Proceedings include all events.
3:96cv595 Perry, et al v. American Home Produc

U.S. District Court
Eastern District of Virginia (Richmond)

CIVIL DOCKET FOR CASE #: 96-CV-595

Perry, et al v. American Home Produc
Assigned to: Judge Richard L. Williams
Demand: $800,000
Lead Docket: None
Dkt# in other court: None

Filed: 07/18/96
Nature of Suit: 790
Jurisdiction: Federal Question

Cause: 28:1441 Notice of Removal-Breach of Contract

ROBERT C. PERRY
plaintiff

Robert Colmant Bode
[COR LD NTC]
Hooker, Bode, Collier & Dickinson
6800 Paragon Place
Suite 126
Richmond, VA 23230
(804) 282-9555

v.

AMERICAN HOME PRODUCTS CORPORATION, t/a Whitehall Robins
defendant

Kimberly W. Daniel
[COR]
Mays & Valentine
P.O. Box 1122
Richmond, VA 23218-1122
(804) 697-1200

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Sent for publica
3/4/97
Order entered

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ROBERT C. PERRY,

Plaintiff,

v.

AMERICAN HOME PRODUCTS CORPORATION, t/a WHITEHALL ROBINS,

Defendant.

Civil Action Number 3:96CV595

FINAL ORDER

This matter is before the Court on the defendant's renewed motion to dismiss following Judge Payne's recusal and vacatur of his prior order of dismissal with prejudice. After consideration of oral argument and the briefs filed by the parties, I adopt Judge Payne's memorandum opinion and reissue it over my own name. For the reasons stated in the accompanying Memorandum Opinion, this action is DISMISSED WITH PREJUDICE.

It is so ORDERED.

Let the Clerk send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

DATE

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ROBERT C. PERRY,

Plaintiff,

v. Civil Action No. 3:96cv595

AMERICAN HOME PRODUCTS
CORPORATION, t/a
WHITEHALL ROBINS,

Defendant.

MEMORANDUM OPINION

Robert C. Perry ("Perry") instituted this action by filing a Motion for Judgment in the Circuit Court for the City of Richmond against his former employer, American Home Products Corporation ("AHP").[1] AHP, a Delaware corporation authorized to conduct business in the Commonwealth of Virginia, timely removed the action to this Court, claiming diversity jurisdiction under 28 U.S.C. § 1332.[2]

Perry alleges that his discharge from employment at AHP constituted a wrongful or retaliatory discharge under Virginia common law. AHP has moved to dismiss the claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

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[1] The parties have stipulated that, at the time Perry was discharged, his employer was actually Wyeth Ayerst Laboratories, a division of AHP. That does not affect jurisdiction.

[2] Before removing this action, AHP filed a Demurrer in the Circuit Court of the City of Richmond; the defenses set forth therein are incorporated in AHP's Motion to Dismiss.

STATEMENT OF FACTS

Perry had been employed as a chemist by AHP for approximately twelve years before his employment was terminated on October 23, 1995. The following sequence of events led to the termination. On November 1, 1992, Perry was asked by persons in the Hammonton, New Jersey laboratory operated by AHP to perform certain testing procedures on a product referred to as Dimetane Extentabs. The method of testing requested by the Hammonton laboratory was not "validated," meaning that the results of such testing would be prone to error and were thus not certifiably accurate. On December 1, 1992, Perry sent the results of the requested testing to the Hammonton laboratory with a disclaimer that the results were prone to error because the testing procedure was not validated. At AHP's request, Perry, on October 1, 1994, sent a second copy of the original 1992 test results to the Hammonton Laboratory.

Perry alleges that thereafter AHP sent the second set of test results to the United States Food and Drug Administration ("FDA"), but that AHP failed to inform the FDA that the nonvalidated testing procedures meant that the results were error prone. Perry alleges that somehow the FDA became aware of the errors in the test results and made inquiry to AHP asking why it had submitted test results which AHP knew, or should have known, to be false and inaccurate. Thereafter, AHP accused Perry of intentionally falsifying data respecting the testing procedures and, for that reason, terminated his employment with AHP. Perry asserts that AHP discharged him in an effort to frame him as a scapegoat and to absolve itself of

liability for the submission of the allegedly false and inaccurate test results. For those reasons, Perry asserts that AHP's actions constitute a wrongful or retaliatory discharge under Virginia common law.

THE LEGAL STANDARD GOVERNING MOTIONS TO DISMISS

To succeed on a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the movant must show that "it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The purpose of a motion made under Rule 12(b)(6) is to test "the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), cert. denied, 114 S. Ct. 93 (1993); 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (2d ed. 1990). The issue to be decided by the court, of course, is "whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

DISCUSSION

The jurisdictional base for this action is diversity of citizenship. Consequently, the substantive law of Virginia is determinative of whether Perry has stated claims upon which relief

can be granted.

I. Virginia's Common Law Employment-At-Will Doctrine.

Although, in paragraphs 12 and 16 of the Motion For Judgment, Perry asserts that the alleged actions of AHP have violated his "implied and/or express contract of employment," the Motion For Judgment lacks allegations necessary to establish the existence of any employment contract. Absent allegations of that sort, in particular an assertion that employment was for a definite term, Perry's employment is presumed to have been terminable "at-will." Title Ins. Co. v. Howell, 164 S.E. 387, 389 (1932) (holding that in Virginia an employee is terminable at-will unless the individual identifies a statute, custom, or contract that fixes the duration of employment).

Virginia strongly adheres to the common law employment-at-will doctrine. See Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d 806, 808 (Va. 1996). The Supreme Court of Virginia has repeatedly stated:

> Virginia adheres to the common-law rule that when the intended duration of a contract for the rendition of services cannot be determined by fair inference from the terms of the contract, then either party is ordinarily at liberty to terminate the contract at will, upon giving the other party reasonable notice.
>
> An employee is ordinarily at liberty to leave his employment for any reason or for no reason, upon giving reasonable notice, without incurring liability to his employer. Notions of fundamental fairness underlie the concept of mutuality which extends a corresponding

freedom to the employer.

Id. at 808 (*quoting* Lockhart v. Commonwealth Education Systems, 439 S.E.2d 328, 330 (Va. 1994)); Miller v. SEVAMP, Inc., 362 S.E.2d 915, 916-17 (Va. 1987); Bowman v. State Bank of Keysville, 331 S.E.2d 797, 798 (Va. 1985); Stonega Coal and Coke Co. v. Louisville & Nashville R.R. Co., 55 S.E. 551, 552 (Va. 1906). Therefore, under Virginia law, there is no generalized claim for wrongful or retaliatory discharge of an at-will employee such as Perry. Miller v. SEVAMP, Inc., 362 S.E.2d at 918.

This general rule is not absolute, however, and the Supreme Court of Virginia has recognized "certain very narrow exceptions" to it. Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d at 808. Perry asserts that his discharge satisfies two recognized exceptions to the employment-at-will doctrine. First, citing Bowman and its progeny, Perry asserts that he has a claim cognizable at law because his discharge falls within the exception to the at-will doctrine which permits recovery for discharges which violate the public policy of Virginia. Second, Perry argues that his claim is legally sufficient because the at-will doctrine does not apply when an employee is discharged without "reasonable notice." AHP denies that Perry's discharge was violative of Virginia's established public policy, and disagrees with Perry respecting the existence of the alleged "reasonable notice" exception. Those issues will be discussed in turn.

II. The Claim Asserted Under The Public Policy Exception.

In Bowman v. State Bank of Keysville, 331 S.E.2d 915, the Supreme Court of Virginia permitted at-will employees of a bank, who also owned shares of the Bank's common stock, to prosecute claims against their former employer, the Bank, which allegedly had fired the stockholder employees in retaliation for their failure to vote in favor of the Bank's proposed merger. The Court held that the at-will employees had a wrongful discharge claim because the alleged discharges violated the public policy of the Commonwealth as articulated in Va. Code § 13.1-32, now Va. Code § 13.1-662, which conferred upon the employees the specific right to vote their shares of stock. In explanation of its decision, the Court stated:

> Because the right conferred by [Code § 13.1-662] is in furtherance of established public policy, the employer may not lawfully use the threat of discharge of an at-will employee as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation.

331 S.E.2d at 801 (emphasis added).

Thereupon, the Supreme Court of Virginia adopted for Virginia what had become in other jurisdictions a widely-accepted exception to the common law employment at-will doctrine. In so doing, the Bowman Court conferred upon employees claiming to have been discharged in violation of an established public policy the right to bring a tort action for the unlawful use of the threat or fact of discharge as a device to control the employee-shareholders' statutory right to freely vote stock. Bowman, 331 S.E.2d at 801.

Two years later in Miller v. SEVAMP, Inc., 362 S.E.2d 915 (Va. 1987), the Court explained that its decision in Bowman was a limited one based on a public policy manifested in Virginia's securities and corporation laws, observing that:

> We held [in Bowman] the discharge to be tortious, not because the employees had a vested right to continued employment, but because the employer had misused its freedom to terminate the services of at-will employees in order to subvert a right guaranteed to stockholders by statute.

SEVAMP, 362 S.E.2d at 918 (emphasis added). The Court emphasized that Bowman represented application of a narrow exception to the employment at-will doctrine but "fell far short of recognizing a generalized cause of action for the tort of 'retaliatory discharge.'" Id. In that regard, the Court explained:

> Declining to follow sweeping adoption of such a cause of action in other jurisdictions, Bowman recognized an exception to the employment-at-will doctrine limited to discharges which violate *public* policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general. Each of the illustrative cases from other jurisdictions cited in Bowman involved violations of public policies of that character.

Id. (original emphasis). Finding that SEVAMP's personnel and procedures manual[3] provided an insufficient basis for the kind of public policy exception permitted in Bowman, and finding no other

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[3] The personnel manual stated, in relevant part: "An employee may be dismissed at the discretion of the Executive Director and will be given, at the time or [sic] dismissal, orally or in writing, the reason[s] for the action." SEVAMP, 362 S.E.2d at 916.

statutory predicate for a public policy, the Court in SEVAMP affirmed the decision of the trial court sustaining dismissal of the plaintiff's claim on demurrer.

Taken together, Bowman and SEVAMP teach that the public policy exception crafted by Bowman must depend upon an express statutory right which itself is in furtherance of public policy. This teaching was somewhat obscured by the decision in Lockhart v. Commonwealth Education Systems, but was subsequently made clear in Lawrence Chrysler Plymouth Corp. v. Brooks. It is necessary, therefore, to consider Perry's claims in perspective of those decisions.

In Lockhart, 439 S.E.2d 328, the Supreme Court expanded the scope of the public policy exception by permitting two former at-will employees to prosecute claims against their respective former employers on the theory that their discharges were based on the employees' race and gender. The alleged conduct, if proven, would have been violative of Virginia's public policy against race and gender discrimination as enunciated in the Virginia Human Rights Act, Va. Code § 2.1-715.

Like Perry, the plaintiff in Lockhart, grounded her claim in the Virginia Human Rights Act, Va. Code § 2.1-715. The statute provides:

> Declaration of policy:
>
> It is the policy of the Commonwealth of Virginia:
>
> 1. To safeguard all individuals within the

> Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, age, marital status or disability, in place of public accommodation, including educational institutions and in real estate transactions; in employment; to preserve the public safety, health and general welfare; and to further the interest, rights and privileges of individuals within the Commonwealth; and
>
> 2. To protect citizens of the Commonwealth against unfounded charges of unlawful discrimination.

Va. Code § 2.1-715 (emphasis added). The Court in Lockhart "recognize[d] that the Virginia Human Rights Act does not create any new causes of actions." Lockhart, 439 S.E.2d at 331. Consequently, the Court eschewed the statute as the source of the plaintiff's claim. Nonetheless, the Court permitted the assertion of the race and gender discrimination claims as tortious (wrongful) discharges under the policy rationale of Bowman. Thus, the Court in Lockhart made clear that employees cannot succeed on a wrongful discharge claim based *solely* on the Virginia Human Rights Act.

However, the Lockhart Court created substantial doubt about the analytical basis for the Bowman claim which it allowed by commenting that:

> Without question, it is the public policy of this Commonwealth that all individuals within this Commonwealth are entitled to pursue employment free of discrimination based on race or gender. Indeed, racial or gender discrimination practiced in the work place is not only an invidious violation of the rights of the individual, but such discrimination also affects the property rights, personal freedoms, and welfare of the people in general.

Lockhart, 439 S.E.2d at 331 (emphasis added). The confusion was underscored by the dissent which correctly observed that, unlike Bowman where the plaintiffs faced loss of employment for exercising their rights under state securities and corporating laws, there was no state statutory predicate in Lockhart on which to fasten a finding of public policy against racial or gender discrimination other than that set forth in the Virginia Human Rights Act (which the majority opinion had determined not to be the basis of the claim it allowed). Lockhart, 439 S.E.2d at 332.

Two years later, the Supreme Court of Virginia retreated considerably from the rather broad "public policy" statement in Lockhart by explaining that the predicate underlying the decision in Lockhart was the statutory enunciation of the specific public policy to "safeguard all individuals within the Commonwealth" from race and gender discrimination, as stated in the Virginia Human Rights Act. Lawrence Chrysler Plymouth v. Brooks, 465 S.E.2d 807, 809 (Va. 1996) (emphasis added).

Of equal significance, the Court, in Lawrence Chrysler, limited public policy exception claims to those which were founded on an employer's contravention of a specific statute.

> In Bowman and Lockhart, the plaintiffs who were permitted to pursue causes of action against their former employers, identified specific Virginia statutes in which the General Assembly had established public policies that the former employers had contravened. Unlike the plaintiffs in Bowman and Lockhart, Brooks does not have a cause of action for wrongful discharge because he is unable to identify any Virginia statute

> establishing a public policy that Lawrence Chrysler violated.

Lawrence Chrysler, 465 S.E.2d at 809 (emphasis added).

Taken as a whole, Lawrence Chrysler circumscribes Bowman claims to those in which an employer has contravened a right conferred on an individual by a specifically identified statute which enunciates a public policy. This, of course, is harmonious with Bowman because the tortious discharge claim there was defined as one in which the employer misused its freedom to terminate an at-will employee "to subvert a right guaranteed to stockholders [the employees at-will] by statute." SEVAMP, 362 S.E.2d at 918 (emphasis added).

Indeed, in first establishing the public policy exception for Virginia, the Court, in Bowman, emphasized that the statute at issue, which clearly enunciated a public policy, conferred a personal right on individual stockholders. The Court explained:

> In order for the goal of the statute [shareholders voting rights] to be realized and the public [voting of shares free of coercion] fulfilled, the shareholder must be able to exercise this right without fear of reprisal [termination of employment] which happens also to be the employer.

Bowman, 331 S.E.2d at 801.

It is essential to view Perry's claim in perspective of the history of Bowman and its progeny. Specifically relevant here is the effect of Lawrence Chrysler on the reach of Lockhart because Perry argues that the second clause in subsection (1) of the Virginia Human Rights Act establishes, as the public policy of

Virginia, the protection of "the public safety, health, and general welfare" of citizens of the Commonwealth in all contexts.[4] The plain language of the statute supports Perry's argument because it declares that: "[i]t is the public policy of the Commonwealth . . . to preserve the public safety, health and general welfare."

However, the latest analysis of the "public policy" excception in Lawrence Chrysler forecloses this argument. The plaintiff in Lawrence Chrysler was discharged for refusing to repair a car as instructed by his employer. The plaintiff's refusal was based on his belief that the requested method of repair was unsafe. He asserted that his discharge was in violation of Virginia's Consumer Protection laws and the Automobile Salvage laws, Va. Code §§ 46.2-1600, et. seq. In "reject[ing] [the plaintiff's attempt] to expand the narrow exception [] recognized in Bowman," the Lawrence Chrysler Court explained:

> In Bowman and Lockhart, the plaintiffs, who were permitted to pursue causes of action

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[4] The Court notes that, in early Spring 1995, in reaction to Lockhart, the Virginia General Assembly passed Senate Bill No. 1025, which amended the Virginia Human Rights Act, Va. Code § 2.1-715 et seq. The new law provides, in part, that the Human Rights Act shall not be used as a source of "public policy" in determining whether a discharge from employment constitutes a common-law wrongful termination in violation of public policy. See Va. Code § 2.1-725(D) ("Causes of action based upon the public policies reflected in this chapter shall be *exclusively limited* to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances") (emphasis added). The 1995 amendments also created a new, limited cause of action for wrongful discharge, in favor of employees of small businesses. See Va. Code § 2.1-725(B)-725(C). These 1995 amendments are inapplicable in the instant case, however, because the underlying conduct leading to Perry's termination occurred before July 1, 1995, the effective date of the amendments.

> against their former employers, identified specific Virginia statutes in which the General Assembly had established public policies that the former employers had contravened.

465 S.E.2d at 809 (emphasis added). However, unlike the plaintiffs in Bowman and Lockhart, Perry has identified no conduct by AHP that contravenes the public policy articulated in Va. Code § 2.1-715(1). At most, Perry asserts that the knowing submission of error prone test results to a federal agency offends the state public policy to protect the public safety, health and welfare of its citizens in general. Although AHP may have offended federal law, it cannot be said that Section 2.1-715(1) incorporates every provision of law generally related to safety and health so that a violation of any federal law contravenes the policy objective of the statute to protect the public safety, health and general welfare of Virginians.

Moreover, there is nothing in the Virginia statute here at issue which specifically addresses the submission of false reports to a federal agency. Under that circumstance, Perry's claims cannot be said to be grounded in a Virginia statute establishing a public policy which, of course, is what Lawrence Chrysler required.[5]

Without doubt, criminal conduct, even if proscribed only in

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[5] Lawrence Chrysler, 465 S.E.2d at 809. Of course, some states find state policy in federal statutes. See Bowman v. State Bank of Keysville, 331 S.E.2d 797, 801 (Va. 1985) (citing Harless v. First National Bk., 246 S.E.2d 270 (W. Va. 1978). In Lawrence Chrysler, Virginia declined to go so far.

federal law, conceptually affects in a general way the public safety, and a false test result submitted to a federal agency conceivably could have an adverse effect on public health. Moreover, to some extent, most, if not all, statutes enacted by Virginia are intended to either preserve public safety, public health or the general welfare of the citizens. Those rather general connections, even if supportable in logic, are too attenuated to be the basis of a Bowman claim given the limited nature of such claims.

Nor does Perry's claim involve a statute which confers or protects individual rights, the deprivation of which offends public policy. In both Bowman and Lockhart, the two instances in which the Supreme Court of Virginia has permitted wrongful discharge claims under the public policy exception, the predicate statutes at issue conferred or protected specified individual rights while establishing the public policy. See Bowman v. State Bank of Keysville, 331 S.E.2d 915 (holding that discharge of shareholder employees violated Virginia's public policy as established in Va. Code § 13.1-32, which confers on individual stockholders the right to vote); Lockhart v. Commonwealth Educ. Systems Corp., 439 S.E.2d 328 (discharge of employees based on sex and race violated Virginia's public policy to protect individuals from discrimination, as established in Va. Code 2.1-715). The broad "safety, health and general welfare" language in Section 2.1-715 does not confer rights on individuals, nor does it pronounce a public policy to protect any individual right. Unlike the

plaintiffs in Lockhart, who were permitted to bring wrongful discharge claims in reliance on the *clearly expressed* race and gender discrimination components of Section 2.1-715, Perry relies solely on the broad "safety, health and general welfare" language which states no specific public policy with respect to the particular circumstances of Perry's discharge. Nor does it confer any right on Perry or any other individual.

Perry cites Section 21 of the Code of Federal Regulations ("C.F.R.") as a second source for the "public policy of Virginia" on which he predicates his claim. Specifically, Perry asserts that a wrongful discharge claim lies because of AHP's alleged "retaliation against the Plaintiff in an effort to conceal unlawful conduct of the Defendant in violation of Section 21, Code of Federal Regulations." Motion For Judgment ¶ 13. Section 21 of the C.F.R. contains regulations issued by the FDA. See 21 C.F.R. § 1.1 et seq. Perry's failure to point to a provision of Virginia law making it the public policy of Virginia to enforce the FDA regulations is a critically important defect in Perry's claim because the Supreme Court of Virginia clearly has limited the public policy exception to those public policies stated explicitly in *the Virginia Code*. See Lawrence Chrysler Plymouth Corp. v. Brooks, 465 S.E.2d at 809 (requiring plaintiff to identify "specific *Virginia statutes*") (emphasis added); Id. (rejecting plaintiff's attempts to expand "the narrow exception we recognized in Bowman" by relying on "common law duties"); Miller v. SEVAMP, Inc., 362 S.E.2d at 919 ("We [] think it wise to leave to the

deliberative processes of *the General Assembly* any substantial alteration of the [employment-at-will] doctrine") (emphasis added).

For the foregoing reasons, Perry's discharge was not violative of an established public policy of the Commonwealth of Virginia, and therefore, under Virginia law, he is not permitted to assert a wrongful or retaliatory discharge claim against AHP.

B. The Reasonable Notice Exception.

In Paragraph 5 of the Motion For Judgment, Perry alleges that he was terminated without "any prior notice" and that, therefore, his discharge offended a second exception to the employment-at-will doctrine -- namely that a discharged employee is permitted to bring a wrongful discharge claim when he or she is discharged without "reasonable notice." Perry predicates his argument in support of the putative "reasonable notice" exception on the oft-repeated language of the Supreme Court of Virginia in Stonega Coke and Coal Co. v. Louisville and Nashville R.R. Co.:

> [W]hen a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so.

55 S.E. at 552 (emphasis added).

Following oral argument on AHP's motion, the parties were instructed to brief this point. Neither the parties nor this Court have been able to locate any decision by the Supreme Court of Virginia elaborating on the meaning of "reasonable notice."

Although this language has been repeated in numerous decisions respecting Virginia's employment-at-will doctrine, the Supreme Court of Virginia has never addressed whether there exists a "reasonable notice" exception to the common law doctrine. More importantly, the Court has never held that the "reasonable notice" language creates a substantive right or an independent claim or that it is, in and of itself, an exception to the employment-at-will doctrine.

The subject was addressed recently, however, in Laudenslager v. Loral, in an opinion issued on May 6, 1996 by the Circuit Court of the City of Chesapeake which held:

> The employment-at-will doctrine in Virginia provides that either party is ordinarily at liberty to terminate the contract at will, upon giving the other party reasonable notice. The Court interprets this language as defining an implied obligation requiring each party to an employment agreement to give the other reasonable notice of termination unless there is an agreement or understanding to the contrary. Failure to give such notice is actionable as a breach of implied contract.

At Law No. 95-878 (emphasis added).

With respect, it seems that such an interpretation of Stonega Coke and its oft repeated language cannot be reconciled with Virginia's at-will employment doctrine. Before addressing the merits, it is well to recall that the "reasonable notice" language in Stonega Coke is merely dicta, and nothing in the many ensuing decisions which repeat that language points to the existence of a claim predicated on the absence of reasonable notice to an at-will employee. Indeed, several of the decisions which contain that

language actually involved terminations without notice. See, e.g., Bowman v. State Bank of Keysville, 331 S.E.2d at 799 (discharge effective immediately upon notification); Miller v. SEVAMP, Inc., 362 S.E.2d at 916 (same); Lockhart v. Commonwealth Educ. Systems Corp., 439 S.E.2d at 329 (employee discharged, effective immediately, two days after receiving unsatisfactory job performance evaluation). That, of course, strongly suggests that absence of notice is not an exception to the at-will doctrine.

More importantly, a "reasonable notice" exception to the employment-at-will doctrine would effectively eviscerate the at-will doctrine itself. No employee-employer relationship in Virginia could truly be "at-will" if an at-will employee has a valid claim, whether for breach of implied contract or in tort, when reasonable notice is not given before termination. The recognition of this new action would permit every discharged employee to sue the employer on the theory that the employer breached its implied duty to provide reasonable notice. What is "reasonable" is a question of fact, and thus every case filed would have to be decided by the finder of fact. Thereupon, one could declare the demise of the at-will doctrine.

The result of articulating such an exception would effectively be to overrule decades of decisions which have consistently affirmed Virginia's adherence to the employment at-will doctrine, and which have required specific evidence to overcome the presumption of an employee's at-will status in order to establish

an implied contractual term of employment.[6] As the Supreme Court of Virginia stated:

> The employment-at-will doctrine is a settled part of the law of Virginia. Parties negotiating contracts for the rendition of services are entitled to rely on its continued stability. Serious policy considerations, affecting countless business relationships, are involved in any change that may be contemplated. We therefore think it wise to leave to the deliberative processes of the General Assembly any substantial alteration of the doctrine.

Miller v. SEVAMP, Inc., 362 S.E.2d at 919. For the foregoing reasons, the Court finds that Virginia law does not recognize a "reasonable notice" exception to the employment-at-will doctrine which would give rise to a wrongful termination claim either in contract or tort.

If a change of that ilk is to be made to Virginia's common law employment-at-will doctrine, a cornerstone of the Commonwealth's employment law, the General Assembly of Virginia or her highest court are the only appropriate bodies to effectuate it. See Gravins v. International Playtex, Inc., 586 F. Supp. 251, 252 (E.D.Va. 1984). Certainly, it is not for this Court to break that ground.

For the reasons set forth in this Memorandum Opinion, AHP's Motion to Dismiss is granted and the action will be dismissed with

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[6] Under Virginia law, an employee is presumed terminable at will unless the individual identifies a statute, custom, or contract that fixes the duration of employment. See Title Ins. Co. v. Howell, 164 S.E. at 389. In the instant case, Perry has failed to allege circumstances sufficient to impose an implied contractual obligation regarding the term or duration of his employment upon AHP.

prejudice.

The Clerk is directed to send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

It is so ORDERED.

____
Senior United States District Judge

Richmond, Virginia
Date: ____________