
In The
Supreme Court of Virginia

RECORD NO. 120348

ANGELA VANBUREN,

Appellant,

v.

STEPHEN A. GRUBB, et al.,

Appellees.

**BRIEF OF *AMICI CURIAE* OF
THE VIRGINIA EMPLOYMENT LAWYERS
ASSOCIATION AND THE METROPOLITAN
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF PLAINTIFF-APPELLANT/CROSS-APPELLEE**

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STATEMENT OF INTEREST OF AMICI CURIAE

The Virginia Employment Lawyers Association ("VELA") and the Metropolitan Washington Employment Lawyers Association ("MWELA") are professional organizations comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. Together they have over 350 members. They advance employee rights and serve lawyers who advocate for equality and justice in the workplace in the Commonwealth of Virginia and the Metropolitan Washington area. VELA and MWELA are local affiliates of the National Employment Lawyers Association. As part of their advocacy efforts, VELA and MWELA support precedent-setting litigation and have authored or joined numerous *amicus curiae* briefs in state and federal appellate courts to ensure that the goals of workplace laws are fully realized.

STATEMENT OF THE CASE

Amici Curiae concur with the Statement of the Case set forth in the Plaintiff-Appellant/Cross-Appellee's Opening Brief.

STATEMENT OF FACTS

Amici Curiae concur with the Statement of Facts set forth in the Plaintiff-Appellant/Cross-Appellee's Opening Brief.

QUESTIONS PRESENTED

Amici Curiae address the question of law certified by the United States Court of Appeals for the Fourth Circuit:

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

SUMMARY OF ARGUMENT

The tort of wrongful discharge is an intentional tort. Corporate officers are generally jointly and severally liable for their tortious conduct. Since this Court issued its opinion in *Bowman v. State Bank of Keysville*, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985), courts of the Commonwealth of Virginia have allowed employees to bring a cause of action for wrongful discharge against their employers and their supervisors who have personally participated in such a discharge.

Other states have explicitly held that supervisors can be personally liable if they personally participate in the tort of wrongful discharge. Several other states have also allowed employees to bring wrongful discharge claims against individual defendants. The minority of states have held to the contrary. However, the proper balance is to hold supervisors liable who have personally participated in wrongfully discharging a putative plaintiff.

Allowing individual liability properly deters individual supervisors from engaging in intentional tortious conduct. In short, direct responsibility aligns the supervisor's interests with the corporation's. Doing so not only benefits employees, who already have a cause of action against the company, but also companies who benefit from supervisors who monitor themselves before engaging in tortious conduct rather than later subjecting their companies to liability. Direct liability matches tortious actors with their tortious acts.

STANDARD OF REVIEW

Amici Curiae concur with the Standard of Review set forth in the Plaintiff-Appellant/Cross-Appellee's Opening Brief.

ARGUMENT

I. SINCE THE DECISION IN *BOWMAN*, WRONGFUL DISCHARGE CLAIMS AGAINST INDIVIDUAL DEFENDANTS HAVE BEEN ALLOWED.

In *Bowman*, this Court specifically held that wrongful discharge sounds in tort. *Bowman v. State*

Bank of Keysville, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985); see also *Doss v. Jamco, Inc.*, 254 Va. 362, 365, 492 S.E.2d 441, 443 (1997) (noting that *Bowman* recognized a common law action in tort); *Shaw v. Titan Corp.*, 255 Va. 535, 545, 498 S.E.2d 696, 701 (1998) ("the common law cause of action for wrongful termination of employment sounds in tort"). Further, it is an intentional tort. See *Shaw v. Titan Corp.*, 255 Va. 535, 545, 498 S.E.2d 696, 701 (1998) (noting that the defendant conceded that wrongful discharge is an intentional tort). Therefore, the common law of torts and its principles are applicable to wrongful discharge claims.

The general rule is that "[c]orporate officers may of course be liable jointly and severally with their corporation for obligations arising out of tortious conduct of the officers that subject the corporation to liability." *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921, 929 (4th Cir. 1984) (citing *Restatement (Second) of Agency* § 343 (1957)).

"[C]orporate officers [are] liable for their tortious conduct." *PTS Corp. v. Buckman*, 264 Va. 613, 622, 561 S.E.2d 718, 723 (Va. 2002).

The law of wrongful discharge in the Commonwealth of Virginia allows an employee to bring a cause of action against individuals. A contrary holding would be a remarkable departure from this Court's previous holdings. Indeed, in *Bowman*, this Court recognized that wrongful discharge claims are available against individuals. The Court specifically stated that the employees were bringing claims against "individual defendants." 229 Va. at 536. There was no mistaking that the cause of action was against the employer and the individual defendants. Removing all doubt, the Court clearly stated the counts, stating, "In one count, the plaintiffs seek recovery against the Bank **and the named directors** for improper discharge from employment." 229 Va. at 538 (emphasis added). The simple fact was that the directors were individuals.

The unmistakable holding by this Court was that the employees "stated a cause of action in tort against the bank **and the named directors** for improper discharge from employment." 229 Va. at 540 (emphasis added). This Court reaffirmed the holding in *Bowman* in 1999, stating, "We held that two bank employees . . . had stated a cause of action in tort against the bank **and bank directors.**" *Dray v. New Mkt. Poultry Products, Inc.*, 258 Va. 187, 191, 518 S.E.2d 312, 313 (1999)(emphasis added).

Since *Bowman* this Court has continued to recognize individuals as proper defendants in wrongful discharge claims. In *Lockhart*, the court allowed a wrongful discharge in violation of public policy claim to proceed against both the entity and the supervisor where the supervisor was the alleged wrongdoer and terminated the employee. *Lockhart v. Commonwealth Educ. Systems Corp.*, 247 Va. 98, 102-06, 439 S.E.2d 328 (1994). In 1998, a claim was allowed to proceed against both a company and one of its officers in his

individual capacity. *Shaw v. Titan Corp.*, 255 Va. 535, 498 S.E.2d 696 (1998). This Court also allowed a wrongful termination claim to proceed against an individual in *Mitchem v. Counts*, 259 Va. 179, 523 S.E.2d 246 (2000); that is, against Durwood L. Counts, who had personally participated in the wrongful discharge. In *Harris*, the court let stand a finding of liability against individual defendants supervisory police officers for wrongful discharge; these officers had met and agreed to the termination decision. *City of Virginia Beach v. Harris*, 259 Va. 220, 229-30, 523 S.E.2d 239, 243 (Va. 2000).

In fact, as recently as 2010, this Court summarized the holding of *Bowman*, stating that "employees had stated cause of action **against directors** for retaliatory discharge in violation of public policy." *Ligon v. County of Goochland*, 279 Va. 312, 317, 689 S.E.2d 666, 669 (2010) (emphasis added).

Federal courts applying Virginia law have come to a similar conclusion. In *McFarland*, the court held that

a manager of a company could be held individually liable along with the company because the plaintiff had alleged that the manager had participated in the company's tortious act. *McFarland v. Va. Ret. Servs. of Chesterfield, L.L.C.*, 477 F. Supp. 2d 727, 738 (E.D. Va. 2007). The court in *McFarland* found specifically important that the personally named defendant "**personally participated** in or contributed to McFarland's alleged wrongful termination." *McFarland v. Va. Ret. Servs. of Chesterfield, L.L.C.*, 477 F. Supp. 2d 727, 738 (E.D. Va. 2007) (emphasis added). The court found that nonparticipatory defendants, however, were not proper defendants. *Id.* The court deferred to this Court's decisions permitting cases to proceed against individual defendants who "played a key role in contributing to the company's tortious conduct allegedly inflicted on a wrongfully discharged plaintiff." *Id.* at 739 (citing *Bowman*, 331 S.E.2d at 798-801) (permitting employees' wrongful discharge lawsuit to proceed against both a Bank and seven

individual members of the Bank's nine-person Board of Directors directly implicated in firing the employees, holding that the employees had "stated a cause of action in tort against the Bank *and the named directors* for improper discharge from employment." (emphasis added); *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 439 S.E.2d 328 (Va. 1994) (employee's wrongful discharge claim allowed to proceed against both corporate entity and individual supervisor who made decision to terminate employee and told her to "get out!")). The ruling below, which held to the contrary, *VanBuren v. Virginia Highlands Orthopaedic Spine Center, LLC*, 728 F. Supp. 2d 791 (W.D. Va. 2010), is not only contrary to *McFarland*, but also to this Court's holdings in *Bowman*, *Lockhart*, *Shaw*, *Mitchem*, and *Harris*.

The effect of a ruling by this Court that individual defendants are not liable for wrongful discharge would be to dam the stream of case law allowing such claims. Parties have relied on this

expectation. This Court has previously noted that in such instances parties "are entitled to rely on [this] continued stability." *Miller v. SEVAMP, Inc.*, 234 Va. 462, 468, 362 S.E.2d 915, 919 (1987). This case is an opportunity to confirm the law as it already exists; there is individual liability under a wrongful discharge cause of action. There is no reason to depart from the status quo.

II. OTHER STATES AGREE WITH THE SUPREME COURT OF VIRGINIA THAT A CAUSE OF ACTION FOR WRONGFUL DISCHARGE IS AVAILABLE AGAINST INDIVIDUAL DEFENDANTS.

Virginia is not alone in allowing wrongful discharge claims against individual defendants. The courts of Iowa, New Jersey, Pennsylvania, and West Virginia have explicitly recognized a cause of action against individual defendants.

In Iowa, the Supreme Court has recently held that liability for the tort of wrongful discharge "can extend to individual officers of a corporation who authorized or directed the discharge of an employee for reasons that contravene public policy." *Jasper v. H.*

Nizam, Inc., 764 N.W.2d 751, 777 (Iowa 2009). The Supreme Court of Iowa reasoned that "the legal status of a corporation as an independent entity was not created to insulate officers from liability for their own tortious conduct." *Id.* at 775 (citing *Haupt v. Miller*, 514 N.W.2d 905, 907-09 (Iowa 1994)). The court noted that imposition of individual liability was limited to those who "**personally participated** in the tortious conduct." *Id.* (emphasis added). The court reasoned that tort law "concerns liability imposed by society for acts by individuals deemed to be undesirable in society. The tort seeks to encourage responsibility for individual behavior." *Id.* at 776. It further noted, "The tort of wrongful discharge does not impose liability for the discharge from employment, but the wrongful reasons motivating the discharge." *Id.* The root of the tort is "the undesirable, injurious act prohibited by the tort" and "not the termination of the employment arrangement per se." *Id.* By recognizing individual liability, the tort

"encourage[es] management to make decisions consistent with fundamental principles of public policy and [] giv[es] employees the freedom to refuse to follow management decisions inconsistent with such policy."

Id.

The New Jersey Supreme Court held that "an individual who **personally participates** in the tort of wrongful discharge may be held individually liable." *Ballinger v. Del. River Port Auth.*, 172 N.J. 586, 608, 800 A.2d 97, 110 (2002) (citations omitted) (emphasis added). In reaching this conclusion, the Supreme Court of New Jersey reasoned that agents remain liable for torts they commit even when acting on the employer's behalf. *Id.* at 608-09 (citing *Restatement (Second) of Agency* § 343 (1958); *Restatement (Second) of Agency* § 217B (1957)).

In Pennsylvania, the tort of wrongful discharge is actionable against individual defendants as "an officer of the corporation **who takes part** in the commission of the tort by the corporation is personally liable

therefore." *Kamensky v. Roemer Indus., Inc.*, 1 Pa. D. & C.4th 497, 499-500 (1988) (quoting *Wicks v. Milzoco Builders Inc.*, 503 Pa. 614, 470 A.2d 86 (1983)) (emphasis added). In *Kamensky*, the court held that the president of the employer corporation was subject to personal liability for a wrongful termination of an employee who would not withdraw an unemployment compensation claim. *Id.*

In West Virginia, the Supreme Court of Appeals held that it was error for the trial court to hold that an individual could not be found liable for retaliatory discharge. *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 685, 289 S.E.2d 692, 698 (1982). Relevant to its holding was the individual defendant's supervisory position over the employee and evidence "that **directly linked him as an adversary** in the central controversy in which the plaintiff was involved." *Id.* (emphasis added).

A federal district court applying the law of the District of Columbia held that "a review of [the D.C.

Court of Appeals' opinions in the employment area suggests that it would not bar claims for wrongful discharge against individual employees if the facts established that the **individuals acted improperly or illegally.**" *Myers v. Alutiiq Int'l Solutions, LLC*, 811 F. Supp. 2d 261, 268 (D.D.C. 2011) (emphasis added). The court found "the reasoning of the states that have allowed claims against individual employees to be more consistent with the law of the District of Columbia" because "there may be some circumstances where an individual supervisory employee can be liable for tortious interference with another employee's contractual relations with the employer." *Id.* at 268-69.

In addition to these states that have explicitly found a cause of action for wrongful discharge against individual defendants, numerous states have allowed wrongful discharge actions to proceed against individual defendants. *See, e.g., Murcott v. Best Western Intern., Inc.*, 198 Ariz. 349, 9 P.3d 1088 (2000)

(upholding jury verdict of liability against corporation and four individuals); *Island v. Buena Vista Resort*, 352 Ark. 548, 103 S.W.3d 671 (2003) (holding that employee had stated a valid cause of action for wrongful termination where an individual was also a named defendant); *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 381, 652 P.2d 625, 632 (1982) ("Parnar has sufficiently alleged a retaliatory discharge in contravention of public policy such that she should be allowed to proceed against the appellees individually."); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985) (holding that employee's count for wrongful discharge against defendants, which included an individual defendant, stated a claim); *Foster v. Albertsons*, 254 Mont. 117, 128, 835 P.2d 720, 727 (1992) (holding "that the District Court erred in directing a verdict in favor of the respondents"—which included an individual defendants—"on the appellant's wrongful discharge claim"); *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987) (allowing case

to proceed past summary judgment where individual defendant was named); *Pytlinski v. Brocar Products, Inc.*, 94 Ohio 77, 760 N.E.2d 385 (2002) (allowing case to proceed where individual defendants were named); *Garner v. Morrison Knudsen Corp.*, 318 S.C. 223, 456 S.E.2d 907 (1995) (allowing a case to proceed where individual defendants were named); *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225 (S.D. 1988) (allowing case to proceed where individual defendants were named); *Hubbard v. Spokane County*, 146 Wash. 2d 699, 50 P.3d 602 (2002) (allowing case to proceed where individual defendants were named).

And other states have explicitly left the question open. *Bourgeois v. Horizon Healthcare Corp.*, 117 N.M. 434, 872 P.2d 852, 855-56 (N.M.1994) (leaving open "the question of whether a retaliatory discharge claim lies against a supervisor, agent, or coemployee if the firing was an intentional act done solely for the supervisor, agent or coemployee's own interest and therefore outside the scope of employment"). Other

states have left the response ambiguous. *DeCarlo v. Bonus Stores, Inc.*, 989 So. 2d 351, 358-59 (Miss. 2008) (en banc) (holding that an individual is not liable for his actions in wrongfully discharging an employee *if the individual acted within the course and scope of his employment* but leaving open the question of whether an individual should be held liable if he acted outside the scope of his employment or employer's interests).

A minority of states have not recognized liability for wrongful discharge claims against individuals. See *Reno v. Baird*, 18 Cal. 4th 640, 76 Cal. Rptr. 2d 499, 957 P.2d 1333, 1334 (Cal. 1998) (holding that supervisors may not be sued individually under common law actions for wrongful discharge); *Buckner v. Atl. Plant Maint., Inc.*, 182 Ill. 2d 12, 230 Ill. Dec. 596, 694 N.E.2d 565, 569-70 (Ill. 1998) (holding no personal liability for retaliatory discharge of subordinate for filing a workers' compensation claim); *Rebarchek v. Farmers Coop. Elevator*, 272 Kan. 546, 35 P.3d 892, 903-04 (Kan. 2001) (same); *Physio GP, Inc. v. Naifeh*, 306

S.W.3d 886, 892 (Tex. App. 2010) (same). These courts reason that the employment relationship is between the corporate employer and the employee and that a supervisor acting on the employer's behalf cannot be individually liable for his conduct. However, the rationale expressed by these courts is inconsistent with the public policy articulated by this Court in *Bowman*, the unambiguous holding declaring that the employees "stated a cause of action in tort against the bank **and the named directors** for improper discharge from employment." 229 Va. at 540 (emphasis added). Hence the minority position is inapposite to Virginia law.

III. PERSONAL PARTICIPATION IS THE TOUCHSTONE FOR INDIVIDUAL LIABILITY FOR THE TORT OF WRONGFUL DISCHARGE.

The clear thread running through the cases finding personal liability for the tort of wrongful discharge is the supervisor's **personal participation**. This Court should explicitly apply the same principle as it has already done implicitly. This principle strikes the

proper balance. Uninvolved supervisors as well as supervisors who have acted appropriately will have nothing to fear because the County Circuit Courts are well equipped to determine a supervisor's participation, as well equipped as they are to determine a company's participation.

IV. INDIVIDUAL LIABILITY PROPERLY DETERS SUPERVISORS FROM TORTIOUS CONDUCT.

Beyond compensating tort victims for the wrongs committed against them, "another aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm." Dan B. Dobbs, *The Law of Torts* 19 (2000).

Individual liability better achieves this goal than corporate liability only. This is because holding the wrongdoer who personally participated in the wrongful discharge directly responsible aligns the supervisory employee's interests with the corporation's. *Jasper*, 764, N.W.2d at 776. That is, individual liability benefits the companies for which supervisory employees work; it protects them from rogue supervisors. If this

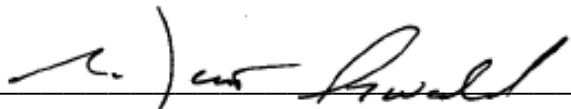
Court followed the minority of jurisdictions by disallowing individual liability, companies would have no recourse against supervisors who are ignorant of the state's public policies other than post hoc termination, while the force of the tort would lie heavily on the company as the sole defendant. Direct liability where there is personal participation matches tortious actors with their tortious acts.

CONCLUSION

Therefore, this Court should answer the question of law certified by the United States Court of Appeals for the Fourth Circuit in the affirmative. Virginia law **does** recognize a common law tort claim of wrongful discharge in violation of established public policy against an individual who was not the plaintiff's actual employer, such as a supervisor or manager, but who participated in the wrongful firing of the plaintiff.

[May 29, 2012].

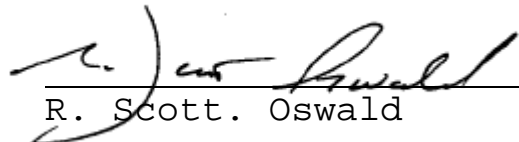
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CERTIFICATE OF SERVICE

In compliance with Rule 5:26(h), this is to certify that the undersigned counsel has caused fifteen bound copies, with one electronic copy on CD, of the foregoing Brief of *Amici Curiae* to be hand-filed with the Clerk of the Supreme Court of Virginia, and three bound copies, with one electronic copy on CD of the same, to be served, via UPS Ground Transportation, to counsel for all parties: James J. O’Keeffe, IV, Gentry, Locke, Rakes & Moore, 10 Franklin Road, SE, P.O. Box 40013, Roanoke, VA 24022-0013, Tel: (540) 983-9459, Fax: (540) 983-9400, Counsel for Plaintiff-Appellant/Cross-Appellee; and Terry Neill Grimes, Grimes & Williams, P.C, 320 Elm Avenue, Roanoke, VA 24016-4001, Tel: (540) 982-3711, Fax: (540) 345-6572, Counsel for Defendant-Appellee/Cross-Appellant on this 29th day of May, 2012.


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