INDIVIDUAL LIABILITY FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY: AN EMERGING TREND

INTRODUCTION

With its four-to-three decision in *VanBuren v. Grubb*,[1] the Supreme Court of Virginia became the latest judicial body to adopt a rule that significantly alters the landscape of employment law. In addition to finding the employer liable, the court held that a supervisor who plays a role in the wrongful discharge of an employee could be held individually liable.[2] In so holding, the Supreme Court of Virginia joined a cluster of other courts whose rulings suggest an emerging trend.[3] The balance of power in American employment law, once squarely in the hands of employers, is slowly oscillating back to employees.

This ruling demonstrates the constant flux that is the common law in the context of the employment law sphere. Such a decision brings about a new hope for employee advocates who strive to dissuade a supervisor's malevolent conduct that, in violation of state public policy, leads to the employee's termination.[4] At the same time, however, this holding has led employers both to fear overdeterrence and to question whether this extension of the law is beyond the court's legal authority.[5]

This Note first will discuss the case facts and procedural history underlying *VanBuren v. Grubb*. Part II will provide a background of the legal issues involved in the case: the employment-at-will doctrine and its deterioration in light of social, economic, and judicial developments; the tort of wrongful discharge in violation of public policy; and the trend of courts extending individual liability to supervisors who engaged in wrongful conduct. In Part III, this Note will recount the *VanBuren* decision, including not only the majority's holding that an extension of the law is necessary to promote deterrence but also the dissent's reservations as to the merit of this theory based on the concept of legal duty. Finally, this

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1. 733 S.E.2d 919 (Va. 2012).
2. *Id.* at 919.
3. *See id.* at 922–23 (citing a number of decisions holding employees and corporate officers liable for tortious acts).
4. *See id.* at 923 (explaining that employer-only liability is insufficient to deter wrongful discharge in violation of public policy).
5. *See id.* at 925 (Kinser, C.J., dissenting) (arguing that the duty not to terminate employment in violation of public policy flows only from employer to employee and not from one employee to another).

Note will demonstrate that there are flaws in both segments of the *VanBuren* opinion and will propose an alternative solution that borrows from other areas of employment law in exposing individual supervisors to liability. Specifically, this Note argues that a wrongfully discharged employee should have a cause of action against an individual supervisor only in situations where the supervisor's conduct is "extreme and outrageous."

I. THE CASE FACTS AND PROCEDURAL HISTORY

Plaintiff Angela VanBuren was employed as a nurse from December 2003 until March 2008 at the Virginia Highlands Orthopaedic Spine Center ("Virginia Highlands").[6] Ms. VanBuren alleged in her complaint that she was subjected to constant sexual harassment by Dr. Stephen Grubb, her supervisor and owner of Virginia Highlands.[7] The sexual harassment consisted of constant hugging, inappropriate touching, and repeated attempts to kiss Ms. VanBuren.[8] Despite Ms. VanBuren's repeated warnings to Dr. Grubb that his pursuits were "offensive" and "unwelcome," he continued the harassing conduct.[9]

Even after Ms. VanBuren's 2007 marriage, Dr. Grubb's unwanted advances continued.[10] Over Ms. VanBuren's objections, Grubb encouraged her to leave her husband while he attempted to kiss and grope her.[11] Finally, in March 2008, Dr. Grubb called her into his office and asked her whether she planned to leave her husband for him.[12] When Ms. VanBuren responded by saying that she intended to stay with her husband, Dr. Grubb fired Ms. VanBuren, giving her no other reason for her discharge.[13] In an effort to secure Ms. VanBuren's silence about the sexual harassment, Dr. Grubb offered her a month's severance pay.[14]

In March 2010, Ms. VanBuren filed suit in the United States District Court for the Western District of Virginia, bringing a gender discrimination claim[15] against Virginia Highlands.[16] Ms. VanBuren also asserted a claim for wrongful discharge in violation of public

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6. *Id.* at 920 (majority opinion) (The court seems to have incorrectly spelled the employer's name as "Orthopedic," when the employer's name is actually "Orthopaedic." *See* source *infra* note 19.).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 921.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Ms. VanBuren's gender discrimination claim was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (2012).
16. *VanBuren*, 733 S.E.2d at 921.

policy against both Virginia Highlands and Dr. Grubb individually.[17] Her wrongful discharge claim alleged that she was discharged for her refusal to engage in criminal conduct—namely, conduct in violation of Virginia's state statutes prohibiting adultery and "lewd and lascivious cohabitation."[18]

The district court dismissed the claim for wrongful discharge against Dr. Grubb in his individual capacity, stating that under state law, "wrongful discharge claims by an employee are cognizable only against the employer and not against supervisors or co-employees in their individual capacity."[19] VanBuren appealed to the United States Court of Appeals for the Fourth Circuit.[20] The Fourth Circuit was unable to determine how it should rule because its decision was constrained by Virginia state law.[21] Therefore, it certified the following question for the Supreme Court of Virginia to decide:

> 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?[22]

The Supreme Court of Virginia, however, used its discretion to narrow the scope of the certified question, restating the question as follows:

> 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 *but who was the actor in violation of public policy* and who participated in the wrongful firing of the plaintiff, such as in the capacity of a supervisor or manager?"[23]

II. BACKGROUND OF THE LEGAL ISSUES

A. *Employment-at-Will Doctrine and Its Deterioration*

Arguably, the single-most defining feature of the American employment landscape is the employment-at-will doctrine.

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17. *Id.*

18. *Id.*; *see also* VA. CODE ANN. § 18.2-365 (2009) (prohibiting adultery); *id.* § 18.2-345 (prohibiting lewd and lascivious cohabitation) (repealed 2013).

19. VanBuren v. Va. Highlands Orthopaedic Spine Ctr., LLC, 728 F. Supp. 2d 791, 794 (W.D. Va. 2010), *rev'd sub nom.* VanBuren v. Grubb, 514 F. App'x 364 (4th Cir. 2013) (per curiam).

20. *See* VanBuren v. Grubb, 471 F. App'x 228, 230 (4th Cir. 2012), *certifying question to* 733 S.E.2d 919 (Va. 2012).

21. *See id.* at 235.

22. *Id.* at 229.

23. VanBuren v. Grubb, 733 S.E.2d 919, 921 (Va. 2012) (emphasis added).

Conceived and articulated by treatise writer H. G. Wood, this seminal dogma provides that in the absence of a contract to the contrary, an employer may discharge an at-will employee at any time for a good reason, bad reason, or for no reason at all.[24] This idea took hold and became a fundamental basis for America's economic expansion at the turn of the twentieth century in the age of industrialization.[25]

In the late 1700s and early 1800s, before the inception of the employment-at-will doctrine, most economic activity was predicated on individual-based farming or commercial activities.[26] At the time, master-servant relationships were far less disconnected, as most employers had only one or two apprentices as employees.[27] Because of the family-like environment of the employment relationship at the time, there was an implied obligation on the part of an employer to take his employees into his home, care for them, and assist in their development.[28] This dynamic, however, changed at the beginning of the Industrial Revolution.[29]

The rationale for the employment-at-will doctrine was based on a desire to develop industrial economies through laissez-faire principles.[30] Proponents of employment at will theorized that this arrangement would provide a relative equality of bargaining power between employers and employees.[31] Employers, for efficiency purposes, would be able to hire and fire as they pleased.[32] On the other hand, employees would not be bound by any durational term of employment, and they could more easily secure employment opportunities with an employer who would be more willing to take hiring risks.[33]

While the employment-at-will doctrine has generally remained in place in the United States over the past one and a half centuries, the importance of work to the livelihood of the average employee,

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24. *See* H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877) ("[U]nless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party . . . .").

25. *See* 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.4 (3d ed. 1992).

26. *Id.* § 1.3.

27. *See id.* ("When a master-servant relationship existed, it was treated as a status relationship not entirely unlike that within a family.").

28. *See id.*

29. *Id.* § 1.4.

30. Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 837 (Wis. 1983).

31. Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 356 (2001).

32. *See Brockmeyer*, 335 N.W.2d at 837 ("[W]here an employment was for an indefinite term, an employer may discharge an employee 'for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.'").

33. Young, *supra* note 31.

coupled with drastic changes to the makeup of the American economy, has inspired many critics to lash out against the doctrine.[34] The primary critique of employment at will is that there is actually an immense disparity in bargaining power, which in fact favors the employer.[35] While employers may be disadvantaged by one of their employees quitting earlier than expected, employees may be summarily fired for reasons not related to employment and therefore would be unable to feed their families.[36]

Over time, specific factual situations consistently highlighted the harshness of employment at will, causing the courts and the legislatures to cut into the doctrine, carving out a number of exceptions. Legislatively, Congress whittled away at the unfettered employment-at-will doctrine with a number of antidiscrimination provisions. Title VII of the Civil Rights Act of 1964[37] ("Title VII") makes it unlawful to discriminate against any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[38] The Americans with Disabilities Act of 1990[39] ("ADA") prohibits employers from discriminating against a "qualified individual on the basis of disability."[40] Finally, the Age Discrimination in Employment Act of 1967[41] ("ADEA") declares it unlawful for employers to discriminate against individuals because of their age.[42]

Judges have also played an ancillary role in restraining the formerly boundless scope of the employment-at-will doctrine. Much of this limitation has come from a judicially created tort called "wrongful discharge."[43] There are two major categories of wrongful

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34. *See, e.g.*, John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 HARV. J.L. & PUB. POL'Y 555, 574–75 (1997) (criticizing the at-will employment doctrine because of structural labor market defects that undermine one of the doctrine's main premises); Kathleen C. McGowan, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 142–43 (1998) (criticizing the employment-at-will doctrine for its negative impact on society and a person's livelihood); Young, *supra* note 31, at 358 (criticizing the employment-at-will doctrine for its basis on the formal theory of equality and its negative impact on job security).

35. *See* Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 584.

36. *See, e.g.*, Bigelow v. Bullard, 901 P.2d 630, 633 (Nev. 1995) (finding against an employee who lost his job for his "Blacks-have-rights-too" remark).

37. 42 U.S.C. §§ 2000e to -17 (2012).

38. *Id.* § 2000e-2(a)(1).

39. *Id.* §§ 12101–12213.

40. *Id.* § 12112(a).

41. 29 U.S.C. §§ 621–634 (2012).

42. *Id.* § 623(a)(1).

43. ROBERT J. GREGORY, YOUR WORKPLACE RIGHTS AND HOW TO MAKE THE MOST OF THEM 161 (1999).

discharge.[44] The first theory is based on contract and estoppel principles that prevent employers from firing workers after making implied promises of job security.[45] The second theory, wrongful discharge in violation of public policy,[46] is a much more disputed area of employment law, and it is the subject that the *VanBuren* court sought to address.[47]

B. Wrongful Discharge in Violation of Public Policy

This tort arises when an employee is discharged by an employer who has motivations that conflict with a well-established public policy.[48] Public policy was judicially defined in *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396*,[49] a 1959 case that first created the wrongful discharge tort. In *Petermann*, an employer ordered an employee to commit perjury at a legislative hearing, and when that worker refused, he was fired.[50] The California District Court of Appeal held that the firing ran contrary to the state's public policy of emboldening witnesses to testify truthfully.[51] The court defined public policy as the "*principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.*"[52]

The public policy of refusing to commit a crime—the type of public policy that Ms. VanBuren asserted—was the paradigm from which the tort grew.[53] As the idea of wrongful discharge in violation of public policy spread, so did the circumstances in which the tort could occur.[54] Three of the most common scenarios arose from similar rationales, creating protection from discharge for an employee who was exercising a statutorily or legally guaranteed right, reporting illegal activity, or performing a legal duty.[55]

While all of these bases for protection from discharge involve situations where employers unjustly terminated employees, these judicial decisions are not rooted in equity alone. The public policy

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44. *Id.*
45. *Id.*
46. *Id.*
47. *See* VanBuren v. Grubb, 733 S.E.2d 919, 920 (Va. 2012).
48. GREGORY, *supra* note 43, at 166.
49. 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959).
50. *Id.* at 26.
51. *Id.* at 27.
52. *Id.* (emphasis added) (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 261 P.2d 721, 726 (Cal. 1953)).
53. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.10 (3d ed. 2005) (explaining the *Petermann* case and noting that now virtually all states have a public policy exception for cases in which an employee is fired for refusing to commit a criminal act).
54. *See id.* §§ 9.11–.13.
55. *Id.*

must be fundamental, substantial, and well established.[56] This means that the public policy that the deciding court utilizes must be tethered to another source of law, such as a statute or constitution.[57] For example, in *Coman v. Thomas Manufacturing Co.*,[58] a truck driver was terminated after he disobeyed his employer's order to falsify federal records and sleep less than was required of him as a commercial truck driver.[59] The public policy cited by the Supreme Court of North Carolina was refusing to violate a law that could affect the safety of travelers on the roads.[60] The public policy was well established because it was tethered to a state statute that incorporated and adopted the federal travel regulations.[61]

The 1970s marked the age when courts began to recognize that many employees needed increased protection from the potential negative consequences of the employment-at-will doctrine.[62] Utilizing wrongful discharge in violation of public policy as a viable cause of action was "one way to mitigate the injustice and strike at one class of outrageous cases without taking the larger and more daring step of general abrogation of the terminable-at-will rule."[63] Currently, forty-three states allow the tort of wrongful discharge in violation of public policy to be utilized against a breaching employer.[64]

As the doctrine extended across the nation, it also expanded in scope, evolving into a greater antagonist of employment at will.[65] This development occurred because some courts began to allow actions other than discharge to be the basis for suit under this legal framework. These actions include wrongful demotion, wrongful suspension, and wrongful failure to promote an employee.[66]

Courts have also expanded the doctrine's scope by lessening the extent to which a public policy must be tethered to some sort of legislative enactment. For instance, in *Danny v. Laidlaw Transit*

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56. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 379–80 (Cal. 1988).

57. *See, e.g.*, Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899–900 (3d Cir. 1983) (predicting that Pennsylvania courts would derive public policy from the Pennsylvania Constitution); Green v. Ralee Eng'g Co., 960 P.2d 1046, 1049 (Cal. 1998) (finding that federal regulations could be "a source of fundamental public policy").

58. 381 S.E.2d 445 (N.C. 1989).

59. *Id.* at 446.

60. *Id.* at 447.

61. *See id.*

62. WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 252 (1985).

63. *Id.*

64. ROTHSTEIN ET AL., *supra* note 53, § 9.9.

65. GREGORY, *supra* note 43, at 170.

66. *Id.*; *see also* White v. State, 929 P.2d 396, 409 (Wash. 1997) (Madsen, J., concurring) (noting that the public policy exception to the employment-at-will doctrine also protects employees who face discipline short of discharge).

Services, Inc.,[67] the Supreme Court of Washington loosened its standards, allowing a woman to bring a case for discharge after taking off work to care for her children who had been domestically abused by their father.[68] The court could not find an exact statute to which it could fasten the public policy, as no statute specifically condemned an employer's failure to excuse an employee's absence from work on account of domestic violence.[69] Therefore, the court took a penumbra-like approach to the problem, examining all state statutes and regulations that declared support for victims of domestic violence.[70] Reasoning that these other statutes showed overwhelming support for victims of domestic violence, the court held that it was state public policy to prevent employers from terminating employees who were taking leave to ensure their family's safety.[71]

Some courts have even gone as far as declaring that there is no need for the public policy to have any statutory, constitutional, or regulatory support at all. In *Gardner v. Loomis Armored Inc.*,[72] the Supreme Court of Washington again showed its creativity by upholding a claim for wrongful discharge in violation of public policy.[73] In *Gardner*, the plaintiff, a driver for an armored truck company, violated the company's rule against leaving the truck.[74] He left the truck to help a bank manager because she was being chased by a man wielding a knife, and, although she screamed for assistance, there was no one else helping her.[75] The court held that even though there was no statutory basis, the policy of saving people from life-threatening situations was noble enough to outweigh the defendant's company policy in this situation.[76]

The expansion of the scope of this tort, however, has been met with a great deal of criticism, both judicial and legislative. Many judges decry their more permissive colleagues for engaging in judicial activism and giving an "overexpansive reading of the statutes in their attempt to present a general policy" that encourages good behavior.[77] Furthermore, some state legislatures have taken action to ensure that judges no longer control the bounds

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67. 193 P.3d 128 (Wash. 2008).

68. *See id.* at 130–31 (answering in the affirmative the certified question of whether "the State of Washington established a clear mandate of public policy of protecting domestic violence survivors and their families and holding their abusers accountable").

69. *Id.*

70. *Id.* at 132–36.

71. *Id.* at 141.

72. 913 P.2d 377 (Wash. 1996) (en banc).

73. *See id.* at 378.

74. *Id.* at 378–79.

75. *Id.*

76. *Id.* at 386.

77. *Id.* at 389 (Madsen, J., dissenting).

of the wrongful discharge tort. Arizona, for instance, passed the Employment Protection Act.[78] Part of this legislation provides a list of ten instances in which a terminated employee may sue his employer for wrongful termination in violation of public policy.[79] Because of these types of statutes, some courts are now bound by the provisions handed over to them by their respective state legislatures; therefore, they are unable to further expand their states' standards for wrongful discharge in violation of public policy.[80]

C. Individual Liability of Supervisors Engaged in Wrongful Conduct

Running parallel to the trend of courts' willingness to expand the bounds of wrongful discharge in violation of public policy is the mounting inclination for courts to find specific wrongful actors individually liable *in addition to* finding the employer liable in employment suits.[81] The factual contexts surrounding this finding of individual liability generally arise in similar scenarios, such as those resulting in claims of discriminatory discharge, sexual harassment, or retaliatory discharge.[82]

Regarding the federal antidiscrimination statutes, the extension of individual liability is fairly limited. Title VII, the ADA, and the ADEA all seem to have fairly narrow definitions of the term "employer."[83] While a small number of district courts across the

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78. ARIZ. REV. STAT. ANN. §§ 23-1501 to -1502 (2012).

79. *Id.* § 23-1501(A)(3)(c).

80. *See, e.g.*, N.C. GEN. STAT. § 95-241(a) (2012) (limiting the protected activities of an employee for which he cannot be discharged); N.J. STAT. ANN. § 34:19-3 (West 2011) (same).

81. *See generally* Shannon Clark Kief, Annotation, *Individual Liability of Supervisors, Managers, Officers or Co-employees for Discriminatory Actions Under State Civil Rights Act*, 83 A.L.R. 5th 1 (2000) (collecting and analyzing cases that consider whether an employer's supervisors, managers, officers, and co-employees may be held individually liable under state civil rights statutes).

82. *See, e.g.*, Page v. Superior Court, 37 Cal. Rptr. 2d 529, 531–33 (Cal. Ct. App. 1995) (involving claims of retaliatory discharge and sexual harassment, regarding which the court held that a supervisor can be individually liable for retaliation and harassment under California's Fair Employment and Housing Act); Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 241, 244 (Mo. Ct. App. 2006) (involving a claim of sexual harassment, regarding which the court held that the plain language within the definition of "employer" under the Missouri Human Rights Act imposes individual liability in the event of discriminatory conduct); Krause v. Lancer & Loader Grp., 965 N.Y.S.2d 312, 315, 317 (N.Y. Sup. Ct. 2013) (involving claim of discriminatory discharge, regarding which the court held that the company president could be individually liable for discrimination under state and city laws under a theory of aiding and abetting a statutory violation).

83. *See* Tammi J. Lees, Note, *The Individual vs. the Employer: Who Should Be Held Liable Under Employment Discrimination Law?*, 54 CASE W. RES. L.

country have found otherwise, every circuit court that has ruled on the issue has held that the federal antidiscrimination scheme precludes separate liability for individual wrongdoers.[84]

On the other hand, many state courts have allowed this broadening of liability to include individual transgressors, citing agency principles as a means to extend liability to the supervisors.[85] An example of this practice can be found in *Genaro v. Central Transport, Inc.*[86] In *Genaro*, the Supreme Court of Ohio ruled that a victim of employment discrimination could sue his supervisor in an individual capacity and hold him jointly and severally liable along with the employer, because the state statute on point incorporated those acting within the interests of the employer as a part of the employer itself.[87]

State sexual harassment law is a field where there appears to be a willingness to permit individual liability, perhaps due to the special circumstances of the wrongdoing. Courts in as many as nineteen states have permitted findings of individual liability either for the tort of sexual harassment or for an aiding and abetting role alongside the employer.[88] Even in states where the trend has not yet caught on, a few courts have utilized creative solutions that permit individual findings of liability for the harassing supervisor.[89] These solutions include allowing the torts of assault and battery, intentional or negligent infliction of emotional distress, and negligence in failing to properly investigate, correct, and prevent the harassing supervisor's conduct.[90] While these auxiliary torts are rare,[91] they illustrate the trend of courts' willingness to expand liability to wrongful individual actors.

Perhaps the most fertile legal ground on which to find individual liability in the field of employment law is in the confines

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REV. 861, 863–64 (2004) (discussing the definitions of "employer" under Title VII, the ADA, and the ADEA).

84. *See* Horney v. Westfield Gage Co., 95 F. Supp. 2d 29, 33 (D. Mass. 2000) (listing cases from district courts and circuit courts that have addressed this issue).

85. *See, e.g.*, Elezovic v. Ford Motor Co., 697 N.W.2d 851, 863 (Mich. 2005) (holding that a supervisor can be held liable as an agent of an employer under the state Civil Rights Act); Payne v. U.S. Airways, Inc., 987 A.2d 944, 953 (Vt. 2009) (collecting cases where Title VII-patterned state statutes have been construed to extend liability to supervisors and holding that a supervisor is an employer's agent under the antidiscrimination provision of the Fair Employment Practices Act).

86. 703 N.E.2d 782 (Ohio 1999).

87. *Id.* at 785.

88. Jill Jensen-Welch, *Suing the Bastard Boss: Personal Liability of Supervisors for Workplace Sexual Harassment*, 69 DEF. COUNS. J. 466, 470–81 (2002).

89. *Id.* at 481–82.

90. *Id.*

91. *Id.* at 482.

of wrongful discharge in violation of public policy. Rooted in state laws that are often largely permissive of agency principles and drawn from conduct that is likely to be considered reprehensible, the tort of wrongful discharge in violation of public policy may be the perfect tort under which a court could hold a supervisor liable alongside an employer. Some courts across the country have begun to take notice of this opportunity and have started a trend by citing to each other for support.[92] Already, many state supreme courts, such as those in Iowa, New Jersey, and West Virginia, have held supervisors individually liable under the tort of wrongful discharge in violation of public policy.[93]

It now appears as if the Supreme Court of Virginia in *VanBuren v. Grubb* has followed suit. Wrongful discharge in violation of public policy epitomizes the perfect confluence of a malleable doctrine and sympathetic facts in order to find individual supervisor liability. The *VanBuren* decision denotes a trend that, if continued, could have lasting implications on employers, employees, and the employment system as a whole.

III. THE DECISION

A. *Majority Opinion*

The majority used concepts of agency and tort law, combined with the development of the common law in the context of wrongful discharge, to arrive at the conclusion that a supervisor could be held liable as a separate entity in addition to the employer when an employee is discharged in violation of state public policy.[94] The majority emphasized that wrongful discharge is a tort claim and does not arise under contract law.[95]

The opinion reasons that when a tort claim is involved under state law, "employers and employees are deemed to be jointly liable and jointly suable for the employee's wrongful act."[96] This means that when the tortious reason for the wrongful discharge emanates from the supervisor's unlawful actions, that individual supervisor, as an employee, should be held liable and suable as well. In this

92. *See, e.g.*, Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 775 (Iowa 2009) (citing to decisions under the laws of Mississippi, Arizona, New Jersey, and West Virginia); Ballinger v. Del. River Port Auth., 800 A.2d 97, 108 (N.J. 2002) (citing to decisions under Pennsylvania law); Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692, 694–95 n.2 (W. Va. 1982) (citing to decisions in California, Connecticut, and Illinois).

93. *See* cases cited *supra* note 92.

94. VanBuren v. Grubb, 733 S.E.2d 919, 922–23 (Va. 2012).

95. *Id.* at 923 (arguing that, while there are components of a contractual relationship, the fact that wrongful discharge is central to the case means that tort principles should be applied).

96. *Id.* (quoting Thurston Metals & Supply Co. v. Taylor, 339 S.E.2d 538, 543 (Va. 1986)).

case, Mr. Grubb, the supervisor employee, would be held "jointly suable" alongside of Virginia Highlands, as it was his own wrongful conduct that led to the tort of wrongful discharge in the first place.[97]

The majority labeled deterrence of discharge against state public policy as the rationale for the wrongful discharge tort remedy.[98] Furthermore, the majority concluded that the purpose of having a deterrent effect would be mollified if individual actors could not share in the liability[99]—a conclusion that the opinion supports by pointing to the facts of this case. Although not overtly mentioned, the majority seems to imply that Dr. Grubb's status as founder and owner could have motivated the finding of individual liability. The opinion highlights that Dr. Grubb, the founder and owner of Virginia Highlands, left his business in response to the lawsuit to find employment at another healthcare provider.[100] Without the liability structure that the majority implemented, business owners would be free to simply find a new place of employment as a means to escape liability.

The majority recognized that allowing individual supervisors to be held liable for wrongful discharge actions would open up a wider scope of liability in favor of employees.[101] The opinion also mentions possible concerns that this extension of liability could lead to overdeterrence, causing supervisors to avoid rightful discharges of employees for fear of a lawsuit resulting in liability.[102] The majority concluded, however, that despite its holding, wrongful discharge actions are construed narrowly by courts and therefore there should be sufficient protection against the fear of "overuse of wrongful discharge claims."[103]

B. Dissenting Opinion

The dissenting side of the court demonstrated that the solution to this legal controversy depended on the question that was being asked.[104] The dissenting justices determined that liability should not have extended to Dr. Grubb because, in actions regarding termination of an employment relationship, liability can only rest on the employer.[105] To reach this resolution, the dissent argued for

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97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *See id.* (holding that the employer is liable along with individual employees in a position of power).
102. *Id.*
103. *Id.*
104. *See id.* at 926 (Kinser, C.J., dissenting) ("[T]he majority focuses on the wrongful conduct rather than the wrongful discharge itself.").
105. *Id.* at 924 (citing VanBuren v. Va. Highlands Orthopaedic Spine Ctr., LLC, 728 F. Supp. 2d 791, 794 (W.D. Va. 2010), *rev'd sub nom.* VanBuren v. Grubb, 514 F. App'x 364 (4th Cir. 2013) (per curiam)).

what it considered to be the true question that needed to be resolved: "Can the common law tort action for wrongful discharge in violation of public policy be brought against an individual who is not the employer of the discharged employee?"[106]

The rationale of the dissent rested on the characterization of a tort.[107] The opinion begins by stating that every tort action consistently has three elements: "(1) the existence of a legal duty; (2) a breach of that duty; and (3) damages as a proximate result of the breach."[108] The opinion then explains that in employment law, in the absence of a contract to the contrary, an employer is free to terminate an at-will employee for any reason, subject to a few limitations.[109] One of these constraints is a duty that binds employers from discharging employees in violation of public policy.[110]

The dissent's justification was that the aforementioned duty flows exclusively through the employer.[111] That is, a supervising employee who takes part in the wrongful discharge of a coemployee may be morally culpable, but, legally, he is simply acting in a representative capacity of the employer.[112] Because the supervisor, someone who personally has no duty toward the discharged employee, is not acting in an individual capacity, that supervisor should not be held individually liable.[113]

Finally, the opinion states that the majority's policy concerns were insufficient to expand the narrow exception to the doctrine of employment at will.[114] In the dissent's view, not only would it be pointless to deter a group of people who are not bound by a legal duty but also such policy determinations should be made by the legislature and not the court.[115] The dissent offered no justifications as to why the legislature would be better equipped than the court to determine whether individual liability was an appropriate measure.

IV. A MIDDLE GROUND? EVALUATING THE MAJORITY AND THE DISSENTING OPINIONS TO FIND A COMPROMISE

The majority and dissenting sides of the Supreme Court of Virginia took diametrically opposed positions with regard to finding

106. *Id.*
107. *Id.*
108. *Id.* (quoting Kellermann v. McDonough, 684 S.E.2d 786, 790 (Va. 2009)).
109. *Id.* (citing Bowman v. State Bank of Keysville, 331 S.E.2d 797, 798 (Va. 1994)).
110. *Id.* at 925.
111. *Id.*
112. *Id.* at 925, 927.
113. *Id.*
114. *Id.* at 927.
115. *Id.*

Dr. Grubb individually liable alongside Virginia Highlands, with each side finding legal support and policy considerations favoring its respective position. While each opinion uses strong legal reasoning, there are shortcomings on both sides of the argument.

The majority was correct in that it had the legal justification to expand the tort of wrongful discharge and impute liability to Dr. Grubb as an individual supervisor. The majority also raised strong points regarding the policy of deterrence that would protect powerless employees from summary terminations for malevolent purposes. At the same time, however, the majority failed to utilize foresight to evaluate all of the possible consequences from its expansive ruling.

The dissent, on the other hand, made a convincing assertion that tort principles mandate that Virginia Highlands alone should bear the brunt of legal liability for Ms. VanBuren's termination. A closer look, however, unmasks that the dissent did not appear to have completely invalidated the legal justification for finding Dr. Grubb jointly liable. Furthermore, the dissent's policy justifications, or lack thereof, did not adequately address why the Supreme Court of Virginia should not have acted in this case.

Overall, both sides of the debate advanced valid arguments, yet their shortcomings leave a great deal to be desired in crafting a reasonable solution that addresses the best interests of employers and employees. After all, this is an examination of *public* policy. This policy is not a mere abstraction; rather, it is inextricably linked to employment, a fundamental aspect of societal life. By examining the strengths and weaknesses of the majority and the dissent, it is possible to arrive at a compromise that provides the greatest benefits to the employer, the employee, and the public as a whole.

A. Analysis of the Majority Opinion

The majority was not burdened with the difficulty of determining whether there actually was a wrongful discharge in violation of public policy under the facts alleged in this case, as Ms. VanBuren was certainly a victim of this tort. She was discharged because she refused to engage in illegal conduct—in this case, declining to commit adultery.[116] The fundamental, substantial, and well-established support provided by Virginia's statute against adultery demonstrated that the discharge, in light of VanBuren's refusal, had the "tendency to be injurious to the public or against the public good."[117] The real question arose, however, when the

116. *Id.* at 921–22 (majority opinion).

117. Petermann v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 396, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 261 P.2d 721, 726 (Cal. 1953)).

court tackled the question of whether, based on this wrongful discharge, there could be individual liability for Dr. Grubb.

In arriving at the conclusion that individual supervisors who engage in wrongful conduct may be found personally liable for playing a role in an employee's discharge in violation of public policy, the majority found both legal and policy-related support for extending the doctrine.[118] Based on this support, the majority essentially had two main justifications for its holding: the *authority* to find a supervisor individually liable and the *wisdom* of finding in favor of individual liability.

1. Authority

Regarding the authority to find Dr. Grubb individually liable, the majority found helpful precedent from the Supreme Court of Virginia's own prior holdings in *Bowman v. State Bank of Keysville*[119] and *Lockhart v. Commonwealth Education Systems Corp.*[120] These two opinions cleared the way for the majority to justify individual supervisor liability; however, the circumstances underlying the opinions were different than those in *VanBuren*, which could diminish the strength of the majority's assertions.

In *Bowman*, the court found individual members of a bank's board of directors liable for wrongful discharge in violation of public policy[121]—yet a reading of that case suggests that the court did not specifically address the issue of individual liability. *Bowman*, decided in 1985, came at a time when the doctrine of wrongful discharge in violation of public policy was just developing.[122] Therefore, while the decision still maintains its precedential value, it is possible to infer that the *Bowman* court may not have intended for the "narrow exception to the employment-at-will rule"[123] to extend as far as it allowed.

The majority's second Virginia-based precedent, *Lockhart*, utilized *Bowman* as a substantial justification for finding individual liability for firing an employee in violation of public policy in a factual context linked to both gender and racial discrimination.[124] As with *Bowman*, the court in *Lockhart* did not appear to specifically focus on the notion of individual liability. Rather, the court concentrated on reaffirming a commitment to the narrow exception of wrongful discharge in violation of public policy while

118. *See supra* text accompanying notes 94–100.
119. 331 S.E.2d 797 (Va. 1985).
120. 439 S.E.2d 328 (Va. 1994).
121. *Bowman*, 331 S.E.2d at 801.
122. *Id.* at 797; *see* HOLLOWAY & LEECH, *supra* note 62, at 249 (noting that the public policy exception was a "newly developed rule of law" when this book was published in 1985).
123. *Bowman*, 331 S.E.2d at 801.
124. *Lockhart*, 439 S.E.2d at 330–31.

maintaining the court's "strong adherence to the employment-at-will doctrine."[125]

Given the key differences from *VanBuren* found in past Supreme Court of Virginia rulings, it appears that the majority found greater support from the opinions of other state courts across the country. It is important to remember that wrongful discharge in violation of public policy is a judicially created, common law doctrine. The whole conception of the common law incorporates the notion that courts that are not bound by restrictive precedent may incorporate persuasive authority into the decision-making process.[126] In this case, the Supreme Court of Virginia not only has no mandatory authority preventing it from expanding the scope of liability but also is free to look to other jurisdictions' treatment of this exception to employment at will and determine how best to utilize the tort in its rulings.

One of the cases on which the Supreme Court of Virginia relied was *Harless v. First National Bank in Fairmont*.[127] In *Harless*, the Supreme Court of Appeals of West Virginia held that a bank supervisor could be found individually liable when an employee was discharged after confronting the supervisor about the bank's violation of state and federal consumer credit laws.[128] The court found that, as the plaintiff's "immediate superior" and someone who was the "principal protagonist in obtaining the employee's discharge," the supervisor should be held individually liable.[129] In *VanBuren*, Dr. Grubb was VanBuren's immediate superior and the principal protagonist in obtaining her discharge.[130] Therefore, nature of the supervisor-employee relationship provides strong support for the majority extending liability to Dr. Grubb.

Another case cited by the majority is *Higgins v. Assmann Electronics*.[131] In *Higgins*, the Arizona Court of Appeals found a supervisor individually liable after he terminated an employee in response to her reporting him to the police for assault.[132] The court found that when an employer vests a supervisor with day-to-day control over the company—a power that includes the right to fire—the supervisor can be found individually liable for wrongful discharge in violation of public policy.[133] As in *Higgins*, Dr. Grubb

125. *Id.* at 332.

126. *See* WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 42, 44 (5th ed. 2011) ("[A] judge deciding a case must, to a greater or lesser degree, rely on considerations and principles beyond what is set out in prior cases.").

127. 289 S.E.2d 692 (W. Va. 1982).

128. *Id.* at 694, 696.

129. *Id.* at 698–99.

130. VanBuren v. Grubb, 733 S.E.2d 919, 920–21 (Va. 2012).

131. 173 P.3d 453 (Ariz. Ct. App. 2007).

132. *Id.* at 456.

133. *Id.* at 458.

maintained day-to-day control over Virginia Highlands.[134] Furthermore, based on the controversy before the court in *VanBuren*, Dr. Grubb clearly had the ability to fire Ms. VanBuren. This emphasis on the control of the business gives the majority even greater justification for finding Dr. Grubb individually liable.

Perhaps the strongest basis supporting the majority's holding is the state's official definition of what constitutes an employer. Virginia's statutory definition of an employer constitutes "any individual, partnership, association, corporation, business trust, *or any person or groups of persons acting directly or indirectly in the interest of an employer in relation to an employee.*"[135] All that was required of the majority was to point to the language of Virginia's definition of employer and note that Dr. Grubb was acting in the interest of Virginia Highlands in terms of his control and firing powers.[136]

2. Wisdom

The majority's more overpowering justification for its decision emphasized the value of implementing prophylactic measures across the state so that supervisors would be wary of playing a role in improper discharges.[137] From a policy perspective, the wisdom of this concern is certainly valid, as there are many beneficial results that—though not detailed in the opinion—can come from extending individual liability to blameworthy supervisors.

First, greater deterrence could benefit both sides of the employer-employee relationship. Employees would be wrongfully discharged at a lower rate, and more attentive employers would be in a position to avoid lawsuits. Second, a deterrent function would not only help workers in situations where the supervisor is the head of the corporation but also dissuade subordinate supervisors from engaging in wrongful conduct. A lower-ranked supervisor in a large corporation would likely fear individual liability much more than the supervisor would fear acting in a manner that could bring liability on the company.

Third, implementing individual liability could extinguish the incentive to discharge an employee as a means to prevent the employer from discovering other bad conduct, such as sexual harassment. For instance, if a supervisor is sexually harassing an employee, that supervisor might be inclined to terminate the employee as a means to distance the incident from higher-ups in the company to whom the harassment might be reported. Without

134. *See VanBuren*, 733 S.E.2d at 920.

135. VA. CODE ANN. § 40.1-28.9.A (2013) (emphasis added).

136. *See VanBuren*, 733 S.E.2d at 920–21.

137. *See id.* at 923 ("Employer-only liability would be insufficient to deter wrongful discharges . . . .").

individual liability, supervisors who have already engaged in wrongful conduct have no incentive not to commit even further wrongdoing.

Finally, the goals of individual liability should not only be to deter wrongful conduct but also to serve a retributive function. It is in the interest of aggrieved employees to receive justice in response to the wrongs that were done to them. There is an argument that it would only be fair and in the interest of equity to allow employees to be able to hold individual wrongdoers accountable for their actions.

At the same time, however, there are concerns that the majority's policy goals could actually infringe too much on the employment-at-will framework. This blanket policy of exposing individual supervisors to liability could harm efficiency in the workplace. The broadening of this tort could lead to a floodgate of litigation, as the increase in the number of potentially liable parties could incentivize more lawsuits. Added to the specter of potential individual liability, supervisors and managers could be hampered in their decision making, potentially harming employers and employees in the process.

One manner in which this policy could have a negative overdeterring effect on employers is by creating timidity in supervisors who are attempting to fire an employee in actual good faith. Even if a supervisor has no malevolent basis for discharging the employee, the fear of being individually sued could intimidate that supervisor into keeping an employee, to the detriment of the business. This apprehension, in turn, could harm the interests of employees, as employers may be less willing to take chances on marginal applicants.

Eventually, overdeterred employers might migrate and establish their businesses in other states that do not endorse individual liability for wrongful discharge in violation of public policy. This loss of businesses could lead to a loss of jobs, producing a net negative effect. While this extreme possibility is anything but guaranteed, the fact remains that employers feel most comfortable in an employment-at-will environment and are generally willing to abide by the exceptions to the doctrine. Should these exemptions be expanded too widely, however, it could lead to an unpredictable shift in employer decision making, something that could have negative consequences on businesses, their employees, and their surrounding communities.

B. Analysis of the Dissenting Opinion

The dissenting justices acknowledged that Dr. Grubb's conduct was morally reprehensible, yet they asserted that he should still escape individual liability because he did not owe a duty to Ms.

VanBuren.[138] Rather, it was only Virginia Highlands, as the employer, who owed the duty not to discharge Ms. VanBuren in violation of public policy.[139] The justices argued that "[o]nly an employer can breach that duty because only an employer has the ability to hire and fire."[140]

The dissent maintained that the majority's reliance on *Bowman* was misguided, as it disregarded the language of the *Bowman* ruling.[141] The discharge in *Bowman* was tortious because "the *employer* had misused its freedom to terminate the services of at-will employees."[142] The dissent also cited several other cases that found that the supervisor's lack of a duty to the discharged employee precluded the imposition of individual liability.[143]

While the dissent concluded from these cases that Dr. Grubb, as an *employee* of Virginia Highlands, had no duty to Ms. VanBuren, the dissenting justices did not explain how Dr. Grubb did not have a duty to Ms. VanBuren in light of the Virginia statute classifying him as an employer. The dissent failed to adequately describe why Dr. Grubb is not a "person . . . acting directly or indirectly in the interest of [his] employer in relation to an employee."[144] According to the text of the statute, Dr. Grubb had just as much of a duty to Ms. VanBuren as did Virginia Highlands; therefore, he should have been exposed to liability for his wrongful conduct.

Even if the dissent had provided a justification for exclusively labeling Dr. Grubb as an employee and not an employer, it still did not adequately explain why the majority either could not or should not establish a new duty for supervisors to desist from discharging employees in violation of public policy. Unlike the statutorily created exceptions to employment at will, such as Title VII, the ADA, and the ADEA, wrongful discharge in violation of public policy is a judicially created, common law tort.

As it is a common law doctrine, the court has the ability to expand the duty to require supervisors to abstain from wrongfully discharging employees in violation of public policy. A significant segment of the common law is the courts' establishing duties of care to reinsure "the molding of law in response to the needs of the environment."[145] The dissent stated that deterrence of public policy violations "is a laudable goal but cannot change the fact that an

138. *Id.* at 927 (Kinser, C.J., dissenting).

139. *Id.* at 925 (noting generally that only the employer owes the duty not to discharge an employee in violation of public policy).

140. *Id.*

141. *Id.* at 924–25.

142. *Id.* at 925 (quoting Miller v. SEVAMP, Inc., 362 S.E.2d 915, 918 (Va. 1987)).

143. *See, e.g.*, Physio GP, Inc. v. Naifeh, 306 S.W.3d 886 (Tex. App. 2010).

144. VA. CODE ANN. § 40.1-28.9.A (2013).

145. Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 45 (1963).

individual employee is incapable of committing the tort of wrongful discharge."[146] The dissenting justices were horrified by a violation of public policy, yet they claimed to be powerless because there was no duty. The dissent failed, however, to counter the idea that public policy abuses are, in themselves, the very justifications for creating new duties.

Despite this inherent power of the courts, the dissent claimed that "such policy determinations [were] for the General Assembly, not this Court."[147] This answer, given without any justification as to why the state legislature would be more competent to handle such a controversy, is wholly inadequate. Justice Stephen Markman of the Supreme Court of Michigan, a noted advocate of judicial restraint, argued in the 2010 case *Woodman ex rel. Woodman v. Kera, LLC*[148] that it is not "invariably . . . true" that courts are "less well positioned" than state legislatures in deciding when to alter the common law.[149]

Justice Markman argued that the courts, under limited circumstances, should be able to hold on to the power to alter the law.[150] This situation arises if a common law of a particular topic is of "longstanding judicial interest" within the state, "well known to [the] Court in a wide variety of contexts," and addressed by "the judiciaries of most other states," and the "immediate dispute involves only whether to clarify or 'fine-tune' at the margins, a common-law rule of considerable vintage."[151] After all, the judiciary has "the authority to change the common law because the common law *is* 'judge-made law.'"[152]

Based on Justice Markman's argument, the dissent appears to have little grounds to support its conclusory declaration that policy changes are for the legislature. Disputes over employment law are of longstanding interest within every state, and such disputes arise in many contexts. Furthermore, the extension of liability to individuals responsible for discharging employees in violation of public policy would certainly qualify as fine-tuning the margins of this common law tort. Therefore, the dissent not only appears to have been mistaken in its claim that the majority lacked the legal support to extend liability to individual supervisors but also failed to articulate a satisfactory justification as to why the majority should decline to do so.

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146. *VanBuren*, 733 S.E.2d at 927 (Kinser, C.J., dissenting).
147. *Id.*
148. 785 N.W.2d 1 (Mich. 2010.
149. *Id.* at 23) (Markman, J., concurring in part and dissenting in part).
150. *Id.* at 24.
151. *Id.* at 23–24.
152. *Id.* at 24 (quoting Placek v. City of Sterling Heights, 275 N.W.2d 511, 517 (Mich. 1979)).

C. *A Compromise*

After this evaluation of the reasoning advanced by the majority and dissenting opinions, it appears as if the Supreme Court of Virginia was legally justified in expanding liability to encompass the individual supervisor who plays a role in the wrongful discharge. Furthermore, the majority is correct in that a deterrence function could ensure that employers and supervisors take heed of this extension and therefore desist from wrongfully discharging employees. What the court failed to articulate, however, is a policy that both utilizes the benefits of deterrence and minimizes potential disruptions to the employer-employee relationship.

The most desirable result is to craft a system in which liability may be placed on individual bad actors while at the same time keeping this exception to the employment at-will-doctrine as narrow as possible. Wrongful discharge in violation of public policy should be broad enough to conform with the realistic and reasonable needs of society in light of the dynamics of the twenty-first century employment relationship. Beyond this fundamental standard, nothing more is needed.

Perhaps the ideal solution is to constrain the extension of liability by utilizing a common law limitation derived from another type of tort that is closely linked to employment disputes, intentional infliction of emotional distress. This tort was fashioned in the employment law context as a way of "challenging alleged workplace inequities and abuse by supervisors and managers."[153] There is an incredibly large number of possibilities under which plaintiffs could assert that an employer caused them emotional distress.[154] Thus, the unpredictable nature of this type of claim could have a similar overdeterrent effect on employers. Intentional infliction of emotional distress, however, has a limitation that helps manage employers' wariness. The limitation is that the conduct must be so "extreme and outrageous" that it extends "beyond all possible bounds of decency" and is "regarded as . . . utterly intolerable in a civilized society."[155]

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153. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 390 (1994).

154. *See id.* at 392–93.

155. Webb v. Baxter Healthcare Corp., 57 F.3d 1067, No. 94-1784, 1995 WL 352485, at *5 (4th Cir. 1995) (unpublished table decision) (quoting Russo v. White, 400 S.E.2d 160, 162 (Va. 1991)). For examples of factual scenarios that qualify as "extreme and outrageous," see *Mroz v. Lee*, 5 F.3d 1016, 1020 (6th Cir. 1993) (reasoning that extreme and outrageous conduct may arise when facts would allow a reasonable person to infer an abuse of a relationship or a supervisor preying on the employee's peculiar susceptibilities), and *Feltmeier v. Feltmeier*, 798 N.E.2d 75, 82 (Ill. 2003) (quoting McGrath v. Fahey, 533 N.E.2d 806, 809 (Ill. 1988)) ("The more control which a defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous,

Just as such a limitation is placed on intentional infliction of emotional distress, the same type of legal standard could constrain claims for wrongful discharge in violation of public policy brought against individual supervisors. An aggrieved employee should only be eligible to pursue a claim against a supervisor when that supervisor's conduct in wrongfully discharging the employee is "extreme and outrageous." This policy protects employees from exceptionally intolerable conduct and at the same time limits the extension of liability so that it does not overly deter employers to a point that adversely affects business operations.

CONCLUSION

As the pendulum of power in the field of employment law swings away from absolute employer control, courts around the country should carefully examine the basis under which they extend or contract the duties that employers and supervisors owe to employees. In terms of wrongful discharge in violation of public policy, it appears as if agency principles legitimize courts that choose to bind supervisors with such a duty.

If courts choose to conform to this trend, however, they should consider that a failure to place constraints on potential individual liability might significantly disrupt the dynamics of the entire field. Therefore, a middle ground is necessary. It is wise to allow wrongfully discharged employees to bring claims against malevolent supervisors in their individual capacities. This trend, however, must limit the liability to situations where the supervisor conduct, in wrongfully discharging the employee, is "extreme and outrageous." This extra limitation will still allow many deserving employees to seek the justice that they deserve, yet it will preserve the stability desired by all members of the field, employers and employees alike.

Brett J. Chessin[*]

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particularly when the alleged conduct involves either a veiled or explicit threat to exercise such authority or power to plaintiff's detriment. Threats, for example, are much more likely to be a part of outrageous conduct when made by someone with the ability to carry them out than when made by someone in a comparatively weak position.").

* J.D. Candidate 2014; The Ohio State University, B.A. 2010. The author would like to thank his family, especially his wife Liora, parents Judy and Michael, and brother Chad for their unwavering love and support. He would also like to thank Caitlin McCurdy and Micah Kamrass for being great editors and even better friends.