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

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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 otherwise 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 such 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
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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 co-workers 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, chang ing the locks while she was on preg nancy leave, threatening her with termination, and ultimately termi nating her employment.

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

The decision in Connor v. National Pest Control Association will not turn on whether discrimi nation occurred. In fact, at least according to the plaintiff's brief, the defen dant's attorneys already have admit ted 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 a wrongful discharge lawsuit.

In a vacuum, depriving people who lose jobs 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 the light of Virginia's generous allowance of suits for wrongful terminations. The usual rule, adopted by Virginia's Supreme Court in the 1989 case of Bowman v. Smith Bank of Keysville, is that wrongfully terminated employees may sue their employers.

Under the Bowman rule, employers 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 include, in turn, consists of all of the policies that underlie all of the statutes cur rently 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 suits based on discriminatory termina tion, unless the Supreme Court rules for the defendant in the Connor case.

The VHRA, which underlies the dispute, was enacted in 1987 and sig nificantly amended in 1995. When it was enacted, the VHRA expressly proclaimed a Virginia policy against employment discrimination, but also contained a provision that the interpretation of the policy would be based on any and all Virginia statutes. In this case, the question before the Supreme Court is whether the VHRA establishes the identical anti-discrimination policy that underlies the Vienna, Virginia, Supreme Court decision in this "federal question" case to the federal system.

In general, the federal system permits state law claims to proceed whenever the state law claims do not conflict with federal law. Even where a federal claim and a state claim are both based on the same facts and are each independent and different in kind, the plaintiff is permitted to file the state claim. In other words, the plaintiff is permitted to assert both types of claims.

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 Virginia statutes that articulate Virginia's policy against discrimination. Connor's lawsuit itself does not (and cannot after the Dues 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 underly ing these enactments cited 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 statutes that challenge dis crimination as a discriminatory violation of employment, even where the plaintiff invokes Virginia laws other than the VHRA.

The irony of this situation should not be ignored. In Connor's case, 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 differ ent 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 them the right to sue.

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

There are, for example, distinct advantages to bringing the suit under state 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 discrimina tion 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 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 lawsuit 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 war rant concern.

The symbolic harm far exceeds the pragmatic difficulties. A decision for the defendant in the Connor case will mean that the VHRA unilaterally harms precisely those victims of employment discrimination for whose protection the stat ues was enacted.

Every employee in the Commonwealth would face state law protection from wrongful termination based on a Virginia policy of the Commonwealth, except for the policy against discrimination. By thus discriminating victims less favorably than other groups of wrongfully terminated employees, the VHRA violates the promise of its own annunciation.

That has to be wrong.