In The
Supreme Court of Virginia

RECORD NO: 160267

NOEMIE S. FRANCIS,

Appellant,

v.

NATIONAL ACCREDITING COMMISSION OF CAREER ARTS & SCIENCES, INC.,

Appellee.

BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Noemie S. Francis, appellant, filed suit in the Circuit Court of the City of Alexandria on June 11, 2015, for wrongful termination of her at-will employment by her employer, the National Accrediting Commission of Career Arts & Sciences, Inc. (NACCAS) in violation of established public policy. Appellee NACCAS filed a timely demurrer, which the Circuit Court sustained on August 12, 2015 after oral argument, granting appellant leave to file an amended complaint. Appellant filed an amended complaint on August 25, 2016, and appellee filed a timely amended demurrer, which was sustained with prejudice after oral argument on December 9, 2015. Appellant filed a notice of appeal with the Circuit Court on December 31, 2015.

Statement of the Facts

As set forth in the amended complaint, appellant was employed by NACCAS as an at-will administrative assistant on a full-time basis from March 27, 2012 to February 9, 2015 at NACCAS's Alexandria, Virginia office. During 2014, Plaintiff received a favorable job performance review from her supervisor. (Joint Appendix, at 3).

On January 23, 2015, during working hours, appellant was the victim of a sudden and unprovoked physical and verbal assault lasting about five

minutes perpetrated by Ms. Peri Blow (Blow), a fellow NACCAS employee (also an administrative assistant), while appellant was filing documents at the NACCAS office. Blow approached appellant abruptly and very aggressively, and began yelling obscenities and cursing at appellant to her face, calling appellant derogatory names, threatening to harm appellant ("I am going to fuck you up, and hurt you") and raising her hands close to appellant's face as if to strike her at any moment. The assault was witnessed by about a dozen NACCAS employees. During this assault, two other NACCAS employees (Shanna Love and Michelle Stock) tried pulling Blow away from appellant, but Blow continued to come back to appellant with additional threats and vituperations. During this assault, appellant was fearful of her physical health, safety and welfare. (Joint Appendix, at 4).

Appellant, Blow and Love were immediately summoned to a meeting later that same day before Anthony Mirando (Mirando), NACCAS's executive director, and Alicia Williams (Williams), NACCAS's human resources director. At that meeting, when appellant attempted to discuss the attack against her, Mirando waved his hand at her to instruct her not to discuss the matter at all. Love was questioned and treated as if she had done something wrong in her attempts to protect appellant from Blow's attacks. Mirando and Williams limited the meeting to instructing both

appellant and Blow to observe “NACCAS star core values” and for both to improve their behavior in the future. At no time did NACCAS perform a factual investigation regarding the January 23, 2015 incident, and at no time did NACCAS interview appellant to determine any of the factual details regarding the incident. (Joint Appendix, at 4-5).

On January 28, 2015, appellant received a written summary of the January 23, 2015 Mirando-Williams meeting from Williams. The assault against appellant was not addressed in the summary, and there was no reference or indication as to the imposition of any disciplinary measures against Blow, or measures to be taken to protect appellant’s health, safety and wellbeing at the office worksite. In response to this summary, appellant sent an e-mail to Williams, with a copy to her supervisor Demara Stamler, stating her concerns that the summary failed to address her safety, that she did not feel comfortable working closely with someone who had made threats against her physical wellbeing, and that she would seek legal advice on the subject. (Joint Appendix, at 5).

On January 30, 2015, appellant filed with the Prince William County General District Court in Manassas, Virginia an *ex parte* petition for a civil preliminary protective order (PPO) against Blow pursuant to § 19.2-152.9, Code of Virginia. The petition listed Blow’s employment address for service

purposes, since appellant did not know Blow's residential address. The court issued the *ex parte* PPO on that date, ordering Blow not to commit any further acts of violence, force or threats against appellant, nor have contact with appellant of any kind, except lawful conduct. The PPO set a hearing for February 13, 2015 to hear Blow's testimony before issuing a longer-term Protective Order. On Thursday, February 5, 2015, a police officer personally served the PPO upon Blow at the NACCAS office, in the presence of Williams. (Joint Appendix, at 5-6 and 12-13).

On Monday, February 9, 2015, Williams summoned appellant to a private meeting at the office, and informed her she was being terminated by NACCAS effective that same day, stating the reason was that appellant "did not fit the vision of the organization." The Amended Complaint averred, upon information and belief, that appellant was terminated for having exercised her statutory right to seek and obtain a judicial protective order against Blow, and that NACCAS's stated rationale for appellant's employment termination was a pretext. On February 13, 2015, after a court hearing at which both appellant and Blow testified under oath, the court extended the Protective Order in favor of appellant and against Blow until July 15, 2015. (Joint Appendix, at 6 and 15-16).

ASSIGNMENT OF ERROR

The Circuit Court of the City of Alexandria erred in sustaining appellee-employer's amended demurrer because the amended complaint properly pleaded sufficient material facts which met all the necessary legal requirements to establish a common law tort claim of wrongful discharge in violation of established public policy, as an exception to the employment-at-will doctrine in Virginia. (Circuit Court's Order of December 9, 2015, at Joint Appendix, page 39).

STANDARD OF REVIEW, AUTHORITIES AND ARGUMENT

The standard of review of a decision to sustain a demurrer is summarized in *Cline v. Dunlora South, LLC*, 726 S.E.2d 14 (2012), No. 110650, 2012 Va. LEXIS 129 (June 7, 2012):

> The legal question presented by a circuit court's decision to sustain a demurrer requires application of a *de novo* standard of review. *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003). In conducting this review, the appellate court accepts as true the factual allegations of the complaint, its attachments, and the reasonable inferences that follow, but not the pleader's legal conclusions. *Yuzefovsky v. St. John's Wood Apts.*, 261 Va. 97, 102, 540 S.E.2d 134, 136-37 (2001).

In *Bowman v. State Bank of Keysville*[1], the Supreme Court of Virginia recognized a public policy wrongful termination tort as an exception to the

[1] 331 S.E.2d 797 (Va. 1985)

employment at-will doctrine. In its subsequent rulings, the Court has recognized three (3) different factual scenarios in which an at-will employee may bring a claim for wrongful discharge in violation of public policy:

(1) When "an employer violated a policy enabling the exercise of an employee's statutorily created right" (hereinafter Scenario 1);

(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" (hereinafter Scenario 2); and

(3) When "the discharge was based on the employee's refusal to engage in a criminal act." (hereinafter Scenario 3). *Rowan v. Tractor Supply Co.,* 263 Va. 209, 210-212 (Va. 2002).

Appellant's Amended Complaint clearly asserted facts which met <u>both</u> *Bowman* Scenarios 1 and 2, as shown below.[2]

[2] The Amended Complaint did not assert nor claim to assert a wrongful discharge claim under *Bowman* Scenario 3 (refusal to engage in a criminal act).

1. <u>The Amended Complaint met all the requisite elements of *Bowman* Scenario 1.</u>

The elements for a properly pleaded complaint asserting the tort of wrongful discharge in violation of public policy under *Bowman* Scenario 1 are:

a) The employee's exercise of a statutorily created right;

b) The existence of a public policy in Virginia designed to protect, and enable the free exercise of, that statutorily created right; and

c) Termination of plaintiff's employment by her employer as a result or consequence of her exercising that statutorily created right.

The Amended Complaint clearly addressed and pleaded all the factual and legal elements cited above under of Scenario 1, to wit:

- Appellant exercised her statutorily created right to obtain a court protective order to protect her health and safety, which is a right existing pursuant to §§ 19.2-152.7:1 through 19.2-152.10, Va. Code.
- There is a stated public policy pertaining to those seeking protective orders from the Virginia courts explicitly set forth in §19.2-152.10A , Va. Code: i.e., "to protect the health and safety of the petitioner…from an act of violence, force or threat…that may result in injury to person or property."

- Appellant's employment was terminated due to her exercise of that statutory right and in breach of the declared public policy in this Commonwealth.

Appellee argued in support of its amended demurrer that the right exercised by appellant to obtain a protective order is a private, not a public, right:

> "This is a private interest for Ms. Francis. Indeed, she reiterates this point when she states that she obtained the protective order because she was fearful for her own physical health and safety... Ms. Francis' right to obtain a protective order is a personal interest, not a public interest." (Joint Appendix, at 24-25)

Appellee's characterization of the rights bestowed by §§ 19.2-152.7:1 through 19.2-152.10 of the Code of Virginia as "private" and not "public" is incorrect as a matter of law. The protective order statutes of Virginia clearly grant its citizens and residents the statutory right to pursue and obtain a protective court order to protect their individual health and safety from aggressors who have victimized them. The fact that such court orders seek to protect an individual victim does not render this statutory right a "private" right. More importantly, "personal interests" and "public interests" are not even mentioned or referenced as relevant legal factors in *Bowman* or its

progeny of cases.[3] The correct and relevant standard referenced in *Bowman* and in *Rowan* is to "statutorily created rights," not to "personal interests." It should be noted that the specific statutory rights exercised by the *Bowman* employee-plaintiffs were their individual (and eminently "personal") voting rights as shareholders of the bank at which they were employed. The Supreme Court of Virginia did not consider those shareholders' voting rights to be "private" simply because they pertained to an individual shareholder-employee. What mattered to the *Bowman C*ourt was that the plaintiffs' right to vote their shares could not be interfered with by the employer by intimidation or termination as a matter of implied public policy.[4]

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[3] A correct example of what constitutes a non-statutory private right would be a contract-granted right, as the Virginia Supreme Court ruled in *Miller v. SEVAMP, Inc.,* 234 Va. 462 (Va. 1987), where it sustained the demurrer in that wrongful discharge case, because it involved an employee who was discharged after she testified during a private grievance proceeding arising from an employment policy manual, not a statutory proceeding.

[4] "For example, in *Bowman*, we recognized a common law cause of action for wrongful termination based on the public policy underlying former Code § 13.1-32. That statute conferred on stockholders the right to one vote for each outstanding share of stock held. Although former Code § 13.1-32 did not expressly state a public policy, we held that the statute provided a basis for a common law action for wrongful termination brought by two employee stockholders of a bank. We concluded that the statute embodied the public policy that a stockholder's right to vote shall be exercised free of duress and intimidation by corporate management." (emphasis added) *Mitchem v. Counts,* 259 Va. 179, 186 ff.

Also, as the Court took pains to make clear in *Mitchem v. Counts*, 259 Va. 179 (Va. 2000), there is a clear public policy in Virginia to protect the health and safety of its citizens, even if not expressly stated in the statutes, by, *inter alia*, enabling petitioners to seek and obtain protective orders in its courts:

> "Laws that do not expressly state a public policy, but were enacted to protect the property rights, personal freedoms, health, safety, or welfare of the general public, may support a wrongful discharge claim if they further an underlying, established public policy that is violated by the discharge from employment." (emphasis added)
> *Mitchem, Id.,* at 186.

This reference in *Mitchem,* that there exists an unexpressed public policy to protect the safety and health of any individual in Virginia, undoubtedly encompasses Virginia's protective orders statutes of which appellant availed herself, since their stated purpose specifically includes protection of safety and health (i.e., §19.2-152.10A, Va. Code: "to protect the health and safety of the petitioner…from an act of violence, force or threat…that may result in injury to person or property").

Appellee also argued that it did nothing to contravene appellant's right to obtain the protective order. But those are not the facts pleaded in the amended complaint. What appellant set forth in her amended complaint was that she was wrongfully discharged after, and as a result of

her obtaining, a protective order, not because appellee interfered with her tortiously during her pursuit of the order. What the amended complaint clearly asserted was that appellant was wrongfully terminated as a result of her having exercised her right to obtain (not pursue) a protective order.

Finally, the amended complaint (Joint Appendix, at 8, Par. 30) clearly set forth the stated public policy breached by appellee:

> NACCAS's termination of Plaintiff's employment violated Virginia's public policy embodied and inherent in Chapter 9.1 ("Protective Orders") of Title 19.2 of the Code of Virginia, which grants individuals the right to seek a civil protective order "to protect the health and safety of the petitioner…from the commission of an act of violence, force, or threat" by "prohibiting acts of violence, force, or threat or criminal offenses that may result in injury to person or property." §§19.2-152.9 and 19.2-152.10, Va. Code.[5]

Because the facts alleged in the amended complaint must be taken as true in addressing the amended demurrer, and because the facts asserted in the amended complaint did set forth and fulfilled all the necessary elements of a valid *Bowman* Scenario 1 wrongful discharge claim, there were no legal grounds to sustain the amended demurrer under Scenario 1.

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[5] The other citations in Par. 30 are supplementary references citing other statutes which echo Virginia's clear public policy pronouncements regarding health and safety in employment.

2. The amended complaint also met all the elements of *Bowman* Scenario 2.

The two elements for a viable wrongful discharge claim under *Bowman* Scenario 2 are:

- "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." *Rowan, Id.*

The amended complaint met both these elements as well, as it also met those of Scenario 1. The public policy violated by appellee is explicitly set forth in the protective order statutes, at §19.2-152.10A, Va. Code: i.e., "to protect the health and safety of the petitioner…from an act of violence, force or threat…that may result in injury to person or property." There can be no question that appellant is "clearly a member of that class of persons directly entitled to the protection enunciated by the public policy." The amended complaint duly and properly recited the factual circumstances and reasons pursuant to which she sought and obtained a protective order.

Under both *Bowman* Scenarios 1 and 2, no employer may lawfully terminate an employee's employment for having exercised her statutory right to seek and obtain protection to her safety and health, as was done

with appellant. In accepting appellant's allegations in her amended complaint as true for purposes of NACCAS's amended demurrer, the Supreme Court should overturn the sustaining of the amended demurrer by the Circuit Court, since the wrongful discharge claim material pleading requirements set forth in *Bowman* and its progeny had been met and satisfied in the amended complaint. Appellant should have been allowed to proceed to trial, and the amended demurrer denied.

CONCLUSION

The Supreme Court of Virginia should find and order that because the amended complaint met the pleading requirements of a valid wrongful discharge claim in violation of public policy, the Circuit Court's Order of December 9, 2015 granting the Amended Demurrer with prejudice should be overturned, the Amended Complaint reinstated, and remanding this civil action to the Circuit Court for trial.

Respectfully submitted,

s/ Michael E. Veve July 15, 2016

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CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h), that on this 15th day of July, 2016, I electronically filed the foregoing Brief of Appellant with accompanying Appendix via VACES, with the required paper copies set to be delivered within the prescribed one business day. I further certify that on this 15th day of July, 2016, the Brief and Appendix were served, via e-mail, upon the following:

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Exclusive of the portions exempted by Rule 5:26(h), this brief contains 2,735 words.

s/ Michael E. Veve
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