New Va. Whistleblower Law Offers Broad Employee Protection

By **Jason Zuckerman and Dallas Hammer** (April 21, 2020, 4:30 PM EDT)

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This year's legislative session in Virginia proves the adage that elections have consequences. For too long, Virginia workers had very limited remedies under state law to combat discrimination, retaliation and wage theft. And LGBTQ employees lacked any protection under Virginia's Human Rights Act.

But when Democrats regained control of the legislature in the November 2019 election, giving them across-the-board political control for the time in 26 years, workers had a chance to get long overdue protections.

And the 2020 legislative session delivered. Last week, Gov. Ralph Northam signed into law a wide range of employment laws, including robust legislation barring LGBTQ discrimination, combating wage theft, barring noncompetes for low-wage workers and prohibiting retaliation against whistleblowers. These laws will become effective on July 1.

H.B. 798, sponsored by Delegate Karrie Delaney, D-67, provides broad protections against retaliation and fundamentally alters the landscape for whistleblowers in Virginia.[1]

Before the enactment of this statute, the few statutory pockets of protection for whistleblowers under state law were limited, and the primary remedy for workers suffering retaliation for whistleblowing was a common law wrongful discharge tort claim known as a Bowman action.

This tort claim depends on an employer violating public policy, which was narrowly construed. For example, unlike most states recognizing a wrongful discharge exception to employment-at-will, Virginia limited this tort to terminations that contravened a public policy clearly described in a Virginia statute. Public policy in federal law is insufficient to support a Bowman action.

Now Virginia employees need not resort to a narrow and amorphous common law tort action and instead have a fairly strong statutory remedy protecting a broad range of disclosures, including a report to a supervisor about a violation of federal or state law.

Scope of Coverage

The statute prohibits an employer from retaliating against an employee for engaging in specified forms of protected conduct, but it does not define those terms.

Courts will likely apply the definition of employee from Title 40.1 of the Virginia Code, i.e., "any person who, in consideration of wages, salaries or commissions, may be permitted, required or directed by any employer to engage in any employment directly or indirectly." This definition excludes independent contractors, but a misclassified independent contractor could arguably bring a claim.

Protected Whistleblowing

Protected conduct includes:

- Reporting in good faith a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official;
- Being requested by a governmental body or law enforcement official to participate in an investigation, hearing, or inquiry;
- Refusing to engage in a criminal act that would subject the employee to criminal liability;
- Refusing an employer's order to perform an action that violates any federal or state law or regulation when the employee informs the employer that the order is being refused for that reason; or
- Providing information to or testifying before any governmental body or law enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

The first prong of protected conduct is broad in that it protects a disclosure to a supervisor or a federal or state governmental body about a violation of any federal or state law. That would include a report to the U.S. Equal Employment Opportunity Commission about discrimination or a report to the U.S. Environmental Protection Agency about environmental contamination.

There is, however, ambiguity about the extent to which a report to an employer's human resources or compliance departments would be protected. Presumably a disclosure to a supervisory official in those departments would be covered.

The inclusion of the phrase "reporting in good faith" in the first prong of protected conduct suggests that a whistleblower need not prove that they disclosed an actual violation of law.

Instead, courts will likely apply a reasonable belief standard under which the whistleblower must prove that they subjectively believed that the conduct that they were reporting was illegal and that the subjectively held belief was "objectively reasonable" — assessing the basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience.

If the statute is misconstrued to protect only disclosures of actual violations of law, then employees would have a perverse incentive to wait until a law has actually been broken to report the violation. As an employer benefits from an employee's prompt disclosure of potentially unlawful conduct — the internal disclosure provides an employer an opportunity to take remedial action — limiting protection to disclosures of actual violations of law would be contrary to the interests of employers and employees.

We anticipate that employers will try to create an exception for duty speech disclosures, i.e.,whistleblowing in the course of performing job duties. As the statutory text does not carve out duty speech from the ambit of protected disclosures, it would be improper for a judge to rewrite the statute to add such an exception. Instead, applying the plain meaning of the statute should afford broad protection to employees regardless of their job duties.

The second and fifth prongs of protected conduct protect not only traditional participatory activity (e.g., testifying in a government investigation), but also preemptive retaliation. If an employer takes a disciplinary action against an employee who is about to be interviewed by a government investigator (to dissuade the employee from revealing a violation of law to the government agency), the employee would have a claim under this new statute. In other words, the statute expressly bars preemptive retaliation.

Exceptions to Protected Conduct

The Virginia whistleblower protection law clarifies that it does not:

- Authorize an employee to make a disclosure of data otherwise protected by law or any legal privilege;
- Permit an employee to make statements or disclosures knowing that they are false or that they are in reckless disregard of the truth; or
- Permit disclosures that would violate federal or state law or diminish or impair the rights of any person to the continued protection of confidentiality of communications provided by common law.

These are significant exceptions that exclude disclosures of trade secrets, confidential medical information, student education records, and information protected by the attorney-client, marital communication and physician-patient privileges. But nothing in the statute suggests that these exceptions are an affirmative defense to liability; they merely define the scope of protected conduct.

If a whistleblower suffers retaliation for two alleged protected activities, and one of the alleged protected acts falls within one of these exceptions, the whistleblower can still prevail on a claim of retaliation for engaging in the protected act. Nonetheless, the statutory language suggests that whistleblower counsel will need to plead the claim carefully to avoid falling into one of these exceptions.

Courts construing the exclusion for disclosures made in reckless disregard of the truth would likely employ Virginia defamation precedent requiring proof that the person making a statement in fact entertained serious doubts as to the truth of his publication and actually had a high degree of awareness of probable falsity.[2]

Prohibited Acts of Retaliation

The Virginia whistleblower protection law proscribes a broad range of retaliatory acts, including discharging, disciplining, threatening, discriminating against or penalizing an employee, or taking other retaliatory action regarding an employee's compensation, terms, conditions, location or privileges of employment because of the employee's protected conduct.

A mere threat to retaliate against a whistleblower (e.g., threatening to terminate the employee for reporting unlawful conduct or threatening to sue an employee for engaging in additional protected conduct) is actionable.

But the use of the phrase "compensation, terms, conditions, location or privileges of employment" unfortunately suggests that post-employment retaliation might fall outside the

scope of the statute. Fortunately, Virginia has a blacklisting statute barring an employer from "willfully and maliciously prevent[ing] or attempt[ing] to prevent by word or writing, directly or indirectly" a discharged employee from obtaining employment.[3]

The Virginia whistleblower protection law does not define the causation standard. Presumably courts will construe the term "because of" to require "but for" causation.[4] Note, however, that "but for" caution is not tantamount to sole factor causation.

As Justice Antonin Scalia noted in Burrage v. United States,[5] an act is a "but-for" cause even if it "combines with other factors to produce the result, so long as the other factors alone would not have done so — if, so to speak, it was the straw that broke the camel's back."

And the U.S. Court of Appeals for the Fourth Circuit has held that the case of University of Texas Southwestern Medical Center v. Nassar did not alter the causation prong of a prima facie case of retaliation, i.e., a retaliation plaintiff need not prove but for causation as part of the prima facie case.[6] In other words, the causation burden will not be significantly more onerous than motivating factor.

Remedies

A claim under the Virginia whistleblower protection law can be brought within one year of the retaliatory adverse action. As Virginia civil procedure disfavors summary judgment, whistleblowers are more likely to get to trial in state court than in federal court.[7]

Although the scope of protected conduct and prohibited retaliation are broad, the remedies could be stronger. A prevailing plaintiff can secure the following relief:

- An injunction to restrain a continued violation;
- Reinstatement to the same or an equivalent position held before the employer took the retaliatory action; and/or
- Compensation for lost wages, benefits, and other remuneration, together with interest, as well as reasonable attorneys' fees and costs.

The statute does not expressly authorize compensatory or punitive damages. The phrase "other remuneration" will likely be construed to include consequential damages, e.g., the value of stock options, out-of-pocket medical expenses and other costs attributable to the retaliation.

Although an award of back pay, reinstatement (or front pay in lieu thereof), other remuneration and attorney fees could result in a substantial recovery, there is little opportunity for juries to award the massive verdicts that whistleblowers recover in California and other jurisdictions that authorize compensatory and punitive damages.

Indeed, not authorizing compensatory damages arguably deprives a whistleblower of the opportunity to obtain genuine make-whole relief and significantly reduces the deterrent value of the statute. To effectuate the vital purpose of this law, courts should construe the remedies provision (and all aspects of the statute) broadly.

Although the Bowman common law wrongful discharge remedy was narrow, it offered

whistleblowers an opportunity to obtain punitive damages and sue individuals. Accordingly, in certain cases, whistleblowers might bring both a statutory retaliation claim and a Bowman claim to maximize damages, albeit with some risk that the Bowman claim might be dismissed due to the option to pursue a statutory remedy.

Although not as robust as the whistleblower protection laws in California and New Jersey, the Virginia whistleblower protection law is a sea change for workers' rights in Virginia, and employers will act at their peril when they retaliate against whistleblowers.

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[1] The law is codified as Va. Code § 40.1-27.3, and we refer to it as the "Virginia whistleblower protection law."

[2] See, e.g., Shenandoah Publ'g House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993)

[3] Va. Code § 40.1-27

[4] See Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

[5] 571 U.S. 204, 211 (2014).

[6] Foster v. Univ. of Maryland-Eastern Shore, 787 F.3d 243 (4th Cir. 2015).

[7] In general, a motion for summary judgment cannot rely upon discovery depositions. See Va. Code § 8.01-420.