultimately terminating her employment.

These events allegedly took place despite the fact that Connor had always received excellent performance reviews, promotions and salary increases.

The decision in *Connor v. National Pest Control Association* will not turn on whether discrimination occurred. In fact, at least according to the plaintiff's brief, the defendant's attorneys already have admitted that they discriminated against her. Instead, the case will turn on whether, even where an employer admits that it discriminated, the VHRA bars the employee from filing her wrongful discharge lawsuit.

In a vacuum, depriving people like Connor of a right to sue appears not egregious. There are, after all, some wrongs that the law simply does not remedy.

The unfairness becomes apparent only when Connor's case is viewed in light of Virginia's general allowance of suits for wrongful termination. The usual rule, adopted by Virginia's Supreme Court in the 1985 case of *Bowman v. State Bank of Keyesville*, is that wrongfully terminated employees may sue their employers.

Under the Bowman rule, employment terminations are "wrongful" and permit lawsuits whenever an employee is fired for a reason that violates a policy of the Commonwealth. "Policies of the Commonwealth" that can support such wrongful termination claims, in turn, consist of all of the policies that underlie all of the statutes currently effective in Virginia. Because the "anti-discrimination policy" underlies a number of different Virginia statutes, including the VHRA, the Bowman doctrine clearly gives employees a right to file suits based on discriminatory termination, unless the Supreme Court rules for the defendant in the Connor case.

The VHRA, which underlies the dispute, was enacted in 1987 and significantly amended in 1995. When it was enacted, the VHRA expressly proclaimed a Virginia policy against employment discrimination, but also disclaimed the creation of a legal cause of action for violations of that policy.

In combination with the Bowman decision, however, the VHRA made it possible for victims of employment discrimination to bring state law claims against their employers, invoking not the VHRA itself, but the anti-discrimination policy underlying it and all of the other Virginia statutes that are predicated upon that policy.

Employees took such significant advantage of the availability of such discrimination claims that the General Assembly resolved to alleviate the increasing burdens these cases were placing on Virginia courts. The 1995 amendments to the VHRA, while retaining the expression of an anti-discrimination policy, cut off all wrongful termination claims predicated on the policies "reflected" in the VHRA. In the 1996 case of *Doss v. Jamco*, the Virginia Supreme Court confirmed that these 1995 amendments precluded wrongful termination claims predicated on the VHRA.

The question remaining, and that confronts the court in the Connor case, is how broad a bar the 1995 amendments impose. This issue arises because the VHRA is only one of several statutes that articulate Virginia's policy against discrimination.

Connor's lawsuit itself does not (and cannot after the Doss decision) rely on the VHRA. Instead, she alleges that her termination violated anti-discrimination policies expressed in a variety of other Virginia statutes.

The defendant argues that the anti-discrimination policy underlying those enactments relied upon by Connor's lawsuit is the identical anti-discrimination policy that is "reflected" in the VHRA, and thus barred by the terms of the VHRA from supporting a wrongful termination claim.

The question before the Supreme Court now is whether the VHRA has the effect of foreclosing pursuit of all state lawsuits challenging discriminatory termination of employment, even where the plaintiff invokes Virginia laws other than the VHRA.

The irony of this situation should not be ignored: If Connor loses, and the court finds that the amended VHRA extinguishes her claims, then

she is directly disadvantaged by being within the groups "protected" by the VHRA, even though she did not even invoke that statute.

The deprivation of such state law claims has practical and symbolic significance. Admittedly, the denial of a state law claim may cause little harm to employees who qualify to sue under the federal law of employment discrimination and under a different provision of the VHRA that actually grants a right to sue to a narrow category of employees. As to employees who work for companies too small to be covered by either law, moreover, there is a move afoot to amend the VHRA to extend to them the right to sue.

Despite such mitigating factors, however, the denial of a state law remedy under the Bowman doctrine does disadvantage affected employees.

There are, for example, distinct advantages to bringing the suit under state, rather than federal, law.

Federal law imposes strict limits on the amount of damages a plaintiff may recover, whereas state law allows the verdict to reflect the full amount of harm that the discrimination actually caused.

Federal law requires the plaintiff to exhaust administrative remedies before filing the lawsuit, whereas state claimants may get to court more quickly.

In addition, the plaintiff may file her state lawsuit in a Virginia court with assurance that the case will remain in the Virginia court system. The federal claimant, by contrast, may file her suit in Virginia court, only to have the employer remove this "federal question" case to the federal system.

These consequences are not always fatal to a plaintiff's claim, but they are detrimental enough to warrant concern.

The symbolic harm far exceeds the pragmatic difficulties.

A decision for the defendant in the Connor case will mean that the VHRA affirmatively harms precisely those victims of employment discrimination for whose protection the statute was enacted.

Every employee in the Commonwealth would have state law protection from wrongful termination based on any and every policy of the Commonwealth, except for the policy against discrimination. By treating discrimination victims less favorably than any other group of wrongfully terminated employees, the VHRA violates the policy it announces.

That has to be wrong.